

RECEIVED

JUL 26 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

SC 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

SUPPLEMENTAL APPENDIX

SUSAN B. HACKETT
Appellate Defender

ALAN WILSON
Attorney General

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

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

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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FEB - 5 2014

The Supreme Court of South Carolina
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
Disciplinary Counsel

Joseph P. Turner Jr.
Assistant Disciplinary Counsel

Post Office Box 12159
Columbia, South Carolina 29211

Telephone: (803) 734-2038
Facsimile: (803) 734-1964

February 4, 2014

PERSONAL AND CONFIDENTIAL

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, SC 29204



RE: NOTICE OF INVESTIGATION
Complainant: Ronald S. Tillman
Matter Number: 14-DE-L-0061

Dear Ms. Shurling:

We have received information indicating possible professional misconduct on your part. A copy of the information received is enclosed. We are required by the provisions of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, to investigate this matter.

You are hereby notified that the Office of Disciplinary Counsel will investigate the allegations in the enclosed complaint.

The grounds for discipline under RLDE relevant to this matter are found in Rule 7(a). The specific provisions of the Rules of Professional Conduct, Rule 407, SCACR, that we believe are relevant to our investigation at this time are Rules 1.1, 1.2(a), 1.3, 1.4 and 1.7. We do not allege at this time that you violated any of the Rules, but, instead, list those Rules relevant to this investigation to afford you notice thereof. This investigation may be expanded, as provided in RLDE, if we deem appropriate.

You are required to file a written response with this office within fifteen days of the date of this letter. Your written response must address separately and with specificity whether any of the events mentioned occurred, whether you acknowledge violating the Rules of Professional Conduct, and, if so, which Rules. Your response must also include your verification that it is complete and accurate to the best of your knowledge and belief. A form is enclosed for your convenience.

You are further notified that RLDE provides that either the Office of Disciplinary Counsel or you may request that you appear to give a statement concerning this matter on the record and under oath or affirmation. If we request that you appear, we must give you twenty days' notice of the date, time, and place of the required appearance. If you request an opportunity to appear, your written response to this notice must be served on our office prior to or contemporaneously with any such request.

If you have any questions regarding this notice or if you require an extension of time to respond, you should contact our office. Please refer to the matter number set out above on all correspondence and inquiries concerning this matter.

Sincerely,

Joseph P. Turner Jr.

JPT/
Enclosure

STATE OF SOUTH CAROLINA
BEFORE THE SUPREME COURT
COMMISSION ON LAWYER CONDUCT

In the Matter of Tara Dawn Shurling, Esquire,

Lawyer.

Matter Number: 14-DE-L-0061

VERIFICATION

I, Tara Dawn Shurling, Esquire, am the responding lawyer in the above-captioned matter. The response to the Notice of Investigation, dated _____, is complete and accurate to the best of my knowledge and belief. I am admitted in the following jurisdictions: _____

Sworn to and subscribed before me
This ____ day of _____

Tara Dawn Shurling, Esquire

Notary Public for _____
My Commission expires: _____

RECEIVED

JAN 27 2014

OFFICE OF
DISCIPLINARY COUNSELRonald S. Tillman
#222153 MCI F-4-153
386 Redemption Way
McCormick, S.C.**RECEIVED** 29899

JAN 27 2014

COMMISSION ON
LAWYER CONDUCT

RE: Disciplinary Matter

Ms. Tara Dawn Shurling has Violated numerous provisions of the Rules of Professional Conduct contained in Rule 407, SCACR. She failed to represent client competently. Rule 1.1. She failed to abide by client's decisions concerning her representation. Rule 1.2.(A). She failed to act with reasonable diligence and promptness in representing her client. Rule 1.3. She failed to inform client about the status of matter and promptly comply with reasonable requests for information. Rule 1.4(A) and (B). Ms. Tara Dawn Shurling acted in a conflict of interest. Rule 1.7 and Misconduct Rule 8.4 (D).

I'm writing this grievance against my retained attorney Ms. Tara Dawn Shurling. My father retained Ms. Shurling in April of 2011. And during that time, from April 2011 to November 15, 2013. I had only seen her twice. And when she came to see me at McCormick Correctional

(1)

Institution it was four days before my P.C.R hearing.

Ms. Shurling wrote to me on April 4, 2011. She told me in her letter to me (I understand that you feel SCDC is not accurately applying your sentence). She also told me (I want to review all the documentation relevant to your sentencing before she comes to see me. Which she did not do. Ms. Tara Dawn Shurling has denied me Due process per the U.S. and S.C. constitution and the P.C.R act and Martinez v. Ryan 132 S.Ct. 1309, also see Odom v. State 523 S.E2d 753. I am entitled to effective assistance of counsel based on the rulings by the courts in these cases and constitutional law. As of now based on my current counsel's ineffectiveness I will be unable to reasonably show that my trial counsel Mr. Jack Swerling was in fact ineffectiveness and I was prejudiced by his actions. When Ms. Shurling came to see me at Kirkland Correctional Institution. When Ms. Shurling started to talk, she was asking me about my sentence. I

told her it was not only my sentence, but that I was innocent of the crime. I also told Ms. Shurling that I had other issues also. So we talk about the people I wanted her to talk with, and subpoena as witnesses. I ask Ms. Shurling for a copy of my transcript, she told me that the attorney general's office is trying to locate a clean copy of my trial transcript. She told me that it will be very helpful to her if I can sit down and write out any issues that I wanted her to raise in addition to those that are in your original post-conviction relief application. So after that visit with my attorney Ms. Shurling I went and got all the names of all the people that I wanted her to talk with and subpoena to my PCR hearing. And sent them to her. Then in November 15, 2013 Ms. Shurling came to see me at McCormick Correctional Institution, four days before my hearing. We went over my witness list, we took some off and added one that we found out about in June of 2013. She ask me if I knew

where to find these people, I told her my father knew how to find them all. Also my father had already sent Ms. Shurling a list of the names of the witnesses and address and phone numbers. So the day of the PCR hearing November 19, 2013 Ms. Shurling was admonish by the court, the Honorable Robert E. Hood for putting her amendments in late. Ms. Shurling put her amended application in on November 18, 2013 and served it to the Court, Mr. Jack Swerling, and Ms. Megan Harrigan Assistant Attorney General, the day of the PCR hearing which was the next day November 19, 2013. I was the last one to get the amended application. And when I read it, I told Ms. Shurling I did not agree with her amended application, because it had nothing in it I ask her to add. So we were arguing about it in court, and Ms. Shurling walked off. I asked a deputy sheriff to inform the judge that I needed to talk with him. Nothing be came of that, so on November 21, 2013 I told Ms. Shurling to inform the court that I did not

want her to represent me any longer, she did and the court asked me why. And I told the court all that had happened, about the things I ask her to do that she did not do. About people I ask her to talk with that she did not talk with. People I asked her to subpoena, that she didn't subpoena. Issues I asked her to raise, that she didn't raise. Furthermore, counsel Tara Dawn Shurling displayed a conflict of interest due to the statement she made to me. It was after she got finish with her cross-examining of Jack B. Swerling, she told me.

"You have ruined my relationship with Jack Swerling and he will probably never speak to me again!" MS. Shurling put her relationship with Jack Swerling before her ability to perform her duties effectively. I do not have any confidence in my current counsel Tara Dawn Shurling. The only reason she is talking with some of the witnesses now, is because the Honorable court has given her 90 days to do so. To interview

and take depositions from only (4) four of the (9) nine witnesses. Ms. Tara Dawn Shurling was retained to represent me at my PCR hearing, but she did not represent me according to SCRPC, 407 of professional conduct.

Under Rule 407. Rule of Professional Conduct.
Rule 1.1. Competence, thoroughness and preparation.

Rule 1.2. Scope of representation (A).

Rule 1.3. Diligence.

Rule 1.4. Communication (A) (B).

Rule 1.7. Conflict of Interest.

Rule 8.4. Misconduct (D).

S/ Honable S. Tillman

Date 1-21-2014

Table of Authorities

In RE: Toney, 721 SE.2d 437

In RE: Horace A. Smith, 524 SE.2d 616

In the matter of Williams Yon Rast Jr.
524 SE.2d 619

In the matter of Matthew E. Davis,
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In the matter of John G. O'Day, 539 SE.2d 390

In the matter of Milton Demetrios Stratos,
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In the matter of Harry C. Depen, 565 SE.2d 305

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In the matter of James Cullen Galmore

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Ronald Tillman #222153
Applicant

vs.
The State
Respondent

IN THE COURT OF COMMON PLEAS
#2011-CP-40-7453

MOTION TO DISMISS COUNSEL
AND
MOTION FOR STAY AND OR
CONTINUANCE

Now comes the above named applicant, who moves before this Honorable Court in the above entitled matter.

Your Honor,

I move again before this Honorable Court to dismiss defense counsel Tara Dawn Shurling and grant a continuance or stay of proceedings until the court is able to appoint counsel for the applicant and or sufficient time for the applicant to retain private counsel. A continuance would also permit selected counsel sufficient time to thoroughly assess and investigate my case and interview witnesses.

Ms. Shurling is continuing to deny me Due Process per the U.S. and S.C. Constitution and the P.C.R act by refusing to interview and subpoena my witnesses as well as her reluctance to address the original sentencing issue.

This Honorable Court has given Ms. Shurling a 90 day deadline to interview and take depositions from the witnesses asked to come before the court.

Furthermore I am being prejudiced by the failure to include all 9 of the witnesses that I originally requested at my P.C.R. hearing. The witnesses names are Hayes Malloy, Cleveland Malloy, Lt. Sulton, Mark Alston, Robert Jenkins aka "Pig", David Bynum, Jeremy Bynum SCDC # 284966, Herman Whalley, John Corbitt and Gabbey Wells. The court has granted deposition on only 4 of the 9 above named witnesses. Counsel's intended deposition will not cover the applicants needed questions and answers. Ms. Shurling knew that I requested of her to take full depositions that will support my claims. Yet she has failed to do so. See (Bannister v the State 509 s.e.2d 807 : Glover v State 458 2nd edition s.e.2D 538) I will not be able to raise all my claims per. 17-27-90 or prove my claims by the preponderance of the evidence see: (Butler v state 334 s.e. 2D 813 : S.C.R. Civil P. Rule 71.7 (e)).

The above named applicant lacks confidence in current counsel Tara Dawn Shurling due to her ineffectiveness and a conflict of interest shown before the court on 11-19-13 thru 11-21-13. The record will show that Ms. Shurling was not sufficiently prepared to cross examine Mr. Swerling on matters pertaining to the above listed witnesses because of her failure to interview these witnesses. Mr. Swerling noted this fact on the record in his response to Ms. Shurlings question. Furthermore Counsel

PLAINTIFF'S
EXHIBIT

2

RA

Ms. Shurling displayed a conflict of interest due to the statement she made " You ruined my relationship with Jack Swerling and he will probably never speak to me again." to the applicant at the P.C.R. hearing. Due to counsels statement and inability to subpoena the witnesses, inspite of the courts order and 90 day deadline to do so, applicant has no confidence in counsel Tara Dawn Shurling's ability to perform her duties effectively and defend this case successfully. Wherefore I pray that this motion be granted in the common interest of fairness and justice.

Date: December 31, 2013

Sincerely and Respectfully
submitted,

s/ Robert S. Tillman

SWORN TO BEFORE ME this 2nd
day of January 2013

Stephane Marshall (L.S.)

Notary Public for South Carolina

My Commission Expires: May 12, 2021

FEB 24 2014

Date : 2/18/14

Dear Ms. Shurling

Please find enclosed for filing my notice / motion for leave to conduct discovery / order.

Would you be so kind as to file this matter upon my behalf. Also serving the Atty : Gen.'s office one and sending me a filed copy back.

cc. Clerk of Court,

Sincerely,

Ronald S. Lillman

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Ronald Tillman #222153

Applicant

vs.

The State

Respondent

)
) IN THE COURT OF COMMON PLEAS
) #2011-CP-40-7453
)

) NOTICE AND MOTION FOR LEAVE
) TO CONDUCT
) DISCOVERY AND ORDER
)

PLEASE TAKE NOTICE that the Applicant, through his undersigned counsel who moves this Honorable Court in the above entitled matter for leave to conduct discovery per. S.C. code Ann. 17-27-150 (A) and S.C.R. civil P. RULE 34

(1) Applicant submits that good cause exists for the authorization of discovery for the following reasons

(A) Use of discovery procedures will expedite Applicants preparation upon Applicants pending P.C.R. issues selected

(B) Discovery will permit Applicant to obtain necessary witnesses to be present at his P.C.R. hearing SEE: Bannister v. State 509 SE 2d 807: Glover v. State 458 SE2d 538. And or, to present evidence through affidavits and depositions of his witnesses in lieu of live testimony, Also see 17.27-80 and Simpson v. Moore 627 SE2d 701

(C) Permitting discovery will substantially reduce the last - minute continuance in this matter.

(D) If discovery is not authorized Applicant will be denied due process thus he will have no option but to pursue the information and materials he seeks through a subpoena to protect his due process rights.

WHEREFORE : for all the foregoing reasons Applicant submits that he has presented good cause for the invocation of discovery and therefore respectfully requests per. 17-27-150 (A) that the court authorize him to conduct discovery of his prior counsel and solicitor files, as prescribed by the S.C.R. Civil P. Rule 34.

I So Move

Date _____

SC.

Sincerely and Respectfully
submitted,

s/

Counsel for Applicant

IT IS SO ORDERED

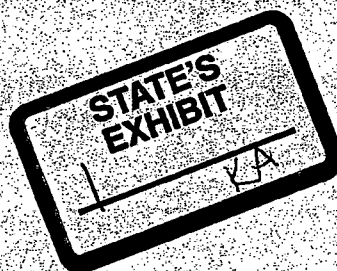
DATE _____

SC.

s/

Judge

Megan Hamgan



SOTATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

AFFIDAVIT

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

I am Jack B. Swerling. I have been a member of the South Carolina Bar since 1973.

