

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF Horry

Court of Common Pleas

The Honorable Circuit Court Judge, William H. Seals, Jr.

Case No. 2016-CP-26-03050

Bradley Gerald Mullins, SCDC # 358052..... Petitioner,

v.

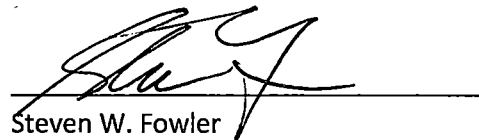
State of South Carolina, ..... Respondent.

**NOTICE OF APPEAL**

The Petitioner appeal the Honorable William H. Seals Jr.'s Order filed on March 13, 2018, 2018, denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on March 21, 2018. A copy of the said Order on appeal is attached to this Notice.

This is the 24th day of March, 2018.



Steven W. Fowler  
Fowler Law Firm  
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North Myrtle Beach, SC 29582  
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SC Bar #69683

**RECEIVED**

MAR 26 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

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APPEAL FROM THE COUNTY OF Horry

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The Honorable Circuit Court Judge, William Seals

Case No. 2016 - CP - 26 - 03050

Bradley Gerald Mullins, SCDC# 358052..... Petitioner,

v.

State of South Carolina, .....Respondent

**PROOF OF SERVICE**

I, Steven W. Fowler, court- appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

- 1) Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and
- 2) Clerk of the South Carolina Supreme Court , 1231 Gervais St, Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the 24th day of March, 2018.



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MAR 26 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Horry	)	
Bradley Gerald Mullins,	)	Case No.: 2016-CP-26-03050
S.C.D.C. No. 358052,	)	
	)	
Applicant,	)	<b>ORDER OF DISMISSAL</b>
v.	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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Horry County  
 Clerk of Court  
 Horry County, SC  
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This matter comes before the Court by way of an application for post-conviction relief filed by Bradley Gerald Mullins (“Applicant”) on May 5, 2016. Respondent made its return on or about January 30, 2017. The Court convened an evidentiary hearing into the matter on Wednesday, November 29, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, William I. Diggs (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September 2013 term of the Horry County Grand Jury for murder (2013-GS-26-04042), and burglary, first

degree (2013-GS-26-04043). William I. Diggs represented Applicant. J. Scott Hucks and George DeBusk, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On December 2, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on December 5, 2013. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of life.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., who raised the following issue:

Whether the court erred by instructing the jury that an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case?

By opinion decided February 17, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Mullins, Op. No. 2016-UP-062 (S.C. Ct. App. 2016). The Remittitur was issued on March 7, 2016.

### **Present Application**

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

1. Ineffective assistance of trial counsel, due to:
  - a. "Failure to object to prosecutorial misconduct."
    - i. "The Prosecution Illegally entered testimonial evidence used to show Intent by his/her own [prejudicial] comments;"
  - b. "Failure to object to improper jury instruction."
    - i. "Jury instructions provided by Trial judge were improper because the 'implied malice' element relied on illegally entered evidence;"
  - c. "Failure to attain and use expert forensic witnesses."

- i. "Expert Witness needed to rebut State pathologist testimony concerning Bullet size and firearms."
  - d. "Failure to independently investigate [evidence]."
  - i. "Independent investigation necessary because State pathologist claims bullet was left in body, yet there were 'exit wounds' he/she did not mention"
  - e. "Failure to procure and utilize exculpatory defense witness."
    - i. "Defense witness that was available and ready to testify was needed to provide testimony of exculpatory nature to show petitioner did not administer 'kill' shot."
- 2. Ineffective assistance of appellate counsel, due to:
  - a. "Failure to argue for direct appeal on abuse of discretion/error of law."
- 3. Newly discovered evidence:
  - a. "Concerning co-defendant's post-trial recanted testimony."
    - i. "Co-Defendant has recanted his trial testimony blaming Petitioner for Murder;"
- 4. Prosecutorial misconduct, in that:
  - a. "The prosecution illegally entered testimonial evidence used to show intent by his/her own prejudicial comments."
  - b. "Concerning witness tampering by the State."
    - i. "Newly/After-discovered evidence has been found showing Witness Coersion/provoked by State;"