I represented Ronald Tillman in a federal bank robbery charge and a state murder charge. During the state Post Conviction Relief ("PCR") hearing for the murder charge, Mr. Tillman raised the issue of whether or not I had a conflict of interest because I also represented a key witness in the murder case named Hayes Malloy. Since this was over twenty-five (25) years ago, I had little recollection (after all, it was over twenty-five (25) years ago) as to Mr. Malloy, except that I cross-examined him extensively about many things, including the charges he had arising out of an incident at the Tillman Party Shop in 1987.

Mr. Tillman claimed that I represented Hayes Malloy in that incident, and that he was unaware of that representation during the murder trial and his bank robbery trial.

My paralegal, Kellie A. Switzer, discovered in the Tillman federal PCR file the documents related to Hayes Malloy.

After reviewing these documents, I can say they show the following:

1. I did not represent Hayes Malloy in that incident described.
2. Joe McCulloch, who was associated with me in the practice of law during that period, represented Hayes Malloy.
3. Not only was Ronald Tillman aware that Joe McCulloch represented Hayes

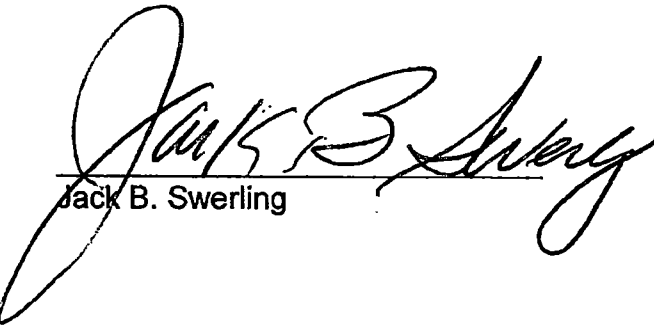
Malloy at the time of the murder trial, he was the person who authorized the Solicitor to dismiss the charges against Hayes Malloy, and received a check from Joe McCulloch for damages that were done during that incident. All of that documentation is located in the file that we have forwarded to Megan Harrigan, attorney for the State of South Carolina.

4. Mr. Tillman raised the same issues in the federal PCR back in 1997. That is why the Hayes Malloy file was in the Ronald Tillman federal PCR file. In the federal PCR proceedings, I did an Affidavit which fully sets forth my knowledge of this issue, and it is attached to this Affidavit and incorporated herein.
5. When this issue came up in the federal PCR proceedings, I asked Mr. McCulloch to review the file which he did. He provided a letter, dated September 24, 1997, which sets forth his knowledge of the events
6. I had no conflict of interest in Mr. Tillman's case as previously stated at the hearing.

It is clear that Ronald Tillman and his father knew that I did not represent Hayes Malloy in that incident, and that he was represented by Joe McCulloch.

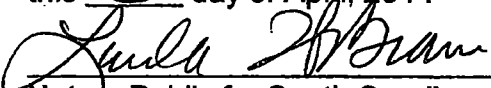
Furthermore, it is clear that Ronald Tillman dealt directly with Joe McCulloch regarding the incident, received the restitution from Mr. Malloy through Mr. McCulloch, and authorized the dismissal of the charges against Hayes Malloy.

Finally, it is clear that I had absolutely nothing to do with the Hayes Malloy case, and may not have even known that Mr. McCulloch was representing him.



Jack B. Swerling

Sworn to and subscribed before me
this 3 day of April, 2014



Notary Public for South Carolina

My Commission Expires: 06/14/22

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

A F F I D A V I T

Personally appeared before me Jack Swerling who after being duly deposes and says:

I am a practicing lawyer in South Carolina. I was admitted to the Bar in 1973. My practice is primarily dedicated to the defense of criminal matters in State and Federal Court.

I represented Ronald Tillman in a number of cases including a bank robbery in federal court and a murder case in Richland County General Sessions Court.

GROUND 3

Mr. Tillman is obviously delusional in the representations he has made in his application for relief.

Mr. Tillman maintains that I had divided loyalties between him and Hayes Malloy, because I simultaneously represented Hayes Malloy in a case during my representation of him. Mr. Tillman is wrong.

Hayes Malloy was charged with several charges arising out of a shooting at Tillman's store on December 22, 1987. On December 28, 1987, Mr. Malloy retained my former partner Joe McCulloch to represent him. Mr. McCulloch negotiated an agreement with Ronald Tillman and/or his father and/or his agent, that if Hayes Malloy made restitution the Tillman's would drop the charges. The restitution agreement was signed by Ronald Tillman himself. He had no contact with me at all. As a result of the negotiations, the charges were dismissed on June 8, 1988. The records were expunged

on July 12, 1988. The case was closed around July 12, 1988, five months before the federal robbery and one and one half years before the federal robbery trial.

I never participated in the Malloy/Tillman dispute in any manner. A review of the file reveals no mention of me and only refers to Mr. McCulloch. A review of the file references no agreement between Tillman and Malloy referring to Mr. Malloy being barred from the store. The documents refer to restitution only and no barring of Mr. Malloy from the store. One of the documents is signed by Ronald Tillman himself.

I had no knowledge of any agreement to bar Mr. Malloy from the store because I did not participate in the case. I do not remember if I knew that Mr. McCulloch represented Mr. Malloy, but if I did, I surely would have questioned him about any agreement. I did not find anywhere any written agreement to bar Mr. Malloy permanently. In fact, the government presented evidence that he cashed checks there.

During the trial I cross-examined Mr. Malloy about the shooting incident, the agreement, the dropping of the charges, and whether he was barred or not. He denied being barred. (Trial Transcript 292, 938) I presented in Mr. Tillman's defense 19 witnesses, many of whom stated that Malloy was not allowed in the shop or that he was not seen in the shop.

Mr. Tillman knew that Joe McCulloch and only Joe McCulloch represented Malloy because he dealt with him directly and he even got letters from Joe McCulloch with my name on the stationary. Mr. Tillman was well aware that Joe McCulloch was my partner. He

raised no objection and in fact retained me with that knowledge.

Mr. Tillman was not prejudiced in any way. He knew of the connection between me and Joe McCulloch. He never raised the issue with me. If I was aware of Malloy's representation by Joe McCulloch, which I cannot now state one way or the other seven years later, there still was no prejudice to Tillman. First, I had no privileged information. Second, I did not fail to ask any question of Mr. Malloy because of any divided loyalties. I had no loyalty to Malloy and no knowledge of any agreement to bar him that I withheld.

Tillman also suggests I was ineffective because I did not subpoena witnesses on the issue of Malloy being barred. I subpoenaed 19 witnesses, many of whom corroborated Tillman. Anyone who Tillman wanted was brought to court.

Tillman also is critical of my not cross-examining John Burnette about Malloy's failing a polygraph. The law does not permit me to do that. Mr. Tillman is also critical of my failure to vigorously cross-examine Malloy about the murder. As a lawyer I deliberately ask questions and deliberately do not ask questions based on my trial strategy and what I think is favorable or prejudicial to my client. I obviously felt that the line of questioning would have been prejudicial. It may have allowed answers that were prejudicial and may have "opened the door" to unfavorable issues. (See discussions with trial judge in the transcript on these issues.)

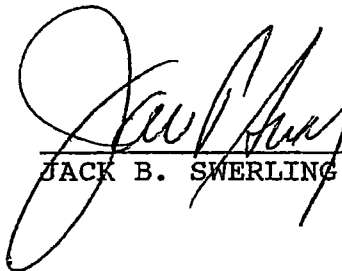
GROUND 4

Mr. Tillman states my performance was deficient in the

sentencing phase. Mr. Tillman states that he was not given access to the presentence report until 10 minutes before sentencing. That is not true. It has been seven years and I cannot recall exactly when he saw the report, but it would have been at or around the same time the report was prepared. Paul Reeves worked with me on the objections.

We had a very extensive sentencing hearing and there were challenges made to the report. The transcript is around sixty pages. Issues regarding the sentencing were presented to the Court of Appeals. (attached are the issues) Mr. Tillman's rights were fully protected and he fully participated.

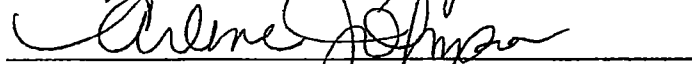
Mr. Tillman had adequate time to view the report and was made fully aware of the impact of the report.



JACK B. SWERLING

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 24th DAY OF September 1997



ARLENE JOHNSON

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES:

2/1/02

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

AFFIDAVIT

Personally appeared before me, Kellie A. Switzer, who being duly sworn states as follows:

I am a paralegal for Jack B. Swerling. I graduated from Midlands Technical College with an Associates Degree in Paralegal Studies in 2005. I have been employed by Mr. Swerling since April 23, 2007.

The Ronald Tillman files were extensive because they included documents from his murder trial and federal bank robbery trial. The files were made available to Megan Harrigan, attorney for the State of South Carolina, and Tara Shurling, attorney for Ronald Tillman, prior to the Post Conviction Relief ("PCR") hearing on the murder conviction.

As I understand it, there was issue about whether or not Mr. Swerling or our office represented Hayes Malloy, We found in our records that there had been a file opened on Hayes Malloy years ago, but we could not locate the file.

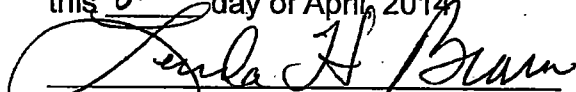
On November 21, 2013, during the Ronald Tillman PCR hearing, I was searching for a file we had on a client named Donna Summers. I looked in a cabinet that we have for PCR and miscellaneous files, and found a federal PCR file from Mr. Tillman's bank robbery conviction. In that file, I discovered what appeared to be the Hayes Malloy file that we had been unable to locate. In that file were documents related to Mr. Malloy and Mr. Tillman. Those proceedings took place in the late 1990's.

I informed Mr. Swerling of the finding, and forwarded the documents we found to Megan Harrigan, attorney for the State of South Carolina.



Kellie A. Switzer

Sworn to and subscribed before me
this 3rd day of April, 2014


Notary Public for South Carolina

My Commission Expires: 06/14/22

LAW OFFICES OF
JOSEPH M. McCULLOCH, JR.
1329 BLANDING STREET
P.O. Box 11623
COLUMBIA, SC 29211

Put in file

TELEPHONE (803) 779-0005

September 24, 1997

FACSIMILE (803) 779-0666

Jack Swerling, Esquire
1720 Main Street
Suite 301
Columbia, SC 29201

RECEIVED SEP 25 1997

Re: State v. Hayes Malloy

Dear Jack:

I have reviewed the file which you have forwarded to me regarding Mr. Hayes Malloy. I have no independent recollection of this matter whatsoever given its age. After reviewing the file it seems apparent that Mr. Malloy came to see me by virtue of a recommendation or referral from Chris Isgett on the charge of assault with intent to kill. The charge apparently arose out of Malloy's firing a rifle into some type of store on Shop Road owned by the Tillman family. It appears that we had some difficulty in getting Mr. Malloy to make a commitment to pay a fee but nonetheless by early May of 1988 he apparently had paid a fee and restitution, and I had obtained from Mr. Ronald Tillman a written indication that complete restitution had been made to the Tillman family for the damages from the bullet hole in the store. I vaguely recall talking with Tommy Croxton of the Richland County Sheriff's Department regarding the facts of the case but have no real recollection.

It further appears that the charge was ultimately dismissed by Creighton Coleman of the Solicitor's Office on or about June 8, 1988 based upon the payment of restitution and the desire of the Tillman family that no further proceedings regarding the criminal charge were necessary. I do not have any specific recall about any agreement for Malloy to refrain from going to the premises on Shop Road (but do notice that was a bond condition).

I think it is wholly unlikely that you had any idea of my representation of Mr. Malloy and certainly I would not have needed to seek your involvement or advice about these matters.

Sincerely,

Joseph M. McCulloch, Jr.

Joseph M. McCulloch, Jr.
Attorney at Law

JMMjr/mlh

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves

April 20, 1988

Creighton Coleman
Assistant Solicitor
Fifth Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

re: Hayes Malloy
charge: ABIK

Dear Creighton:

My repeated efforts to reach you by telephone, as well as your returned telephone calls, still have not resulted in our talking about this case. At a point in time several months ago, Mr. Malloy came to see me to discuss representation. I have never been retained formerly by Mr. Malloy and therefore am uncertain of our responsibilities thereabouts. I have attempted several times to contact Mr. Malloy both by mail and and telephone without result. Please advise me as to the status of the case and whether or not your records or your file reflect representation of the Public Defender or some other counsel.

Sincerely,

Swerling & Harpootlian

Joe

Joseph M. McCulloch, Jr.

:kld

Dictated before your call -
I have not been retained by
Mr. Malloy, but have sent
still another letter. JM

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves

April 20, 1988

Hayes Malloy

Columbia, South Carolina 29209

Columbia, South Carolina

Dear Mr. Malloy:

I have informed the Solicitor's office of the Fifth Judicial Circuit that I have never been formerly retained by you and do not know at this time whether it is your desire that this law firm represent you. In order for me to take any action on your behalf, I will need for you to contact me immediately and schedule an appointment and have you appear in this office to discuss the case.

Please attend to this matter immediately.

Sincerely,

Swerling & Harpootlian

Joe McCulloch
Joseph M. McCulloch, Jr.

:kld

The State of South Carolina



James C. Anders
Solicitor

Phone
748-4785

S O L I C I T O R

Fifth Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

Warren B. Giese
Deputy Solicitor

May 23, 1988

Joseph M. McCulloch, Jr., Esquire
Swerling & Harpootlian
1720 Main Street, Suite 301
Columbia, South Carolina 29201

Re: State vs. Hayes Malloy

Dear Joe:

I am in receipt of the restitution statement signed by the victim, Mr. Ronald Tillman, in regard to the above-referenced defendant. Please see if you can get the victim to send me a letter on his official business stationery to place in the file and to cover myself.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Creighton B. Coleman
Assistant Solicitor

CBC/ic

*Opie Lee told me to tell
you hello!*

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

Joseph M. McCulloch, Jr.
Paul L. Reeves

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Dear Mr. Malloy,

Since you chose not to return to our office following your initial visit, we assume that you do not wish to utilize our services. Therefore, we are returning the pertinent papers and information that you left with us. If you have any questions do not hesitate to contact us.

Sincerely,

John G. O'Day
John G. O'Day
Lawcleck

[Handwritten signature]

UNITED STATE DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

ORIGINAL FILED

APR 21 1997

LARRY W. PROPPS, CLERK
COLUMBIA, S.C.

DISTRICT COURT CASE No. CR:3:89-6

3:97-1079-08


UNITED STATES OF AMERICA

PLAINTIFF,

VS.

RONALD S. TILLMAN

DEFENDANT,

DEFENDANT'S MEMORANDUM OF LAW, IN SUPPORT OF HIS
MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

LEGAL STANDARD BY WHICH TO HOLD A PRO-SE PLEADING

SINCE THIS IS A PRO-SE PLEADING AND THE PETITIONER'S IN THE
ABOVE CAPTIONED CAUSE IS UNSKILLED IN LAW. PETITIONER'S RESPECTFULLY
REQUEST THAT THE COURT HOLD THIS 2255 TO A LESS STRINGENT STANDARD
THAT OF 2255 MEMO DRAFTED BY AN ATTORNEY. SEE CRUZ V. BETO, 405 U.S.
519 (1972) and HAINES V. KERNER, 404 U.S. 519 (1972).

ORIGINAL FILED

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

APR 21 1997

LARRY W. PROPPS, CLERK

United States District Court		District U.S. District Court District of South Carolina, at Columbia	
Name of Movant	Ronald S. Tillman	Prisoner No.	# 85375-071
Place of Confinement	U.S.P. Lewisburg, Lewisburg Pennsylvania	Docket No.	CR. 3-89-00006
UNITED STATES OF AMERICA		V. RONALD S. TILLMAN	
		(full name of movant)	

MOTION

- Name and location of court which entered the judgment of conviction under attack U.S. DISTRICT COURT DISTRICT OF SOUTH CAROLINA, AT COLUMBIA
- Date of judgment of conviction FEBRUARY, 14 1990
- Length of sentence 25 Years (300 months)
- Nature of offense involved (all counts) ARMED BANK ROBBERY 18: 2113 (a), use of weapon in the commission of a felony 18:2113 (d). 2, 18:924 Possession of a firearm.

5. What was your plea? (Check one)

(a) Not guilty ☒

(b) Guilty ☐

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

N/A

6. Kind of trial: (Check one)

(a) Jury ☒

(b) Judge only ☐

7. Did you testify at the trial?
Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT

(b) Result THE APPEAL WAS DENIED

(c) Date of result MAY 28, 1991

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result N/A

(6) Date of result N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result N/A

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result N/A

(6) Date of Result N/A

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☒

(3) Third petition, etc. Yes ☐ No ☒

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: The conviction was obtained by the use of perjured
testimony

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

See Attachment

B. Ground two: The conviction was obtained by violation of the
defendant's right to due process of law by the prosecution:

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

See Attachment

C. Ground three: The defendant's counsel was ineffective due to a
conflict of interest

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

See Attachment

AO 243
REV 6/82

D. Ground four: Ineffective Assistance of Counsel by Jack B. Swerling
the defendant was denied effective assistive of counsel in
violation of sixth Amendment of United States Constitution.
Supporting FACTS (tell your story *briefly* without citing cases or law): _____

See Attachment

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

I was not awhere at the time

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Jack B. Swerling

1720 Main St. Suite 301 Columbia, S.C 29201

(b) At arraignment and plea Jack B. Swerling

(c) At trial Jack B. Swerling

(d) At sentencing Jack B. Swerling

(e) On appeal Jack B. Swerling

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☒ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: 5TH JUDICIAL

CIRCUIT RICHLAND COUNTY JUDICIAL CENTER, COLUMBIA, SOUTH CAROLINA

(b) Give date and length of the above sentence: January 15, 1990, Life

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☒ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Petitioner Proceeding Pro-Se
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

4-16-97

(date)

Ronald S. Tillman
Signature of Movant

12. Stated grounds on which petitioner claim that he is being held unlawfully.

1. The conviction was obtain by the use of perjured testimony, submission of improper evidence, and by denial of the right to cross examine the defendant's accuser in violation of the fifth Amendment and the sixth Amendment right to a fair trial and confrontation clause all which are fundamental and protected right.
2. The conviction was obtain by violation of the defendant's right to due process of law by the prosecution's admission of evidence of other bad acts used to proffer evidence of the defendant's propensity to comit the simular crime charge and to improperly attact the defendant's character in violation of the Federal Rule of Evidence and thus the defendant's right to due process at law and a fair trial on the merits... all fundamental protected right.
3. The defendant's counsel was ineffective do to a conflict of interest with adversely effected the defendant's right to a fair trial.
4. Ineffective Assistance of Counsel by Jack B. Swerling, the defendant was denied effective assistance of counsel in violation of sixth Amendment of United States Constitution. Thus, Mr. Swerling counsel for the defendant, representation was so defected it went below the American Bar Association Standard and violated standard set forth in STRICKLAND VS. WASHINGTON 466 US 668, that there is "reasonable probability that, but for counsel unethical representation the result " the sentencing and other proceeding would have been different" Id at 694.

ORIGINAL FILED

SEP 24 1997

LARRY W. PROPER, CLERK
COLUMBIA, S. C.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

DISTRICT COURT CASE NO. 3:97-1079-08

UNITED STATES OF AMERICA

PLAINTIFF,

VS.

RONALD S. TILLMAN

DEFENDANT,

AFFIDAVIT OF JACK B. SWERLING

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

A F F I D A V I T

Personally appeared before me Jack Swerling who after being duly deposes and says:

I am a practicing lawyer in South Carolina. I was admitted to the Bar in 1973. My practice is primarily dedicated to the defense of criminal matters in State and Federal Court.

I represented Ronald Tillman in a number of cases including a bank robbery in federal court and a murder case in Richland County General Sessions Court.

GROUND 3

Mr. Tillman is obviously delusional in the representations he has made in his application for relief.

Mr. Tillman maintains that I had divided loyalties between him and Hayes Malloy, because I simultaneously represented Hayes Malloy in a case during my representation of him. Mr. Tillman is wrong.

Hayes Malloy was charged with several charges arising out of a shooting at Tillman's store on December 22, 1987. On December 28, 1987, Mr. Malloy retained my former partner Joe McCulloch to represent him. Mr. McCulloch negotiated an agreement with Ronald Tillman and/or his father and/or his agent, that if Hayes Malloy made restitution the Tillman's would drop the charges. The restitution agreement was signed by Ronald Tillman himself. He had no contact with me at all. As a result of the negotiations, the charges were dismissed on June 8, 1988. The records were expunged

on July 12, 1988. The case was closed around July 12, 1988, five months before the federal robbery and one and one half years before the federal robbery trial.

I never participated in the Malloy/Tillman dispute in any manner. A review of the file reveals no mention of me and only refers to Mr. McCulloch. A review of the file references no agreement between Tillman and Malloy referring to Mr. Malloy being barred from the store. The documents refer to restitution only and no barring of Mr. Malloy from the store. One of the documents is signed by Ronald Tillman himself.

I had no knowledge of any agreement to bar Mr. Malloy from the store because I did not participate in the case. I do not remember if I knew that Mr. McCulloch represented Mr. Malloy, but if I did, I surely would have questioned him about any agreement. I did not find anywhere any written agreement to bar Mr. Malloy permanently. In fact, the government presented evidence that he cashed checks there.

During the trial I cross-examined Mr. Malloy about the shooting incident, the agreement, the dropping of the charges, and whether he was barred or not. He denied being barred. (Trial Transcript 292, 938) I presented in Mr. Tillman's defense 19 witnesses, many of whom stated that Malloy was not allowed in the shop or that he was not seen in the shop.

Mr. Tillman knew that Joe McCulloch and only Joe McCulloch represented Malloy because he dealt with him directly and he even got letters from Joe McCulloch with my name on the stationary. Mr. Tillman was well aware that Joe McCulloch was my partner. He

raised no objection and in fact retained me with that knowledge.

Mr. Tillman was not prejudiced in any way. He knew of the connection between me and Joe McCulloch. He never raised the issue with me. If I was aware of Malloy's representation by Joe McCulloch, which I cannot now state one way or the other seven years later, there still was no prejudice to Tillman. First, I had no privileged information. Second, I did not fail to ask any question of Mr. Malloy because of any divided loyalties. I had no loyalty to Malloy and no knowledge of any agreement to bar him that I withheld.

Tillman also suggests I was ineffective because I did not subpoena witnesses on the issue of Malloy being barred. I subpoenaed 19 witnesses, many of whom corroborated Tillman. Anyone who Tillman wanted was brought to court.

Tillman also is critical of my not cross-examining John Burnette about Malloy's failing a polygraph. The law does not permit me to do that. Mr. Tillman is also critical of my failure to vigorously cross-examine Malloy about the murder. As a lawyer I deliberately ask questions and deliberately do not ask questions based on my trial strategy and what I think is favorable or prejudicial to my client. I obviously felt that the line of questioning would have been prejudicial. It may have allowed answers that were prejudicial and may have "opened the door" to unfavorable issues. (See discussions with trial judge in the transcript on these issues.)

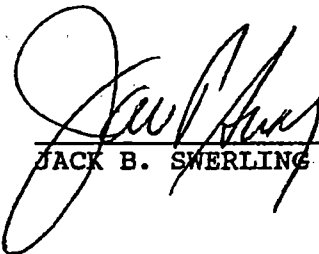
GROUND 4

Mr. Tillman states my performance was deficient in the

sentencing phase. Mr. Tillman states that he was not given access to the presentence report until 10 minutes before sentencing. That is not true. It has been seven years and I cannot recall exactly when he saw the report, but it would have been at or around the same time the report was prepared. Paul Reeves worked with me on the objections.

We had a very extensive sentencing hearing and there were challenges made to the report. The transcript is around sixty pages. Issues regarding the sentencing were presented to the Court of Appeals. (attached are the issues) Mr. Tillman's rights were fully protected and he fully participated.

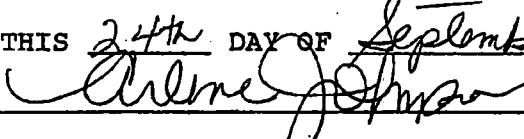
Mr. Tillman had adequate time to view the report and was made fully aware of the impact of the report.



JACK B. SWERLING

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 24th DAY OF September, 1997



NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES:

2/1/02

UNITED STATES DISTRICT COURT

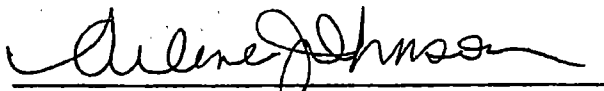
DISTRICT OF SOUTH CAROLINA

3:97-1079-08

CERTIFICATE OF SERVICE

I, Arlene Johnson, being first duly sworn, says that on the 24th day of September 1997, I faxed via facsimile transmittal and U.S. Postal Mail, postage prepaid a copy of the Affidavit of Jack B. Swerling to the following named person(s) at his/her address, to wit:

Alfred W. Bethea
Assistant United States Attorney
Room 365, 401 W. Evans Street
Post Office Box 1567
Florence, South Carolina 29503
Facsimile Transmittal
(803) 678-8809


Arlene Johnson

SWORN TO AND SUBSCRIBED BEFORE ME

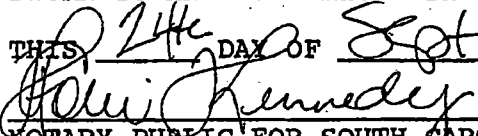
THIS 24th DAY OF Sept, 1997
NOTARY PUBLIC FOR SOUTH CAROLINAMY COMMISSION EXPIRES: 3/12/2001

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D
J

U.S. Department of Justice

United States Attorney

District of South Carolina

First Union Building
Suite 300
1441 Main Street
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FAX (803)678-8809

103 N. Spring Street, Suite 200
Post Office Box 10087
Greenville, SC 29603
(864) 282-2100
FAX (803) 223-3186

Reply to: Florence, SC

Date:

2/17/98

Time:

12:20

Deliver to:

Jack Swerling / Patty

Sent by:

Buddy Bertha

Office:

USAO - FLORENCE OFFICE

This transmission is intended for the sole use of the individual and entity to whom it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. You are hereby notified that any dissemination, distribution or duplication of this transmission by someone other than the intended addressee or their designated agent is strictly prohibited.

If you receive this transmission in error, please notify the indicated office immediately by collect call if necessary and send the original transmission to us by return mail to the above applicable address.

If you have any questions about this transmission, please contact the sender at the applicable phone number.

NUMBER OF PAGES TO FOLLOW: 5.

Re:

Simmons

ADDITIONAL INFORMATION:

Please refer to order & provide documents
needed by the Court to me asap. Call
if you have any questions. Also provide
transcript of direct & cross on Hayes Mallory
if you have it.

Thanks

ORIGINAL FILED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FEB 12 1998

LARRY W. PROPPS, CLERK
CHARLESTON, SC

Ronald S. Tillman,

Petitioner,

-vs-

United States of America,

Respondent.

Civil Action No. 3:97-1079-8
Cr. No. 3:89-8**ORDER**

On April 21, 1997, the Petitioner filed his 28 U.S.C. §2255 petition in this action seeking to vacate his federal conviction for bank robbery, based upon four grounds explained in a 21-page memorandum, with exhibits. The Respondent filed its brief in response and has requested summary judgment. The Petitioner was given until January 31, 1998, to respond to the Respondent's Motion for Summary Judgment. On January 20, 1998, the Petitioner filed a "Motion with Affidavits in Opposition to Summary Judgment," which is a brief in response to the summary judgment motion. On the same date, the Petitioner filed several motions: Motion for Leave to Conduct Discovery Under Rule 6; Motion with Supporting Affidavit for Production of Trial Record In forma pauperis; Motion for Leave to Amend the Petition; and, a Motion to Enlarge Time.