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or

she must prove “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.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

***1. Failure to Object to Prosecutorial Misconduct – Claim of .22 Rifle***

Applicant alleges Counsel was ineffective in failing to object to alleged acts of prosecutorial misconduct. At the evidentiary hearing, Applicant testified Counsel should have objected to statements by the prosecution indicating the existence and use of a .22 caliber rifle in the course of the crime. "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Smith v. State, 375 S.C. 507, 522-23, 654 S.E.2d 523, 531-32 (2007)

At trial, multiple witnesses testified to the theft and/or use of a .22 caliber rifle, in addition to the fatal .38 or .357 round recovered from the victim's head. Crime scene reconstruction expert, Peter Cestare, of the Horry County Police Department, testified the victim suffered two wounds: one in the head and one in the right side. (Tr. 151-52). Verne Allen Ray, testified he was asked to clean and oil a number of stolen weapons, including a .22 caliber rifle. (Tr. 222-23.) Charles Mullins Sr., a/k/a "Moon," testified Applicant explicitly confessed to the theft and use of the .22 caliber rifle by co-defendant Anthony Ray:

A: They went to the man's property, and they went into his cabin by the pond and had taken two, three guns out of the cabin. During the course of those guns, I suppose one was a .22 rifle.

Q: Don't suppose nothing, just tell us what he said.

A: One was a .22 rifle. They found shells to it. When they left the cabin, they went to the main house, went inside of it and searched the rooms and gathered several guns, all but one, and when they tried to enter the room, the room was locked. By rattling the door, the man hollered, came out of the door naked with a handgun. He said they were running through the house, and they separated. He had my nephew, [Applicant], pinned in the living room and was going to shoot him with a handgun.

[...]

A: Anthony was standing in the other end of the house somewhere, and shot the man with a .22 rifle in the shoulder area. The man turned the gun on Anthony, when he turned the gun on Anthony, [Applicant] said he took him to the floor and took the pistol away from him, the man begged him not to kill him, [Applicant] said you were going to kill me, good night, and pulled the trigger, he said, shot him in the head.

(Tr. 251-53.) The State's forensic pathology expert, Dr. Edward Proctor, testified the victim suffered two gunshot wounds: "one gunshot wound to the left head just above the ear, and a gunshot wound to the right chest in the posterior axillary line towards the back area." (Tr. 274, ll. 22-25.) Dr. Proctor testified the bullet that pierced the back was "difficult to find" and, consequently, left "within the vertebral body adjacent to the spinal cord." (Tr. 276, ll. 17-20.) Dr. Proctor could not determine the caliber of the bullet that caused the back wound without the projectile itself. (Tr. 280-81). Co-conspirator Anthony Ray testified to a version of events closely matching that reported by Applicant to Moon:

A: [Applicant] was here. Mr. Elliott was here with a gun turned on him. I turned around. As we had been collecting guns, I had a little .22 rifle in my hand. I hold it up, screamed at him to put the gun down, put the gun down. When he points the gun at me, I shot him. He fell down, and [Applicant] goes on top of him.

This is kind of behind the couch, but [Applicant] – by the time I got up there, [Applicant] shot him in the head.

Q: How did [Applicant] shoot him in the head?

A: It was with a pistol.

(Tr. 346, ll. 8-17.) The guns stolen from the victim's house were sold in Louisiana. (Tr. 249-50, 353-54.) The State tied together Anthony Ray's testimony and the forensic evidence in its closing argument—that Ray shot the victim with a .22 from across the room, knocking the victim, at which point Applicant executed the victim. (Tr. 486-87.)