In his motions, the Petitioner seeks to obtain a copy of the entire federal trial transcript, so that he may review it to determine whether to amend his petition to assert

additional grounds for relief. He seeks more time so that he may file an amended petition after he reviews the transcript. He also requests discovery pursuant to Rule 6 of the Rules Governing §2255 Proceedings, which this Court may grant leave to permit, for good cause shown; and, in compliance with Rule 6, he did provide the Court with the specific discovery requests desired. This Court has reviewed the four grounds for relief set forth in the §2255 petition, the Affidavit filed by Jack Swerling, Petitioner's former counsel, the Respondent's brief, and the law.

The Court believes that the record in this action should include a portion of the trial transcript, namely the testimony of witness Hayes Malloy on direct and cross examination, and that the sentencing transcript should also be included as part of the record. The Court does not believe that any other portion of the trial transcript is necessary or relevant to determine the four grounds for relief alleged in the Petition.¹ As to the Requests for Admission, which the Petitioner desires to serve on the Respondent, only (D) is relevant to the grounds raised in the Petition; therefore, the Respondent shall respond to request (D) within 30 days from the date of this Order by filing its response with the Court and by serving it upon the Petitioner.

As to the Petitioner's request for discovery of all documents relied upon by Mr. Swerling in his affidavit, this Court feels that certain documents should be made part of the record. This Court directs the Respondent to provide: copies of any document,

 2

¹ The only other part of the trial transcript which would be relevant to a ground for relief is the testimony of Gabby Wells, which relates to the second ground for relief; however, the second ground for relief was raised on direct appeal and denied, and thus cannot be raised again in this action.

FEB 17 '98 12:33PM U

P.4

restitution agreement or letters, signed by Petitioner in the criminal matter involving Hayes Malloy and The State of South Carolina, with the Tillmans as victims, which documents may be in the possession or control of Mr. Swerling or Mr. McCulloch. The Court does not believe that it is necessary to review the lawyer's file relating to the representation of Mr. Malloy at this time. The attorney-client privilege may be implicated by requiring the disclosure of the lawyer's file, and it may not be necessary to review the file, depending upon a review of the produced copies of any documents signed by Petitioner in the criminal matter involving Hayes Malloy.² The only other outside records relied upon by Mr. Swerling in his Affidavit are portions of transcripts, which will be produced in compliance with this Order.

The Court denies the Petitioner's request for a copy of the entire trial transcript, so that he may review it to determine whether to amend his petition to assert additional grounds for relief, and the Court denies his request for more time so that he may file an amended petition after he reviews the transcript. The Petitioner admits in his motions that he has asserted all known grounds for relief, but he argues that he should be given more time because he was without the assistance of counsel at the time he filed his petition. Practically all federal prisoners who file §2255 petitions are without assistance of counsel; Petitioner is not an exceptional case.


² The attorney-client privilege is not implicated by requiring the Respondent to produce copies of any document, restitution agreement or letters, signed by Petitioner in the criminal matter involving Hayes Malloy and The State of South Carolina, with the Tillmans as victims, because such documents would have been disclosed, by necessity, to a third party, the Petitioner, and any claim of privilege would have been waived.

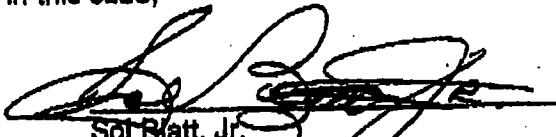
This Court will not permit a defendant to stay his \$2255 proceedings while he combs the record in the hope of discovering some flaw, and it will not find good cause for discovery pursuant to Rule 6 where the requests are so broad and baseless as to constitute a fishing expedition. See United States v. Wilson, 901 F.2d 378 (4th Cir. 1990); United States v. Glass, 317 F.2d 200 (4th Cir. 1963); United States v. Altman, 1989 WL 64203 (4th Cir. 1989). Here, the Petitioner's request does not amount to a particularized need, but instead is a request to conduct a fishing expedition, which is denied. The Court further notes that the Petitioner does not seem to be an exceptional case who would require the assistance of counsel; Petitioner's pleadings, including his original petition and memorandum in support, are very well drafted, with appropriate legal citations.

Based on the foregoing, it is ORDERED:

- (1) that the Clerk of Court adjust its records to reflect that the Petitioner's January 20, 1998, "Motion with Affidavits in Opposition to Summary Judgment" is a brief, not a motion.
- (2) that the Petitioner's January 20, 1998, Motion for Leave to Conduct Discovery Under Rule 6, is granted in part, in that the Respondent shall:
(a) respond to request to admit (D) within 30 days from the date of this Order by filing its response with the Court and by serving it upon the Petitioner, and (b) the Respondent shall provide to Petitioner within 30 days from the date of this Order copies of any document, restitution agreement or letters, signed by Petitioner in the criminal matter involving Hayes Malloy and The State of South Carolina, with the Tillmans as victims, which documents may be in the possession or control of Mr. Swerling or Mr. McCulloch, and shall file any such documents with the Court. The motion is denied in all other respects.

- (3) that the Petitioner's January 20, 1998, Motion with supporting affidavit for Production of Trial Record, is granted in part, in that the Respondent shall, within 30 days from the date of this Order, produce a copy of a portion of the trial transcript, namely the testimony of witness Hayes Malloy on direct and cross examination, and the sentencing transcript, by serving it upon the Petitioner, and by filing a copy with the Court. The motion is denied in all other respects.
- (4) that the Petitioner's January 20, 1998, Motion for Leave to Amend the Petition, and Motion to Enlarge Time, are hereby denied.
- (5) that the Court will stay its decision in this action until after it receives the above-listed supplements to the record, and that if the Court then feels that the record needs to be further supplemented, it will so order.
- (6) that the Respondent shall file a supplemental brief, within 30 days from the date of this Order, related to ground three of the §2255 Petition, addressing the issues relating to the legal standard the Court is to apply to a Sixth Amendment conflict of interest claim in a §2255 action, i.e. the Strickland or Cuyler v. Sullivan, 100 S.Ct. 1708 (1980), standard, and how the law applies to the facts in this case,

IT IS SO ORDERED.


Sol Blatt, Jr.
Senior U.S. District Judge

February 11, 1998
Charleston, S.C.

#5

*Law Offices of
Jack B. Swerling*

*1720 Main Street, Suite 301
Columbia, South Carolina 29201*

*Telephone 803-765-2626
Fax 803-799-4059*

March 20, 1998

Alfred W. Bethea
Assistant United States Attorney
Post Office Box 1567
Florence, South Carolina 29503-1567

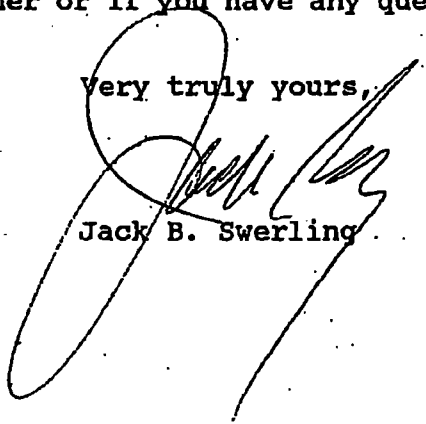
Re: Ronald Tillman

Dear Buddy:

In following with Judge Blatt's Order, enclosed are documents regarding the restitution in this matter.

If you need anything further or if you have any questions, do not hesitate to contact me.

Very truly yours,


Jack B. Swerling

JBS:lhb
Enclosures: 3

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves

May 16, 1988

Creighton Coleman
Assistant Solicitor
Fifth Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

re: State v. Hayes Malloy

Dear Creighton:

I am enclosing proof of payment of full restitution by Mr. Malloy to the owners of the store at 1744 Shop Road. Based upon my conversation with them, they do not wish to pursue the charge against Mr. Malloy.

Should you need to confirm this, you may contact Mr. Ronald Tillman or his father at 765-1226. Please advise me if this will satisfactorily dispose of this matter.

Sincerely,

Swerling & Harpootlian

Joseph M. McCulloch, Jr.

:kld
Enclosure

Swerling and Harpothian
Attorneys at Law

Jack B. Swerling
Richard A. Harpothian

Joseph M. McCulloch, Jr.
Paul L. Reeves

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

This is to confirm that Mr. Hayes Malloy has made full and complete restitution to me for damages to the premises at 1744 Shop Road.

Ronald T. Till

May 16, 1988

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA,

v.

HAYES MALLOY,

RESPONDENT.

AFFIDAVIT OF
RONALD TILLMAN

As a result of actions of Hayes Malloy, certain property belonging to me, Ronald Tillman, was damaged and a warrant was issued on December 23, 1987, for the arrest of Hayes Malloy charging him with Assault with Intent to Kill. Full and complete restitution has been made. I have given a lot of thought to this matter and I believe that it would be best to have the charges dropped; and; therefore, I request that the case be dismissed.

BY: _____
RONALD TILLMAN

SWORN TO BEFORE ME THIS
____ DAY OF _____, 1988.

ADDRESS: _____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: _____

D.L.#: _____

S.S.#: _____

PHONE NO.: _____

Swerling and Harpoonian
Attorneys at Law

Jack B. Swerling
Richard A. Harpoonian

Joseph M. McCulloch, Jr.
Paul L. Reeves

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

This is to confirm that Mr. Hayes Malloy has made full and complete restitution to me for damages to the premises at 1744 Shop Road.

Robert T. Till

May 16, 1988

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves

May 3, 1988

Creighton Coleman
Assistant Solicitor
Fifth Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

re: Hayes Malloy
Charge: ABIK

Dear Creighton:

This is to advise that I do not represent Mr. Hayes Malloy on the above-referenced charge. As you will recall, I contacted you to ascertain the status of the charges after he visited me here at the office. Since that time, I have been contacted by him by telephone, but he has never reappeared in my office for the purpose of further discussion about the case or for the purpose cementing the attorney/client privilege. I have made several attempts to contact him by mail all wholly unsuccessful.

Should he contact me, I will be happy to refer him to your office for discussion about his case.

Sincerely,

Swerling & Harpootlian

Joseph M. McCulloch, Jr.

:kld

cc: Hayes Malloy

Columbia, South Carolina 29209

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves
Jennifer Kneese Shealy

July 14, 1988

Hayes Malloy

Columbia, South Carolina 29209

RE: STATE V. HAYES MALLOY
 ORDER OF EXPUNGEMENT

Dear Hayes:

Enclosed please find an Order of Expungement duly issued by the Court of General Sessions for the Fifth Judicial Circuit which directs that certain arrest and booking records with regard to the above-referenced matter be destroyed. This copy is for your personal records and information.

Thank you for your attention herein. If we can ever be of service to you in the future, please do not hesitate to contact this office.

Sincerely,

SWERLING & HARPOOTLIAN

JOSEPH M. MCCULLOCH, JR.

:kld
 Enclosure

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves
Jennifer Kneese Shealy

July 14, 1988

Mr. H. Lee Smith
 S.C. Court Administration
 P.O. Box 50447
 Columbia, South Carolina 29250

Martha Robertson
 SLED
 P.O. Box 21398
 Columbia, South Carolina 29211

Re: Hayes Malloy
 Order of Expungement

Dear Sir/Madame:

Enclosed please find an Order of Expungement duly issued by the Court of General Sessions for the Fifth Judicial Circuit which directs that certain arrest and booking records of the above-named individual be destroyed. We would appreciate your taking notice of this Order and removing any and all information relative to the arrest specified in the Order expunging the records.

Thank you for your anticipated cooperation herein.

Sincerely,

SWERLING & HARPOOTLIAN

JOSEPH M. MCCULLOCH, JR.

:kld
 Enclosure

Swerling and Harpoottlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpoottlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves
Jennifer Hnesco Shealy

July 14, 1988

Ms. Thelma Truesdale
Criminal Records
Richland County Sheriff's Department
P.O. Box 143
Columbia, South Carolina 29201

Ms. Charlotte Thomas
Bond Court
Richland County Sheriff's Department
1328 Huger Street
Columbia, South Carolina 29201

Officer in Charge of ID Section
Detention Center
Richland County Sheriff's Department
1400 Huger Street
Columbia, South Carolina 29201

Re: Hayes Malloy
Order of Expungement

Dear Sir/Madame:

Enclosed please find an Order of Expungement duly issued by the Court of General Sessions for the Fifth Judicial Circuit which directs that certain arrest and booking records of the above-named individual be destroyed. We would appreciate your taking notice of this Order and removing any and all information relative to the arrest specified in the Order expunging the records.

Thank you for your anticipated cooperation herein.

Sincerely,

SWERLING & HARPOOTLIAN

JOSEPH M. MCCULLOCH, JR.

:kld
Enclosure

THE STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

The State of South Carolina,

-vs-

HAYES MALLOY

Defendant

AKA

IN THE COURT OF GENERAL SESSIONS

ORDER FOR THE DESTRUCTION OF
ARREST RECORDS

Warrant #: B-962762

GS #:

Race/Sex: white/male

DOB:

Age:

SSN #:

IT APPEARS that the defendant was arrested on December 22, 1987
in Richland (County) and charged with Assault with Intent to Kill

IT ALSO APPEARS that the defendant is entitled to have all records relating to such offense expunged and destroyed according to the section of the South Carolina Code of Laws which is marked below

- ☒ Section 17-1-40. The above charge was dismissed nol prossed or the defendant was found not guilty on 6/8/88.
- ☐ Section 17-22-150. The above charge was dismissed on _____ by the solicitor because the defendant successfully completed the Pre-Trial Intervention Program.
- ☐ Section 34-11-90 (e). The defendant was convicted under the Fraudulent Check Law on _____ and no additional criminal activity has taken place in one year from date of conviction.
- ☐ Section 44-53-450 (b). The defendant was convicted of first offense simple possession of marijuana on _____, received a conditional discharge and has successfully complied with the terms of that sentence.

IT IS ORDERED that all records relating to such arrest and subsequent discharge pursuant to the above referenced section be dismissed, expunged and immediately destroyed and that no evidence of such records pertaining to such charge shall be retained by any municipal, county or state agency (except nonpublic information retained on each person accepted for Pre-Trial Intervention as provided for in Code Section 17-22-130 and nonpublic information retained by the Department of Narcotic and Dangerous Drugs as provided for in Code Section 44-53-450).

On Motion of:

Signed this 12 day of July, 19 88

Richard W. McIllochy
Defendant/Attorney for Defendant

A. Marion Kinton
Presiding Circuit Court Judge

I Consent:

Creighton B. Coleman
Circuit Solicitor

I attest that the above named defendant successfully completed the Pre-Trial Intervention Program.

Director, Pre-Trial Intervention

State of South Carolina
COUNTY OF RICHLAND

MAGISTRATES SUMMONS
FOR

- ☐ ATTORNEY
☐ WITNESS
☒ DEFENDANT

Thayes Malloy

Columbia, S. C. 29029

This is a rescheduled court date.

You are hereby summoned to be and appear personally before a court
of the Magistrate to be held at the Richland County Judicial Center,
2nd Floor, Courtroom #2-C, 1701 Main St., Columbia, S. C. on the
14th January 88 1:00
_____ day of _____ 19____ at _____ o'clock

^P in the M., to serve as ^{Attorney} Defendant in a Preliminary Hearing in the
~~Witness~~

certain case of the State vs. Hayes Malloy

Herein fail not, on pain of forfeiting the lawful penalty in such
cases made and provided.

Handwritten: JAN 5 1988

Chief Judge for Admin. Purposes

State of South Carolina

COUNTY OF RICHLAND

MAGISTRATES SUMMONS FOR

- ☐ ATTORNEY
☐ WITNESS
☒ DEFENDANT

To Hayes Malloy

Columbia, S. C. 29209

NOT IN JAIL

You are hereby summoned to be and appear personally before a court of the Magistrate to be held at the Richland County Judicial Center, 2nd Floor, Courtroom #2-C, 1701 Main St., Columbia, S. C. on the 15th day of January 1988 at 1:00 o'clock in the P. M., to serve as Attorney Defendant in a Preliminary Hearing in the Witness certain case of the State vs.

Hayes Malloy

Herein fail not, on pain of forfeiting the lawful penalty in such cases made and provided.

Paul C. Hilde DEC 30 1987

Chief Judge for Admin. Purposes

Hayer Malloy

29201

256-1780

Sunbird

Important

11 25
799-2511

Creighton

Coleman

no money
paid

STATE OF SOUTH CAROLINA

COUNTY OF Richland

AFFIDAVIT

Personally appeared before me, Judge of the Court, one Bogan for Bell, RCSD, who being duly sworn, deposes and says that Hayes Malloy (name of defendant) did within this County and State on December 22 19 87, violate the criminal laws of the State of South Carolina [or ordinance of the municipality of Columbia] in the following particulars:

DESCRIPTION OF OFFENSE

Assault

With Intent to Kill

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that such probable cause is based on the following facts:

That on December 22, 1987 one Hayes Malloy did commit the crime of Assault With Intent to Kill in that the defendant did fire rifle into the door at 1744 Shop Road in Richland County, after the victim had just entered the room. The defendant did then leave the building. The victim identified the defendant at another location within an hour of the incident.

Affiant and others are witness to prove the same.

Sworn to and Subscribed before me,

This 23 day of December, 19 87.

[Signature] (L.S.)
Signature of Issuing Judge

Address JUDGE GLEN DAVIS
5617 BLUFF ROAD
Phone: COLUMBIA, S. C. 29201
PHONE 783-2424

[Signature]
Signature of Affiant
Address RCSD
Phone: _____

79170C

STATE OF SOUTH CAROLINA

ARREST WARRANT

COUNTY OF Richlandfor MUNICIPALITY OF Columbia

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE, COUNTY OR MUNICIPALITY, OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that Hayes Malloy (name of defendant) did on December 22 19 87, violate the criminal laws of the State of South Carolina [or ordinance of the municipality of Columbia] as set forth below:

DESCRIPTION OF OFFENSE

Assault

With Intent to Kill

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Done at Columbia, S.C.
on December 23, 19 87.

D.L. Bell RCSD

[Signature] (L.S.)
Signature of Judge

STATE OF SOUTH CAROLINA)

MAGISTRATES COURT

COUNTY OF RICHLAND)

Mr./Ms.

you are charged with:

and you are entitled to a Preliminary Hearing. You must request a Preliminary Hearing within ten (10) days of this notice or lose your right to such hearing. You may request such hearing by completing the lower left section of this notice and return it to the Court either in person or by mail to the following address:

Magisterial Court Administrator
P.O. Box 192, 1701 Main Street
Columbia, South Carolina 29202

I request a Preliminary Hearing.

(Defendant)

(Presiding Judge)

(Address)

(DATE)

STATE OF SOUTH CAROLINA
COUNTY OF Richland

STATE OF SOUTH CAROLINA

v. Hayes Malloy

Hayes Malloy
Name of Defendant

IN THE

Ticket Or Warrant No. _____
() COURT OF GENERAL SESSIONS
() MAGISTRATE'S COURT
() MUNICIPAL COURT OF _____

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE

(Bond Proceeding Form 2)

Offense Charged: Assault With Intent to Kill B962762

At a bail proceeding conducted by undersigned judge, for the defendant named above, it was determined by the court (check one or both):

- () The release of the defendant on recognizance will not reasonably assure his appearance as required.
() The release of the defendant on recognizance will result in an unreasonable danger to the community.

This determination was based upon the following findings of fact: If Defendant does go back to or near 1744 Shopp Road, Bond will be revoked - Per Judge Maurer.

Considerations: Nature and circumstances of the offense charged, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and any record of flight to avoid prosecution or failure to appear at other court proceedings.

THEREFORE, IT IS HEREBY ORDERED:

1. That the above named defendant be released from custody on the condition that he will personally appear before the designated court at the place, date and time required, to answer the charge made against him and do what shall be ordered by the court, and not depart the State without the permission of the court and be of good behavior.
2. That the above named defendant be released from custody provided as follows (check one): Receipt #: C77260

CASH IN LIEU OF BOND

- () The defendant acknowledging himself to be indebted to the State of South Carolina, deposits _____ to secure his release from custody. Should the defendant fail to comply with all terms and conditions of this Order, this sum of money is subject to being forfeited to the State.

CASH PERCENTAGE IN LIEU OF BOND

- () The defendant acknowledges himself to be indebted to the State of South Carolina in the sum of \$ 1,000, his release to be obtained by payment to the court of Ten (10%) of this bond in cash, this amount being \$ 100. The defendant will be obligated to the State in the full amount of \$ 1,000, such sum to be levied on his real and personal property for the use of the State, should he fail to perform the conditions of this order.

APPEARANCE RECOGNIZANCE WITH SURETY

- () The defendant will provide good and sufficient surety approved in the court, in the form set forth on the reverse side, acknowledging an indebtedness to the State in the amount of \$ _____.

IT IS FURTHER ORDERED:

3. That the defendant shall appear at

GENERAL SESSIONS COURT AT

THE CALL OF COURT BY SOLICITOR

and remain there throughout the term of court or until some disposition is made of his case or at such other place, date and time as the court may direct.

the call of his case by the solicitor, whether pre-arrestment or post-arrestment; after written notice is mailed to the defendant at the address listed below.

Time

Initials of Defendant H.M.

Bell, RCSD

4. That those conditions described on the reverse side which are marked are also imposed.

ACKNOWLEDGEMENT BY DEFENDANT

I understand that if I violate any condition of this order, including any conditions included on the reverse side of this order, a warrant for my arrest will be issued.

I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence.

It has been explained to me that if I fail to appear before the court as required, an additional criminal charge will be instituted against me. If the failure to appear is in connection with a felony charge, or while awaiting sentence, or pending appeal or certiorari after conviction, the penalty is a fine of not more than \$5,000 or imprisonment for not more than five years, or both; if I fail to appear in connection with a misdemeanor charge, the penalty is a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

I acknowledge the receipt of a copy of this order and understand the conditions of my release and the penalties applicable to me in the event I violate any condition of the order or fail to appear as required.

Address

City and State

Social Security Number/Telephone No.

Hayes Malloy
Signature of Defendant

(L.S.)

Date

12/23/87
Date

Attorney Representing Accused (if known)

ORIGINAL AND ONE COPY OF THIS FORM ARE TO BE COMPLETED IN EVERY BAIL PROCEEDING IN WHICH IT IS USED
Original Copy for the Trial Court - Copy for the Defendant
FORM CONTINUES ON BACK

SPECIAL CONDITIONS OF RELEASE

a. () Placement in custody. The defendant is placed in the custody of: _____
Name of person or organization

Address _____ City _____ State _____ Telephone _____

who agrees (1) to supervise the defendant in accordance with conditions set forth by the court, (2) to use every effort to assure the appearance of the defendant at all scheduled hearings before the court, and (3) to notify the court immediately in the event the defendant violates any conditions of his release or disappears.

Signature of Custodian (If Appointed)

Date

b. () Restrictions on Travel, Association or Residence. The defendant will comply with each of the following conditions:

c. () Part-Time Release. The defendant will be released from custody from _____ a.m./p.m. to _____ a.m./p.m. on _____ on condition that he return to the custody of _____ at _____ as designated.

d. () Other Conditions. The defendant agrees that he will notify the court promptly if he changes his address from the one contained in this order and that he will comply with the following other conditions of release: _____

APPEARANCE RECOGNIZANCE WITH SURETY

On the _____ day of _____, 19____, personally appeared before the undersigned judge the surety named below who acknowledged himself indebted to the State of South Carolina, in the sum of \$_____, such sum to be levied on his real and personal property for the use of the State, if the within named defendant shall fail in performing the conditions of this order.

The surety, being duly sworn, says that he is a resident and free holder within the State and is worth the sum acknowledged and underwritten herein, over all his debts and liabilities, and exclusive of property exempt from execution.

Name of Surety (Printed or Typed)

Signature of Surety

(L.S.)

Address of Surety

Signature of Judge

City

S.C.

Date

The State of South Carolina



James C. Anders
Solicitor

Phone
748-4785

S O L I C I T O R
Fifth Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

Warren B. Giese
Deputy Solicitor

Date _____

Appeared _____

Assistant Solicitor _____

You are hereby notified that you must report to Courtroom 3-A of the Richland County Judicial Center, 1701 Main Street, at 8:30 A.M. on 11/11/77. You must either have your attorney with you or proof that you have retained an attorney or been interviewed by the Public Defender's Office.

Should you fail to appear on the above date and time, a bench warrant will be issued for your arrest.

Signed: _____

THE STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The State of South Carolina,

-vs-

HAYES MALLOY

Defendant

AKA

IN THE COURT OF GENERAL SESSIONS

ORDER FOR THE DESTRUCTION OF
ARREST RECORDSWarrant #: B-962762

GS #:

Race/Sex: white/male

DOB: _____ Age: _____

SSN #: _____

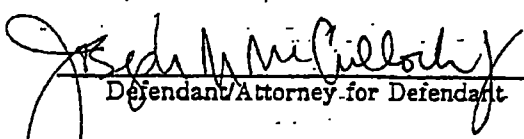
IT APPEARS that the defendant was arrested on December 22, 1987
in Richland (County) and charged with Assault with Intent to Kill

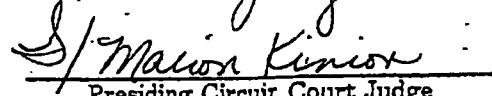
IT ALSO APPEARS that the defendant is entitled to have all records relating to such offense expunged and destroyed according to the section of the South Carolina Code of Laws which is marked below:

- ☒ Section 17-1-40. The above charge was dismissed not pressed or the defendant was found not guilty on 6/8/88.
- ☐ Section 17-22-150. The above charge was dismissed on _____ by the solicitor because the defendant successfully completed the Pre-Trial Intervention Program.
- ☐ Section 34-11-90 (e). The defendant was convicted under the Fraudulent Check Law on _____ and no additional criminal activity has taken place in one year from date of conviction.
- ☐ Section 44-53-450 (b). The defendant was convicted of first offense simple possession of marijuana on _____, received a conditional discharge and has successfully complied with the terms of that sentence.

IT IS ORDERED that all records relating to such arrest and subsequent discharge pursuant to the above referenced section be dismissed, expunged and immediately destroyed and that no evidence of such records pertaining to such charge shall be retained by any municipal, county or state agency (except nonpublic information retained on each person accepted for Pre-Trial Intervention as provided for in Code Section 17-22-130 and non-public information retained by the Department of Narcotic and Dangerous Drugs as provided for in Code Section 44-53-450).

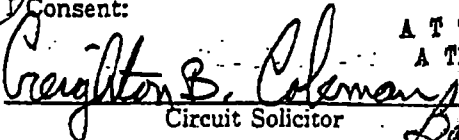
On Motion of:

Signed this 12 day of July, 19 88

 Defendant/Attorney for Defendant

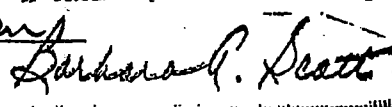

 Presiding Circuit Court Judge

I Consent:

I attest that the above named defendant successfully completed the Pre-Trial Intervention Program.


 Circuit Solicitor

A T T E S T :
A TRUE COPY


 Director, Pre-Trial Intervention

THE STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The State of South Carolina,

vs.

HAYES MALLOY

Defendant

AKA

IN THE COURT OF GENERAL SESSIONS

ORDER FOR THE DESTRUCTION OF
ARREST RECORDSWarrant #: B-962762

GS #:

Race/Sex: white/male

DOB:

Age: 20

SSN #:

SCOTT

JUL 13 20 PM '88

RECEIVED

IT APPEARS that the defendant was arrested on December 22, 1987
in Richland (County) and charged with Assault with Intent to Kill

IT ALSO APPEARS that the defendant is entitled to have all records relating to such offense expunged and destroyed according to the section of the South Carolina Code of Laws which is marked below:

- ☒ Section 17-1-40. The above charge was dismissed not pressed or the defendant was found not guilty on 6/8/88
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On Motion of:

Signed this 12 day of July, 19 88Joseph M. McCallister
Defendant/Attorney for DefendantSt. Marion Kenion
Presiding Circuit Court Judge

I Consent:

Freighton B. Coleman
Circuit SolicitorATTEST:
A TRUE COPYBarbara C. Scott

I attest that the above named defendant successfully completed the Pre-Trial Intervention Program.