At the evidentiary hearing, Applicant testified no evidence of a .22 caliber rifle existed—aside from Anthony Ray's testimony. Applicant argued Counsel should have objected to testimony regarding the .22, and that nobody ever said anything about an alleged exit wound in the victim's lower back. Applicant questioned how Dr. Proctor's report regarding an "exit wound" and Dr. Proctor's testimony that a bullet was left in the victim's body could be reconciled.

Counsel testified the victim suffered two wounds: one bullet in the head and one bullet lodged in the victim's backbone. Counsel did note that the stories provided by the witnesses to law enforcement changed over time—they did not initially include Applicant, but did not exclude him either. Counsel indicated his belief that Moon favored Anthony Ray. Counsel recalled that Ray testified to using a .22, that the victim's body had decomposed by the time he was discovered, and that the trajectories determined by the State's crime scene expert appeared accurate upon his review of the case.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Applicant offers no basis on which Counsel could have conceivably objected. Despite Applicant's assertions to the contrary, sufficient evidence existed for the State to argue the victim was shot

by two different weapons: a .22 caliber rifle fired by Anthony Ray from across the room and a .38 or .357 caliber pistol fired by Applicant standing over the victim. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

### ***2. Failure to Object to Improper Jury Instruction***

Applicant alleges Counsel was ineffective for failing to object to the "implied malice" jury instruction because it was based upon the "illegally entered evidence" of a .22 rifle. This Court's findings in the above section are dispositive as to this allegation—the evidence of the .22 was not "illegally entered," but rather founded upon the entirely admissible testimony of a co-defendant. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

### ***3. Failure to Obtain and Utilize an Expert Witness, Investigate***

Applicant alleges Counsel was ineffective in failing to retain an expert witness to investigate and challenge the findings of the State's expert witness, Dr. Edward Proctor. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Reeves v. State*, 415 S.C. 366, 375-76, 782 S.E.2d 747, 752 (Ct. App. 2015) (quoting *Strickland*, 466 U.S. at 691). "At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Id.* (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007)). "A particular decision to not investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* (quoting *Strickland*, 466 U.S. at 691). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* (quoting *Strickland*, 466 U.S. at 690-91).

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

No expert testimony was offered at the evidentiary hearing. Applicant, as noted in Section II.A.2, above, complained that the forensic reports indicated two exit wounds and that the victim was shot twice, but that a bullet was left inside the victim. Counsel testified he did not see the use in retaining any expert on the case. In Counsel's opinion, the "sufficiently nebulous" evidence against Applicant only served to support his trial strategy and arguments. Counsel further noted the case was messy and only came together after a long delay.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The testimony and evidence at trial, as well as the testimony and record before this court, consistently shows the same story: the victim was shot once in the right side of his chest and once in his head. Furthermore, Counsel articulated a reasonable trial strategy of deliberately preserving "sufficiently nebulous" evidence; to the extent expert investigation could have revealed anything, it could have further incriminated Applicant. Whether or not an expert could have discovered

anything helpful to Applicant is unknown to this Court, as no expert testimony was proffered. As such, any prejudice Applicant might have suffered is merely speculative. For these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

#### ***4. Failure to Object to Hand-of-One, Hand-of-All***

Applicant did not allege in his application, but alleged in his testimony at the evidentiary hearing that Counsel was ineffective for failing to object to the Judge's instructions to the jury on hand-of-one, hand-of-all. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002).

The testimony excerpts in Section II.A.1, above, are a sample of extensive testimony at trial that evidenced Applicant, alongside his co-conspirators, went to the victim's house to burglarize it and steal his known gun collection. In the process, the victim was shot and killed with his own weapons.

At the evidentiary hearing, Counsel testified the question of whether "hand-of-one, hand-of-all" was an appropriate instruction was not an important subject of interest. Counsel posited that the trial strategy was to argue Applicant was not there at all, and that if the jury concluded otherwise, they would almost certainly also conclude that Applicant was the executioner.