Director, Pre-Trial Intervention

THE STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The State of South Carolina,

-vs-

HAYES MALLOY

Defendant

AKA

IN THE COURT OF GENERAL SESSIONS

ORDER FOR THE DESTRUCTION OF
ARREST RECORDSWarrant #: B-962762

GS #:

Race/Sex: white/male

DOB:

Age:

SSN #:

IT APPEARS that the defendant was arrested on December 22, 1987
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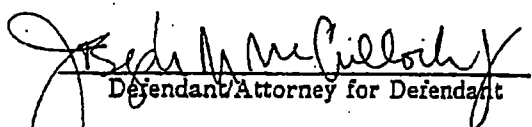
IT ALSO APPEARS that the defendant is entitled to have all records relating to such offense expunged and destroyed according to the section of the South Carolina Code of Laws which is marked below:

- ☒ Section 17-1-40. The above charge was dismissed not pressed or the defendant was found not guilty on 6/8/88.
- ☐ Section 17-22-150. The above charge was dismissed on _____ by the solicitor because the defendant successfully completed the Pre-Trial Intervention Program.
- ☐ Section 34-11-90 (e). The defendant was convicted under the Fraudulent Check Law on _____ and no additional criminal activity has taken place in one year from date of conviction.
- ☐ Section 44-53-450 (b). The defendant was convicted of first offense simple possession of marijuana on _____, received a conditional discharge and has successfully complied with the terms of that sentence.

IT IS ORDERED that all records relating to such arrest and subsequent discharge pursuant to the above referenced section be dismissed, expunged and immediately destroyed and that no evidence of such records pertaining to such charge shall be retained by any municipal, county or state agency (except nonpublic information retained on each person accepted for Pre-Trial Intervention as provided for in Code Section 17-22-130 and nonpublic information retained by the Department of Narcotic and Dangerous Drugs as provided for in Code Section 44-53-450).

On Motion of:

Signed this _____ day of _____, 19 _____


 Defendant Attorney for Defendant

I Consent:


 Circuit Solicitor

Presiding Circuit Court Judge

I attest that the above named defendant successfully completed the Pre-Trial Intervention Program.

Director, Pre-Trial Intervention

THE STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The State of South Carolina,

-vs-

HAYES MALLOY

Defendant

AKA

IN THE COURT OF GENERAL SESSIONS

ORDER FOR THE DESTRUCTION OF
ARREST RECORDSWarrant #: B-962762

GS #:

Race/Sex: white/male

DOB: _____ Age: _____

SSN #: _____

IT APPEARS that the defendant was arrested on December 22, 1987
in Richland (County) and charged with Assault With Intent to Kill

IT ALSO APPEARS that the defendant is entitled to have all records relating to such offense expunged and destroyed according to the section of the South Carolina Code of Laws which is marked below:

- ☒ Section 17-1-40. The above charge was dismissed not pressed or the defendant was found not guilty on 6/8/88.
- ☐ Section 17-22-150. The above charge was dismissed on _____ by the solicitor because the defendant successfully completed the Pre-Trial Intervention Program.
- ☐ Section 34-11-90 (e). The defendant was convicted under the Fraudulent Check Law on _____ and no additional criminal activity has taken place in one year from date of conviction.
- ☐ Section 44-53-450 (b). The defendant was convicted of first offense simple possession of marijuana on _____ received a conditional discharge and has successfully complied with the terms of that sentence.

IT IS ORDERED that all records relating to such arrest and subsequent discharge pursuant to the above referenced section be dismissed, expunged and immediately destroyed and that no evidence of such records pertaining to such charge shall be retained by any municipal, county or state agency (except nonpublic information retained on each person accepted for Pre-Trial Intervention as provided for in Code Section 17-22-130 and nonpublic information retained by the Department of Narcotic and Dangerous Drugs as provided for in Code Section 44-53-450).

On Motion of:

Signed this 12 day of July, 19 88

Joseph M. McIllochy
Defendant/Attorney for Defendant

S. Marion Kinnion
Presiding Circuit Court Judge

I Consent:

Freighton B. Coleman
Circuit Solicitor

ATTEST
TRUE COPY

Barbara P. Scott

I attest that the above named defendant successfully completed the Pre-Trial Intervention Program.

Director, Pre-Trial Intervention

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves

June 2, 1988

Hayes Malloy

Columbia, South Carolina 29209

Dear Hayes:

Please find enclosed an additional form which the Solicitor's office wishes to have signed before they dismiss the charge against you. Since it may be difficult to have a notary witness Mr. Tillman's signature, please obtain at least his signature and the other information on the form and return it to me as soon as possible. I hope the Solicitor's office will accept it without a notary seal.

Sincerely,

Swerling & Harpootlian

Joseph M. McCulloch, Jr.

:kld
Enclosure

CLIENT Hayes Malley

ADDRESS _____

TEL. NO. _____

CITY _____

STATE _____

ZIP CODE _____

DATE	PAID TO OR RECEIVED FROM	CHECK OR RECEIPT NO.	CLIENT ADVANCES		TRUST FUNDS		FEES		BALANCES	
			ADVANCED	RECEIVED	DISBURSED	RECEIVED	CHARGED	RECEIVED	CLIENT ADV.	TRUST
1/14/88	Hayes Malley	3640						100.00	1	100
2									2	
3									3	
4									4	
5									5	
6									6	
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21									21	
22									22	
23									23	
24									24	

Please pull
file

The State of South Carolina



James C. Anders
Solicitor

Phone
748-4785

S O L I C I T O R
Fifth Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

Warren B. Giese
Deputy Solicitor

04/29/88

HAYES MALLOY

COLUMBIA

SC

DEAR HAYES MALLOY

PLEASE TAKE NOTICE THAT YOU ARE REQUIRED
TO BE IN COURTROOM #3-B OF THE RICHLAND COUNTY
JUDICIAL CENTER, 1701 MAIN STREET, COLUMBIA,
SOUTH CAROLINA ON *May 16, 1988* AT *8:30 A.M.*

SHOULD YOU FAIL TO APPEAR AT THE ABOVE TIME,
A BENCH WARRANT WILL BE ISSUED FOR YOUR ARREST,
AND YOUR CASE SHALL BE TRIED IN YOUR ABSENCE.

PLEASE BE PREPARED TO DISCUSS THE DISPOSITION OF
YOUR CASE.

SHOULD YOU HAVE ANY QUESTIONS CONCERNING THE
ABOVE MATTERS, PLEASE CONTACT YOUR DEFENSE
ATTORNEY OR THE SOLICITOR'S OFFICE AT 748-4785.

SINCERELY,

James C. Anders
JAMES C. ANDERS
SOLICITOR

NOTE: THIS CASE WILL BE HANDLED BY SOLICITOR COLEMAN, CREIGHTON

CASE NO. 8962762 INDICTMENT NO. 881788

ATTORNEY: MCCULLOUGH, JOE CHARGE: ABIK

DATE OF ARREST: 12/23/87

Swerling and Harpootlian
Attorneys at Law

Jack B. Swerling
Richard A. Harpootlian

1720 Main Street, Suite 301
Columbia, South Carolina 29201
803-765-2626

Joseph M. McCulloch, Jr.
Paul L. Reeves

January 20, 1988

Febr. 3 1988

Hayes Malloy

Columbia, South Carolina 29209

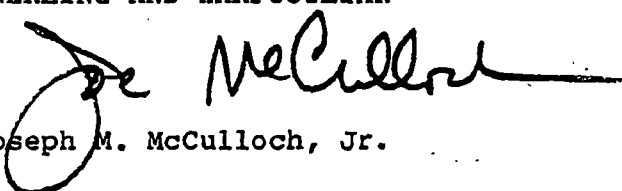
Dear Mr. Malloy:

Upon receipt of this letter, please call my office to set up an appointment to come in to see me as soon as possible.

I look forward to hearing from you soon.

Sincerely,

SWERLING AND HARPOOTLIAN


Joseph M. McCulloch, Jr.

JMMc:lhb

Memo to file

Date: 1-14-88

Telephone call from Tom Croxson

PCSD in re new charge

of razor slashing agst

Hayes Mulloy

Sph w/ Ron
Son of ~~Randy~~
Paul in
re damage
estimate.
Asked them
to call me
asap

Ronald Paul
 288-2909 AA
 765-1226 Daisy
 SL

Bell, RCSD

(name of defendant) did within
 Carolina (or ordinance of the

Following particulars:

DESCRIPTION OF OFFENSE

Assault With Intent to Kill

I further state that there is probable cause to believe that the defendant named above did commit the crime that such probable cause is based on the following facts:

That on December 22, 1987 one Hayes Malloy did commit the crime of Assault With Intent to Kill in that the defendant did fire rifle into the door at 1744 Road in Richland County, after the victim had just entered the room. The defendant did then leave the building. The victim identified the defendant at another location within an hour of the incident. Affiant and others are witness to prove the same.

Sworn to and Subscribed before me,

This 23 day of December, 19 87

[Signature]
 Signature of Issuing Judge

(L.S.)

Address JUDGE GLEN DAVIS
 5617 BLUFF ROAD
 Phone: COLUMBIA, S. C. 29201

PHONE 783-2424

Address

Phone:

STATE OF SOUTH CAROLINA

ARREST WARRANT

COUNTY OF Richland

(or MUNICIPALITY OF Columbia)

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE, COUNTY OR MUNICIPALITY, OR ANY CONSTABLE OF THIS

It appearing from the above affidavit that there are reasonable grounds to believe that Hayes Malloy (name of defendant) did on December 22, 19 87 violate the criminal laws of the State of South Carolina (or of the municipality of Columbia) as set forth below:

DESCRIPTION OF OFFENSE

Assault With Intent to Kill

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before the court to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the first reasonable opportunity thereafter as is practicable.

Done at Columbia

on December 23, 1987

D.L. Bell RCTD

CLIENT INFORMATION SHEETDATE: 1/14/88NAME: Hayes MalloyPHONE: 256-1780 (HOME)
____ (WORK)

ADDRESS: _____

DATE OF BIRTH: _____

EMPLOYER'S NAME: paul smitheart

TELEPHONE #: _____

ADDRESS: Sun Bird Boat com.Shop Rd.TYPE OF CASE: ASult with entant to kill

REFERRED BY: _____

ADDRESS AND TELEPHONE NUMBER OF CLOSEST RELATIVE OR FRIEND:

776-3207
Mr. Thomas Grand farther

SPOUSE'S NAME: _____

ATTORNEYS NOTES

Ayer Malloy

- 22 yoa

- Shubio

- juvenile - R+E - SAR -
CPD

shot at 2 guys
- David Byner
- Popcat

Temple

Party Shop

\$500.00

CLIENT INFORMATION SHEETDATE: 12-28-87NAME: Hayes Malloy

PHONE: _____ (HOME)

(WORK)

ADDRESS: _____

DATE OF BIRTH: _____

Columbia, S.C. 29209EMPLOYER'S NAME: SunlifeTELEPHONE #: 256-1780 (H)ADDRESS: _____

TYPE OF CASE: _____

REFERRED BY: Chris Isgett

ADDRESS AND TELEPHONE NUMBER OF CLOSEST RELATIVE OR FRIEND:

Elliott Thomas 776-3207

SPOUSE'S NAME: _____

ATTORNEYS NOTES

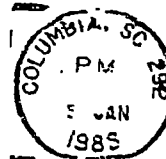
- to bring guest names
- sharing as Party Shop

Swerling and Harpootlian

Attorneys at Law

1720 Main Street, Suite 301

Columbia, South Carolina 29201



FOR HAYE

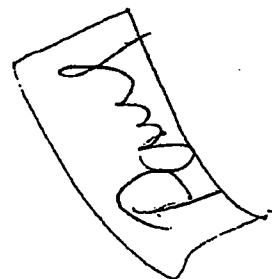
Hayes Malloy

Cola. SC 29209

Call-John

765-2626

52



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO: 2011-CP-40-7453
	)	
Ronald S. Tillman, #222153,	)	
	)	
Applicant,	)	
	)	ORDER GRANTING APPLICATION
v.	)	FOR POST-CONVICTION RELIEF
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is currently confined in the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. Applicant was previously tried by jury before the Honorable Don S. Rushing from January 15-23, 1990. Applicant was represented by Jack Swerling and Jennifer Shealy, Esquires. The jury found Applicant guilty for Murder and Judge Rushing sentenced the Applicant to life imprisonment.

The direct appeal was subsequently transferred to the South Carolina Court of Appeals. Oral argument took place on March 18, 1991, and the Court of Appeals issued an opinion on May 28, 1991, affirming the sentence and conviction. *State v. Tillman*, 405 S.E.2d 607 (S.C. Ct. App. 1991). Applicant, through counsel, filed a Petition for Rehearing on June 12, 1991, which the Court of Appeals denied by Order dated June 20, 1991.

Attorneys Swerling and Shealy filed a Petition for Writ of Certiorari in the South Carolina Supreme Court on July 22, 1991. The State filed a Return to the Petition on August 23, 1991. On September 5, 1991, the Supreme Court issued an Order denying the Petition. The Remittitur was sent on September 9, 1991.

Applicant initially filed an Application for post-conviction relief on July 17, 1995 (1995-CP-40-2449). Applicant raised the following allegations:

1. Ineffective Assistance of Counsel: Trial counsel failed to interview or subpoena crucial witnesses;
2. Brady violations: Prosecutor withheld exculpatory evidence that was favorable to the defense.
3. Judge abused his discretion and denied the defendant a fair trial. Trial judge gave the Allen charge-it was deemed coercive.

Respondent filed a Return and Motion to Dismiss on September 22, 1995. Applicant, through attorney Tara D. Shurling, filed a Reply dated October 23, 1995, and a Supplemental Reply dated November 27, 1995. The State filed a Supplemental Return and Motion to Dismiss without Prejudice, in which it asserted that dismissal without prejudice was warranted as Applicant was in federal custody. Applicant, through counsel, filed a Reply to the State's Supplemental Motion.

By Order dated March 24, 1997, the Honorable L. Casey Manning dismissed the Application without prejudice as Applicant was not in State custody. Applicant filed a Motion to Alter or Amend on April 7, 1997. By Order dated July 13, 1998, Judge Manning denied Applicant's Motion.