The Court finds no deficiency on the part of Counsel nor prejudice therefrom. Abundant evidence existed to justify the hand-of-one, hand-of-all jury instruction. Counsel would have had no valid basis for an objection to the instruction. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

## B. All Other Allegations

At the close of Applicant's presentation at the evidentiary hearing, the State moved for a directed verdict as to all allegations relating to ineffective assistance of appellate counsel, newly-discovered evidence,<sup>1</sup> and prosecutorial misconduct, arguing Applicant failed to introduce any evidence to support any of these grounds. This Court affirms its ruling on Respondent's motion for a directed verdict,<sup>2</sup> and finds Applicant failed to introduce any admissible evidence to support these claims. Respondent's motion for a directed verdict is **GRANTED**, and Applicant's claims of ineffective assistance of appellate counsel, newly-discovered evidence, and prosecutorial misconduct are **DISMISSED**.

*[Conclusion and signature on following page]*

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<sup>1</sup> Applicant endeavored repeatedly in the course of his own testimony to introduce the out-of-court statements of various individuals. Respondent, understandably, objected vociferously to the repeated attempts at hearsay. This Court sustained those objections.

<sup>2</sup> The Court granted the motion orally and witnesses for the State on these allegations were excused.

### III. CONCLUSION

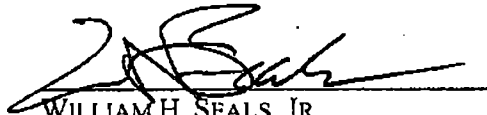
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 6 day of March, 2018.



WILLIAM H. SEALS, JR.  
Presiding Judge  
Fifteenth Judicial Circuit

Marion, South Carolina





ALAN WILSON  
ATTORNEY GENERAL

March 9, 2018

The Honorable Rence N. Elvis  
Clerk of Court, Horry County  
Post Office Box 677  
Conway, SC 29528-0677

Re: Bradley G. Mullins, #358052 v. State of South Carolina  
2016-CP-26-3050

2018 MAR 13 PM 1:02  
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HORRY COUNTY, SC

Dear Ms. Elvis:

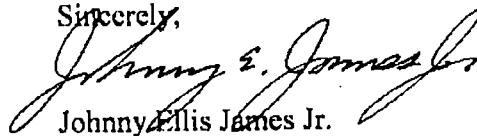
Enclosed please find the original **Order of Dismissal** signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

If you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,



Johnny Ellis James Jr.  
Assistant Attorney General

JEJ/mm

Enclosure



ALAN WILSON  
ATTORNEY GENERAL

March 15, 2018

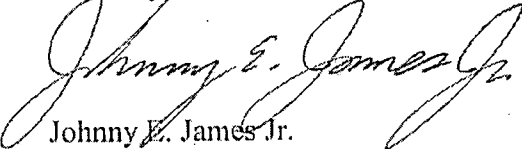
Steven W. Fowler, Esquire  
Fowler Law Firm  
730 Main Street, Unit 237  
North Myrtle Beach, SC 29582

**Re: Bradley G. Mullins, #358052 v. State of South Carolina  
2016-CP-26-3050**

Dear Mr. Fowler:

Enclosed please find a copy of the **Order of Dismissal** for the above-captioned post-conviction relief application; signed by the Honorable William H. Seals, Jr., Presiding Judge for the Fifteenth Judicial Circuit.

Sincerely,



Johnny E. James Jr.  
Assistant Attorney General

JEJ/mm  
Enclosure

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

BRADLEY G. MULLINS, #358052,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Steven W. Fowler, Esquire  
Fowler Law Firm  
730 Main Street, Unit 237  
North Myrtle Beach, SC 29582

This 15<sup>th</sup> day of March, 2018.



MALLORY MORRIS  
LEGAL ASSISTANT FOR RESPONDENT

SWORN to before me this 15<sup>th</sup> day of March, 2018.

  
Notary Public for South Carolina.

My Commission Expires:

5/14/2024

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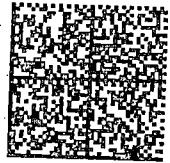


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