A timely Notice of Appeal was filed with the South Carolina Supreme Court. On January 18, 1999, Applicant filed a Petition for Writ of Certiorari. By Order dated July 22, 1999, the South Carolina Supreme Court denied the Petition, however, the Court ordered that the PCR statute of limitations would not apply to Applicant until he returned to South Carolina from federal custody.

Applicant subsequently filed a second application for post-conviction relief on March 1, 2002 (2002-CP-40-971), in which he raised the following allegations:

1. Ineffective assistance of counsel: The Applicant was the victim of woefully ineffective assistance of counsel in that counsel of record failed to timely object to or preserve for appellate review the erroneous instructions to the jury by the trial court of murder, and counsel of record failed to object to the State attorney using perjury testimony by Hayes Malloy denied the Applicant to rights to a fair trial. Also, counsel of record had a strong conflict of interest when his law firm represented the state witness Hayes Malloy for an assault and battery when Hayes Malloy shot up the Applicant's father's party shop. This representation of Hayes Malloy should have been brought to the attention of the trial court so the Applicant could have received fair representation.

2. Actual Innocence: The Applicant never received a fair trial and/or sentencing determination when counsel of record, as well as the State of South Carolina attorney for the Richland County conspire to deny the Applicant due process rights under the United States Constitution to a fair trial. Both counsels knew or should have known that Hayes Malloy's testimony was false when they knew that Malloy failed the polygraph test given by Officer Burnette in regards to the shooting of Donald Sutton. The facts supporting this case if the Applicant was given a fair trial would have shown that the Applicant was actually innocent of the killing of Donald Sutton.

3. Prosecutorial Misconduct: The State Attorney for the Richland County for the District of South Carolina knowingly used false testimony against the Applicant when the State attorney for the Richland County made a deal with Hayes Malloy for his testimony against the Applicant for promises to dismiss Hayes Malloy's pending case before the court as well as the State's Attorney for Richland County knowingly making a deal not to charge Hayes Malloy for the murder of Donald Sutton if Hayes Malloy testified against the Applicant to save Malloy's own neck. The actions by the State attorney for the Richland County violated the Applicant's rights to due process and equal protection under the United States Constitution.

The State filed a Return and Motion to Dismiss on June 12, 2002. On June 17, 2002, Applicant filed a Reply, Request for a Petition for Writ of Habeas Corpus Ad Testificandum and Motion for Appointment of Counsel. On June 13, 2002, the Honorable G. Thomas Cooper signed a Rule to Show Cause, giving Applicant twenty (20) days to show why his Application should not be dismissed without prejudice. 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 action without prejudice for failure to prosecute. Upon information and belief, no appeal was filed.

Applicant filed his current post-conviction relief application on November 3, 2011 and amended on November 18, 2013. Respondent made its return on November 8, 2011. An evidentiary hearing into the matter was convened on November 19 and 21, 2013, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Ms. Shurling. At the hearing, Applicant alleged to the Court that Ms. Shurling failed to interview certain witnesses in support of his PCR claim. This Court took the matter under advisement and allowed Ms. Shurling ninety (90) days to interview four (4) additional witnesses. Subsequently, Applicant filed a grievance against Ms. Shurling and filed a Motion to Relieve Counsel in February of 2014. A hearing into the Motion was conducted on April 3, 2014, at the Richland County Courthouse. Applicant was present at the hearing with Ms. Shurling. 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 that she had not interviewed the additional witnesses that she was previously directed to interview. At Applicant's request, Ms. Shurling was relieved as counsel and Lance S. Boozer, Esquire was appointed to represent the Applicant by Order dated May 16, 2014. The Order also implemented the following schedule: Once Mr. Boozer received the prior transcripts and case filings, he was to interview the four (4) witnesses within one hundred and twenty (120) days; if necessary, Mr. Boozer could depose those witnesses within sixty (60) days of the interviews; after any depositions, the State could reply in affidavit form within thirty (30) days; and after the State had an opportunity to reply, both parties were to submit proposed Order within forty-five (45) days. This Court finds that the

parties have complied with the scheduling order and makes the following finds of fact and conclusions of law.

ALLEGATIONS

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

1. "The Applicant received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution."
 - a. "Trial counsel failed to adequately investigate the Applicant's charges, failed to investigate and interview potential witnesses and failed to investigate defenses against the charge prior to trial. Trial counsel neglected to adequately review discovery materials with the Applicant and failed to present Applicant's own testimony at trial. Trial counsel further failed to reveal the nature of a conflict of interest which prevented him from effectively representing the Applicant."

Applicant filed an amended Application on November 18, 2013, alleging that he was being held in custody unlawfully based on the following allegations:

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, 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 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's car at the time tread impressions were taken from the vehicle. *See State v. Tillman*, 304 S.C. 512, 521, fn 1, 405 S.E.2d 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 "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.

At the evidentiary hearing, Applicant testified on his own behalf. Mr. Swerling and his part-time associate, Aleksandra Chauhan, Esq. also testified. This Court also had before it a copy

of the trial transcript, appellate records, the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR Application and Amended Application and Return. On May 13, 2015, Herman Whaley was deposed and the Court has before it a copy of the deposition transcript.

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 268 S.C. 441, 334 S.E.2d 813 (1985).

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is 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. Based on the record and testimony presented at the PCR hearing, this Court finds that the Applicant has met his burden of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.
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).

The State's main witness, Hayes Malloy, was also charged with Murder in connection with the charges Applicant faced at trial. At some point very near the trial date, the State dismissed the pending Murder charge against Malloy. Applicant alleged counsel was ineffective for failing to cross-examine Malloy concerning his understanding of the range of penalties he could have received for Murder had that charge not been dismissed. Applicant also alleged counsel's cross-examination about his sentencing exposure for murder for hire emphasized the State's theory that Applicant had been trying to hire others to kill the victim.

During the trial, counsel cross-examined Malloy as follows:

Counsel: You knew that if you had been charged with murder, you could be sentenced to life in prison, isn't that true?

Malloy: Yes, but I know I didn't do it.

Counsel: I didn't ask you that. You knew that if you were charged with a murder for hire that you could even be looking at the electric chair, isn't that true?

Malloy: I guess.

Counsel: Do you remember anybody telling you that if you had committed that murder for hire or if you had committed the murder you could, even if you didn't get the electric chair, could serve thirty years in prison?

Solicitor: Your Honor —

Malloy: No.

Counsel: With no parole.

Tr. pp. 293, l. 23 – pp. 294, l. 14.

Applicant further alleged counsel failed to adequately cross-examine Malloy concerning the fact that his Murder charge in connection with the victim's death was dismissed in exchange for his cooperation in the prosecution of Applicant. Applicant also alleged counsel failed to cross-examine Malloy whether his Murder charge had been dismissed "with prejudice" prior to trial.

During cross-examination, Malloy acknowledged that the Murder charge had been dismissed. Tr. p. 267, l. 5 – p. 268, l. 10. During the PCR hearing, Applicant questioned counsel

if he was able to question Malloy as to whether the charge had been dismissed with or "without prejudice." PCR tr. pg. 19, ll. 12-16. Counsel responded that he "made a point that it could be resurrected. He had gotten the charge dismissed because he was agreeing to testify." Id. at ll. 17-19. Counsel went on to testify that he had never had a case in state court dismissed "with prejudice." Id. at ll. 21-23. Counsel acknowledged it is his experience that charges are dismissed with the right to resurrect. PCR tr. pg. 20, ll. 2-3.

This Court notes that the following questions were presented to Malloy during cross-examination:

Counsel: Mr. Malloy, that charge was dismissed against you only last Friday, isn't that correct?

Malloy: Yes.

Counsel: And that charge was dismissed against you in return for your testimony in the trial of the case of the State versus Ronald Tillman? Isn't that a fact?

Malloy: I think you would have to ask them that.

Counsel: No, I'm asking you.

Malloy: I can't make up - I can't say what they would decide or what.

Counsel: Isn't it a fact that your understanding is that the charges against you were dismissed if you would testify and cooperate in this trial?

Malloy: I was going to testify if I was charged with it.

Tr. pg. 267, ll. 2 - 21.

The cross-examination continued:

Counsel: That charge has been dismissed on you right now, is that correct?

Malloy: That's right.

Counsel: So, you sit here right now on that witness chair a free man on that charge? Is that correct?

Malloy: Yes.

Tr. pg. 267, l. 24 - pg. 268, l. 4.

This Court finds that although counsel questioned Malloy about whether the charge had been dismissed, it could be interpreted that the State would be unable to resurrect the charge. As

counsel testified at the PCR hearing, he had never seen a charge dismissed "with prejudice." Although this may be common knowledge to an experienced criminal attorney, it is unlikely a jury would be aware of this distinction. Accordingly, this Court finds that counsel failed to clarify to the jury through his cross-examination or otherwise, that the charges could be reinstated should Malloy fail to testify in a manner consistent with the State's case. This Court further finds such clarification would have assisted the jury in evaluating Malloy's credibility. This Court also finds counsel was ineffective in his cross-examination of Malloy regarding the range of penalties he faced.

This Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. 668. Accordingly, this Court finds Applicant is entitled to a new trial.

12. Trial counsel provided the Applicant with ineffective assistance of counsel when he 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).

Applicant alleged counsel was ineffective for failing to initially object to testimony from witness Bruce Hall concerning the statistical frequency with which he sold Goodyear Vector tires at his Goodyear tire store in Columbia. Tr. p. 852, ll. 7-20. At trial, the State introduced photographic and impression evidence showing tire tracks leading to the location of the victim's body at the crime scene. The State offered Bruce Hall as an expert on Goodyear tire treads. Tr. p. 830, ll. 11-14. Hall had worked for six (6) years at a Goodyear tire store in Columbia. Hall opined that the tire tracks found near the victim's body were those of Goodyear Vector tires and

that Applicant's automobile had that brand. Tr. p. 837, ll. 23-24. He further testified that only around two (2) percent of the tires sold in the store he managed were Goodyear Vectors. Tr. pg. 852, l. 7-20. Counsel did not object to this testimony. Counsel later objected to the two (2) percent figure and the trial judge sustained the objection. Tr. p. 852, l. 21 – p. 853, l. 5. However, counsel failed to request a mistrial or curative instruction.

On direct appeal, Applicant, among other arguments, claimed Hall's testimony that only two (2) 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, 520 405 S.E.2d 607 (Ct. App. 1991).

At the PCR hearing, counsel acknowledged neither he nor his co-counsel initially objected to the testimony and "guessed" that he didn't feel like he needed to object at the time. PCR tr. p. 48, ll. 3-4. Counsel further testified that due to the case having occurred in 1990, he would not be able to say what he was thinking at the time of the testimony. PCR. Tr. p. 48, ll. 21-25.

This Court finds counsel was ineffective for failing to object to Hall's testimony regarding the frequency with which he sold Goodyear Vector tires and for failing to request a mistrial or curative instruction once an objection was finally made and sustained. The trial transcript reflects that the State's case rested mainly upon the alleged eyewitness, Malloy. Any evidence corroborating Malloy's testimony that Applicant drove him to the scene and refuting the Applicant's alibi defense would be detrimental to the Applicant. Counsel's failure to object or request a mistrial or curative instruction allowed the jury to hear and consider Hall's

testimony corroborating Malloy's testimony and refuting Applicant's alibi defense. Furthermore, counsel's inaction failed to preserve any errors associated with this testimony for appellate review.

This Court finds Applicant's testimony credible. This Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. 668. Accordingly, this Court finds Applicant is entitled to a new trial.

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's car at the time tread impressions were taken from the vehicle. See *State v. Tillman*, 304 S.C. 512, 521, fn 1, 405 S.E.2d 607, 612, fn 1 (Ct. App. 1991).

Applicant alleged counsel was ineffective for failing to challenge trial tread evidence in dispute on the ground that the Richland County Sheriff's Department lacked probable cause to examine Applicant's car. As discussed above, the State introduced photographic and impression evidence showing tire tracks leading to the location of the victim's body at the crime scene. Prior to the Sheriff's Department examining the Applicant's car, the car had been taken by the F.B.I. following Applicant's consent. The F.B.I. was investigating Applicant in connection with a bank robbery. Tr. pg. 673, ll. 2-5. Applicant had not yet been charged for the victim's murder in this case. While in F.B.I. custody, the Sheriff's Department examined the Applicant's car and took photographs and tire impressions. Tr. pg. 673, ll. 1-25. During Applicant's trial, counsel argued that the Sheriff Department's examination of the vehicle was an invasion of Applicant's right to privacy under the 4th and 14th Amendments. Tr. pg. 622, ll. 21-25. The trial court ultimately ruled that Applicant did not have an expectation of privacy but, if there was, it had been waived by the Applicant's consent. Tr. pg. 675 1-5. The Court further ruled that the

taking of photographs and impressions by the Sheriff's Department was reasonable. Tr. pg. 675, 1. 1-6. Counsel did not argue that the Sheriff's Department lacked probable cause to conduct the examination of the Applicant's vehicle.

The Fourth Amendment requires that a warrant for search and seizure be supported by probable cause. U.S. Const. amend. IV. Therefore, a warrantless search is *per se* unreasonable and violates the Fourth Amendment unless the search falls within one of several well-recognized exceptions to the warrant requirement. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). These exceptions "include (1) search incident to a lawful arrest, (2) 'hot pursuit', (3) stop and frisk, (4) automobile exception, (5) the 'plain view' doctrine, and (6) consent." *State v. Bailey*, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). The automobile exception to requiring a search warrant exists in recognition of "the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained" and "the lessened expectation of privacy in motor vehicles which are subject to government regulation." *State v. Cox*, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). To survive a Fourth Amendment challenge to a warrantless search, the State must establish the officer had probable cause and demonstrate one of the exceptions to the prohibition against warrantless searches and seizures applies. *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

Similar to reasonable suspicion, probable cause is a fluid concept. Probable cause is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Probable cause to conduct a search exists where "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Id.* at 696. "The

principle components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause." *Id.* Therefore, determining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances. *State v. Brannon*, 347 S.C. 85, 92, 552 S.E.2d 773, 776 (Ct. App. 2001).

Counsel failed to raise the issue of whether the Sheriff's Department had probable cause to search the Applicant's rental vehicle. Had counsel raised this issue, the State would have been forced to prove it had probable cause to conduct the search. The trial court only ruled on counsel's objection that Applicant consented to the F.B.I. searching the vehicle rather than the Sheriff's Department and that he had an expectation of privacy. Counsel's failure to object to the lack of probable cause to search by the Sheriff's Department not only deprived Applicant the right to challenge the search at trial, but also the appellate court's ability to review any trial ruling on appeal.¹ At the PCR hearing, counsel indicated he felt he raised the probable cause issue but not as a primary issue. PCR tr. pg. 235, ll. 7-8. He also testified:

I remember there was an awful lot of discussion about whether they had the right to search the car, photograph the car, measure his tires. Mr. Tillman gave consent to the F.B.I. taking the vehicle. The Sheriff's Department, I remember, came over there to examine the car. But I think that, uh, -- you know, I see what you're saying with respect to what the Court of Appeals said but I think we -- there's a number of pages in the transcript that deal with the objections regarding what the Sheriff's Department did. As far as any other custody on that, I just don't know.

PCR tr. pg. 49, l. 17 -- pg. 50, l. 3.

¹ The South Carolina Court of Appeals noted that the neither trial counsel nor appellate counsel raised the issue of whether the Sheriff's Department had probable cause to examine the Applicant's vehicle. *State v. Tillman*, 304 S.C. 512, 521, fn 1, 405 S.E.2d 607, 612, fn 1 (Ct. App. 1991).

This Court finds counsel was ineffective for failing to raise the issue of whether the Sheriff's Department lacked probable cause to examine Applicant's vehicle. The failure to challenge the search on these grounds opened the door for the testimony connecting the Applicant's vehicle with the tire tracks found at the crime scene. With a finding that the Sheriff's Department lacked probable cause, no photographs or tire impressions could have been considered by the State's expert witness to link the Applicant's vehicle to the crime scene. As discussed above, any evidence corroborating Malloy's testimony that Applicant drove him to the scene and refuting the Applicant's alibi defense was detrimental to the Applicant. Counsel's inaction also failed to preserve any errors associated with this testimony for appellate review.

This Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. 668. Accordingly, this Court finds Applicant is entitled to a new 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, 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.

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.

During the Applicant's trial, the record reflects that Malloy had a pending, unrelated charge of Assault and Battery with Intent to Kill. Additionally, prior to trial, the State dismissed

other charges, including a Murder charge stemming from the incident involving Applicant.

During closing arguments, the State indicated the following:

Solicitor: Hayes Malloy had no reason whatsoever to come in here and testify to you about Ronald Tillman. 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. We didn't wait and make sure he testified the way we wanted him to like Mr. Swerling is going to have you believe, that this is all some conspiracy on the part of the State that we have dragged all these people in here and rewarded them with all these great things for them to lie is what he's saying. Not only have we rewarded them and have we dismissed all these charges against Hayes Malloy so that he could come in here and lie. That's what you have to believe. That's what Mr. Swerling wants you to believe.

Tr. p. 1073, l. 20 – p. 1074, l. 7.

The trial transcript reflects counsel did not object to this argument. At the PCR hearing, counsel testified he probably determined that it wasn't worth making an objection. PCR tr. p. 29, ll. 1-8. In reviewing the transcript, Malloy's testimony as the only alleged eyewitness was crucial to the Applicant's trial. As noted earlier, Malloy was previously charged with Murder in connection with this incident, however, that charge was dismissed prior to trial. Malloy also faced an unrelated charge of Assault and Battery with Intent to Kill at the time of Applicant's trial. In light of the importance of the motives for Malloy's testimony against the Applicant, this Court finds counsel was ineffective for failing to object to the Solicitor's closing argument. The closing argument suggests that Malloy had no motive to testify at trial and that there were no implications should he have failed to testify. This Court also finds counsel failed to articulate a valid trial strategy for not objecting to this argument.

This Court finds Applicant's testimony credible. This Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by

counsel's deficient performance for failing to object to the State's closing argument. *Strickland*, 466 U.S. 668. Accordingly, this Court finds Applicant is entitled to a new trial.

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.

Applicant alleged counsel failed to disclose his potential conflict of interest in representing the Applicant when he had previously represented Malloy on a serious criminal charge. At the PCR hearing, counsel testified the his office records indicated his firm represented Mr. Malloy on a charge in which Mr. Malloy was alleged to have shot at Applicant's father's party shop. PCR Tr. pg. 54, l 5 – pg. 55, l. 11. Counsel further testified he had no recollection who, if anyone, in his firm at the time represented Malloy. PCR Tr. pg. 56, ll. 22-24. Counsel also testified that Applicant's father eventually agreed to drop the charges against Malloy after Malloy paid for the damage done to the party shop. Pg. 56, ll. 13-15. The case was dismissed on June 9, 1988, prior to the Applicant's trial. PCR Tr. pg. 55, ll. 1-4. Counsel maintained that both the Applicant and the Applicant's father would have been aware that his firm previously represented Malloy. PCR Tr. pg. 60, ll. 12-15

The Applicant's father, Thomas Tillman, testified at the PCR hearing that he owned the party shop with a partner. PCR tr. pg. 208, ll. 17-19. He testified that he became aware that there had been an altercation near the party shop that resulted in gun fire breaking the shop door and register. PCR tr. pg. 209, ll. 2-7. He further indicated that his partner negotiated a deal in which the door and register would be paid for if they didn't press charges. PCR Tr. pg. 209, ll. 8-12. He acknowledged receiving a check from Swerling's law firm but denied knowing Malloy. PCR Tr. pg. 209, ll. 12-16.

This Court finds Applicant's testimony and his father's testimony credible. This Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by counsel's deficient performance for failing to inform him that he had previously represented the State's main witness, Malloy, in a crime involving Applicant's father. *Strickland*, 466 U.S. 668. Accordingly, this Court finds Applicant is entitled to a new trial.

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 "no adverse-inference" instruction given by the trial court. See Tr. p. 1088, l. 21-p. 1089, l. 17.

The Applicant alleged 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. See Tr. p. 1088, l. 21-p. 1089, l. 17.

A review of the record reveals counsel did not object the trial court's use of the phrase "failure to testify" when discussing Applicant's constitutional right to remain silent. This Court finds counsel should have objected and requested a curative instruction as the jury may have inferred the Applicant had a duty to testify. This Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by counsel's deficient performance for failing to object. *Strickland*, 466 U.S. 668. Accordingly, this Court finds Applicant is entitled to a new trial.

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).

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.

At trial, Malloy testified he initially lied to police in written statements and led them to believe that Vito McKie killed the victim rather than the Applicant. Tr. pg. 323 l. 1 – pg. 329, l.19; pg. 331, ll. 3 – 8. At the PCR hearing, counsel testified that he requested that the trial judge instruct the jury that prior inconsistent statements could be used for the sole purpose of addressing the credibility of a witness, however, this request was denied. PCR tr. pg. 39, ll. 8 – 17. Counsel further acknowledged that the rule of law in South Carolina at the time was not only could prior inconsistent statements be used for impeachment purposes, they could also be considered as substantive evidence by the jury. Tr. pg. 39, ll. 15 – 19. Counsel testified that he apparently made the decision not request a *Copeland* charge from the trial judge. Tr. pg. 42, ll. 20 – 23. Counsel went on to say “it is obviously because of my experience as a trial lawyer and cross-examination and impeaching many witnesses, I believe that that was the right course of action.” Tr. pg. 42, l. 23 – pg. 43, l. 2. Counsel later clarified his testimony and indicated he did not request a *Copeland* charge because it would not have assisted the Applicant but may have instead allowed the evidence to put the blame on the Applicant as the principal in the crime or an accessory. Tr. pg. 229, l. 19 – pg. 230, l. 18.

This Court finds counsel failed to articulate a valid strategy regarding his decision to not request a jury instruction that Malloy's prior inconsistent statements could be considered as substantive evidence. If the trial judge would have instructed the jury it could have considered Malloy's prior inconsistent statements as substantive evidence, the jury could have considered that Veto McKie killed the victim rather than the Applicant. This Court finds that such substantive evidence could have changed the outcome at trial. Accordingly, this Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. 668. This Court finds Applicant is entitled to a new trial.

17. Trial counsel was ineffective for failing to properly interview and examine witness, Herman Whaley.

Applicant alleged and testified counsel failed to properly interview and examine trial witness, Herman Whaley. Whaley testified during his deposition that he and his brother were interviewed by police on two (2) separate occasions regarding the incident. Whaley dep. pg. 14, ll. 1-8. An investigative report completed by Officer Austin indicated that Whaley was interviewed on December 31, 1988. Whaley dep. pg. 12, ll. 1-4. The investigative report indicated that Whaley stated the following:

Herman stated that he, Gordon and Scott English left and went to Boogies Club on Zion Church Rd. at a little after 6:00. He said he drank a couple of drinks and then left after about an hour. Scott and Gordon English took him home. Changed his story and then said that they let him off at house around 9:00, but he never said he was not at the party shop earlier that afternoon. Said he did not see Tillman pick anybody up on Walcott.

At trial, the defense called Whaley as a witness. Tr. pg. 1029, ll. 5 – 8. Applicant's counsel, Ms. Shealy, conducted the following direct examination:

Ms. Shealy: Mr. Whaley, where are you living at this time?
Mr. Whaley: 1752 Andrews Road, Columbia.

Ms. Shealy: Let me ask you a question then. Did you ever see Ron Tillman pick up a boy on Walcott Street around 8:30 on December 26, 1988.

Mr. Whaley: No, I can't say I saw that.

Ms. Shealy: Did you ever tell Hayes Malloy that you did?

Mr. Whaley: No.

Tr. pg. 1029, ll. 11 – 18.

Neither the State nor Applicant's counsel asked Whaley any further questions. During his deposition, Whaley indicated that on December 26, 1988, the day of the alleged murder, he was standing outside the party shop during the early evening where the Applicant was also working at the time. Whaley dep. pp. 21, l. 10 – pp. 27, ll. 25. Whaley stated he thought the Applicant would have probably gotten off of work at around 7:00 p.m. when the party shop closed. *Id.* Whaley testified that prior to leaving the party shop at around 6:00 p.m., he saw the victim and Malloy across the street standing together near a car. *Id.* Whaley further testified that he believes he saw the victim and Malloy enter the car together. Whaley dep. pg. 29, ll. 17 – 20. He also testified the Applicant would have still been working the counter inside the party shop. Whaley dep. pp. 29, l. 25 – pp. 30, l. 1. Whaley testified he never disclosed this information to investigators, Applicant's counsel or during his trial testimony because he was never asked these questions directly. Whaley dep. pg. 31, ll. 2-12.

In response to Whaley's deposition testimony, counsel provided an affidavit indicating his office interviewed Whaley at the Applicant's request prior to the trial. It appears from the affidavit that he has no independent recollection of investigating Whaley and speculates based on his review of the trial transcript that Whaley's purpose at trial was to testify that he never saw the Applicant pick up anybody on Walcott Street, refuting Malloy's testimony.

This Court finds Whaley's testimony credible. This Court finds counsel was ineffective in failing to fully investigate Whaley as a witness or otherwise properly question him at trial.

This Court finds had counsel directly questioned Whaley during his investigation or at trial, it would have become known that Whaley saw the victim and Malloy getting into a car together at or near the time the victim was allegedly killed. Whaley's testimony would have also shown that the Applicant was still working at the party shop at that same time. Without this investigation or testimony, the jury was unable to consider evidence that Malloy and the victim were together in a car shortly before the time of the murder while the Applicant was working in the party shop. This Court finds that such testimony could have changed the outcome at trial. Accordingly, this Court finds that Applicant has met his burden in proving counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. 668. This Court finds Applicant is entitled to a new trial.

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.

At trial, Malloy testified he initially lied to police in written statements and led them to believe that Vito McKie killed the victim rather than the Applicant. Tr. pg. 323 l. 1 – pg. 329, l.19; pg. 331, ll. 3 – 8. At the PCR hearing, counsel testified that he requested that the trial judge instruct the jury that prior inconsistent statements could be used for the sole purpose of addressing the credibility of a witness, however, this request was denied. Tr. pg. 39, ll. 8 – 17. On appeal, appellate counsel did not brief whether the trial court erred in failing to charge the jury on the allowable uses of prior inconsistent statements.

A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*,

463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985). The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. *Thrift, Id.* at 537; *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005). When a claim of ineffective assistance of counsel is based upon a failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.* Where the result of appeal would have been different had counsel not been deficient, the appropriate remedy is to grant a new trial. *Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001).

Although Applicant's counsel failed to request that the trial judge instruct the jury that Malloy's prior inconsistent statements could be used as substantive evidence, counsel did request that the court instruct jury that it could consider such statements for impeachment purposes. That request was denied. "When a prior inconsistent statement is introduced to impeach a witness, the court, upon request, must instruct the jury that it can consider such evidence for the purpose of impeachment only...." *State v. Warren*, S.C. 284 S.E. (2d) 355 (1981).

This Court finds appellate counsel was ineffective for failing to brief the issue on whether the trial court erred when it failed to grant Applicant's request for a jury charge on the allowable uses of prior inconsistent statements.² Once trial counsel requested the charge, the trial court was bound to give the jury instruction. Accordingly, the trial court erred in failing to give the

² Appellate counsel did not testify at the PCR hearing.

appropriate charge and appellate counsel failed to brief the issue for appellate review. This Court finds had appellate counsel briefed the issue, the result of Applicant's direct appeal would have been different. This Court finds appellate counsel was deficient and that Applicant was prejudiced by the deficiency. This Court finds Applicant is entitled to a new trial.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has met his burden of proof in showing he received ineffective assistance of trial and appellate counsel and counsels' performance prejudiced him. Accordingly, this application for post-conviction relief must be granted.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be granted; and
2. Applicant is entitled to a new trial.

AND IT IS SO ORDERED this _____ day of _____, 2015.

The Honorable Robert E. Hood
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina