

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 07 2019

S.C. SUPREME COURT

Appeal from Greenville
County Court of Common Pleas
[C/A No.2017-CP-23-4462]

William Phillips -- Appellant,

-vs-

State of South Carolina -- Respondent,

APPELLANT'S WRITTEN EXPLANATION

PURSUANT TO SCACR 243

William Phillips
SCDC# 355787
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Appellant, pro-se

STATE OF SOUTH CAROLINA

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State of South Carolina -- Respondent,

APPELLANT'S WRITTEN EXPLANATION

PURSUANT TO SCACR 243

INTRODUCTION

This matter comes before this Honorable Court pursuant to South Carolina Appellate Court Rule 243, which requires Appellant to provide the Court with Written Explanation as to why the lower Court's decision was in error and the Appellant is entitled to a hearing on the merits.

Appellant filed the instant application 2017-CP-23-4462, ROA at 1-7. Respondent's filed their Return and Motion to dismiss, ROA at 9-16. The Court issued a Conditional Order in the matter, ROA at 17-23, allotting Appellant 20-days to reply. Appellant lodged his Opposition and Reply to the Conditional Order while conjunctively amending the application with meritorious issues,

ROA at 24-66. The State submitted a proposed Final Order and Appellant lodged a timely opposition to the proposed Final Order, ROA at 67-73. Nonetheless, the lower Court signed the Final Order and Appellant filed a timely notice of appeal. This Court issued a an Order allotting Appellant 20-days from receiving the Order to provide a written explanation as to why the application should not be dismissed a successive. The written explanation is as follows:

PROCEDURAL HISTORY

The Trial and Direct Appeal

Appellant is currently confined in the South Carolina Department of Corrections serving life without the possibility of parole pursuant to commitment orders of the Greenville County Clerk of Court. Appellant was indicted by a Greenville County Grand Jury for accessory before the fact of murder. (2013-GS-23-094A).

Appellant proceeded to trial by a Judge and Jury. Appellant was represented by Cassandra Gorton esquire. On June 12, 2013 the jury convicted Appellant was indicted and the Honorable C. Victor Pyle, Jr. sentenced Appellant to life without parole.

A timely notice of appeal was filed. Appellant was represented by Robert M. Dudek and David L. Paavola of the South Carolina Office of Indigent Defense. The South Carolina Court of Appeals affirmed the conviction and sentence in an unpublished opinion. State v. Phillips, Op.No.2015-UP-100 (S.C.Ct.App. filed March 4, 2015. The remittitur was handed down March 24, 2015.

POST CONVICTION RELIEF

Appellant filed a pro-se application for post conviction

relief ("PCR")(2015-CP-23-4910) on August 7, 2015. On January 29, 2016 the State filed a Return and Motion to Dismiss because of the insufficiency of Appellant's allegations in the original application.

Appellant was appointed State statutory (Rule 71.1(d), SCRCP) appointed PCR counsel, Rodney W. Richey (hereafter "Richey").

After being appointed Richey filed a kitchen sink amendment alleging 31-allegations on October 10, 2016. It is noteworthy that Richey never presented any of the 31-allegations and/or claims at the PCR hearing. The PCR hearing was convened December 6, 2016 at the Greenville County Courthouse. Appellant was present and was represented by Richey and the State was represented by Patrick Schmeckpepper. At the onset of the hearing Richey informed the Court that he would be proceeding on only one issue. Two days after the hearing on December 8, 2016 the Honorable J. Mark Hayes, III issued an order of dismissal denying relief.

A timely appeal was filed and on May 19, 2017 Robert M. Pachak of the South Carolina Office of Indigent Defense filed a no merit Johnson petition for writ of certiorari.

On October 6, 2017, the South Carolina Supreme Court denied certiorari and the remittitur was handed down October 24, 2017.

THE CURRENT PCR APPLICATION

(2017-CP-23-4462)

Appellant filed the instant application in the identical manner as the Original due to his limited abilities in that he "cannot read or write." (emphasis original). The previous record

is replete with an abundance of sufficient evidence and as admitted by trial counsel during the initial PCR hearing, "...Applicant is functionally illiterate", App.695, 1.14-19; ROA at 32-33.

As was noted supra, Richey had filed an amendment raising 31-allegations. The initial PCR hearing was conducted on December 6, 2016 and at the onset of the hearing the following colloquy of Richey and the Court was recorded:

The Court: All right. Mr. Richey.

Mr. Richey: Thank you, your Honor. I've discussed with the Attorney General and we're going on ineffective assistance of counsel because of his educational level. That's all we're doing.

The Court: All right. You ready to call your first witness?

[App.685, 1.1-7].

As seen in the above, Richey advised the Court that "he had spoken with the Attorney General" and [they] were only going on ineffective assistance of counsel because of Appellant's educational level.

The PCR Court without hesitation or inquiry from Applicant, i.e. if he understood what PCR counsel was doing etcetera, said "call your first witness and the hearing was conducted on only one issue that Richey and the Attorney General discussed and agreed on while couching the meritorious available claims that occurred during trial.

Appellant has not received his "one full bite at the apple" in any sense of the word as a result of Richey's negligence and lack of professional obligation owed to Appellant.

Appellant did not knowingly, voluntarily, intelligently or wilfully abandon any of his available claims to which he was and is entitled have adjudicated on the merits.

It would be fundamentally unfair to appoint PCR Counsel (Richey) to assist the indigent incarcerated PCR applicant who is also **functionally illiterate** and without the ability to "read or write" penalize the Appellant for Richey's failure and complete negligence by failing to ensure all grounds available were included in the initial, supplemental or amended application. See Post Conviction Relief Actions, Rule 71.1(d), SCRCP. Such is akin to convicting a prisoner who is mentally incompetent, which is prohibited. As this Court is well aware Rodney Richey has been appointed in many PCR cases and surely Richey is familiar with the PCR Relief Actions.

A determination that a procedure is important enough that the U.S. Supreme Court may require state courts to use it amounts to a determination that the absence of the procedure violates the Due Process Clause, or some other provision of the Constitution. The function of collateral relief has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. It's root principle is that a civilized society, government must always be accountable to the judiciary for a man's imprisonment. Thus, the traditional scope of collateral relief requires that Appellant (and all prisoners) be afforded the broadest possible opportunity to present claims that [his] detention is the result of an unconstitutional procedure.

Because post conviction proceedings are prisoner-initiated, and particularly because of the unforgiving nature disfavoring and forbidding review of second/successive PCR applications, the

responsibility to conduct a "full and fair" post conviction proceeding on all available claims -- and, failing that, to construct a record demonstrating how the state proceedings were not "full and fair" and why the state courts bear the entire blame for the deficiencies belongs to Appellant, hence to appointed PCR counsel. Where as here, appointed PCR counsel has inexcusably failed to ask the PCR court for relief on a particular claim, Appellant is being penalized by denying him his "one full bite at the apple."

Here is was statutory appointed PCR Counsel Richey's statutory (S.C. Code Ann. §17-27-60 (Supp.2010); Post Conviction relief Actions Rule 71.1(d), S.C. Rule of Civil Procedure; Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001) as well as professional obligation, therefore, to insist upon a "full and fair" PCR proceeding raising all grounds available, as defined by state law, statutory and case law that specify the attributes of a state PCR proceeding.

The general basis for finding a constitutional right to full and fair post conviction procedures are the concurring opinions by Justices Clark and Brennan in Case v. Nebraska, 381 U.S. 336, at 337-47 & nn.5-6 (1965). In Case, the U.S. Supreme Court granted certiorari precisely in order to decide whether the Constitution requires States to provide a post conviction remedy that offers an "adequate corrective process for the hearing of federal constitutional guarantees, and if so, what constitutes an "adequate" process. The Honorable Justices concluded that the Constitution mandates full, fair and adequate state post conviction procedures. Id.

All grounds for relief available to a PCR applicant, must be raised in his original, supplemental, or amended application. S.C. Code Ann. §17-27-90(1985). Further, any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, "unless the Court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." Id

In Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996), the Court applied the standard established in Aice, 305 S.C. 448, 409 S.E.2d 392 (1991). The Washington Court noted that the sole issue in Aice involved whether a convict may maintain a successive application for PCR on the ground that his first complete PCR application was insufficient due to ineffective assistance of PCR Counsel. The Washington Court further emphasized:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, **"with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice."**

Washington, 324 S.C. at 237, 478 S.E.2d at 835 (quoting Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991)). The Court concluded that since so many procedural irregularities occurred during the course of Washington's judicial process, he was

deprived of due process of law. Consequently, Washington's successive PCR application was granted. Washington, 324 S.C. 232, 478 S.E.2d 833 (1996).

Under the extraordinary circumstances and facts presented by Appellant, this Court should easily conclude this case presents sufficient evidence warranting a hearing in the interest of justice. The lower Court erred in denying relief.

CONCLUSION

Based on the facts and circumstances above Appellant respectfully prays this Court will remand the case back to the lower court for an evidentiary hearing on the matters stated herein.

Respectfully Submitted,

/s/ William Phillips

William Phillips, pro-se

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville
County Court of Common Pleas
[C/A No.2017-CP-23-4462]

William Phillips -- Appellant,

-vs-

State of South Carolina -- Respondent,

APPENDICIES OF
RECORD ON APPEAL ("ROA").

1. PCR Application 2017-CP-23-4462 , p.1-7.
2. State's Return and Motion to Dismiss, p.9-16.
3. Court's Conditional Order, p.17-23.
4. Appellant's Reply to Conditional Order, p.24-35.
5. Amended PCR Claims, p.36-66.
6. Appellant's Reply to Proposed Final Order, p.67-73.

William Phillips
SCDC# 355787
Perry Corr. Inst.
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Pelzer, SC. 29669

Appellant, pro-se

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FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

William J Phillips 355787
Full name and prison number (if any) of Applicant.

IN THE COURT OF COMMON PLEAS

2017-CP-23- 04462

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution 4460 Broad River Road
2. Name and location of Court which imposed sentence Greenville County Court House
3. Name(s) of co-defendant(s) (if any) Jerry Leonard Allen J.B.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 16-01-0040 16-01-0050 16-03-0010
 - (b) Accessory before the fact of murder
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) June 12, 2013 Life sentence
 - (b) N/A

(2)
(c) N/A

6. Check whether a finding of guilty was made:

(a) after a plea of guilty N/A

(b) after a plea of not guilty N/A

(c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. State of South Carolina in the Court of Appeal

ii. N/A

iii. N/A

(b) the result in each such Court to which you appealed:

i. State of South Carolina in the Court of Appeal Affirmed

ii. N/A

iii. N/A

(c) the date of each such result:

i. March 4 2015

ii. N/A

iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. N/A

iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) I never Confessed to this crime Auto or written
- (b) N/A
- (c) N/A

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Ive never confessed to nothing
- (b) Counsel was Ineffective never did his Job
- (c) N/A

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? YES
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. Pitition for written of certiorari to the court of
 - ii. Appeal
 - iii. N/A
 - iv. N/A
- (b) the name and location of the Court in which each was filed:
 - i. State of South caroling in the superme court
 - ii. Location Columbia S.C
 - iii. N/A
 - iv. N/A
- (c) the disposition thereof:
 - i. N/A
 - ii. N/A
 - iii. N/A

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iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. Ineffective Assistance of Counsel P.C.A. counsel

ii. New discovered evidence

iii. N/A

(b) the proceedings in which each ground was raised:

i. Appeal

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Because Counsel didn't bring in court the matter

(b) N/A

(c) N/A

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO
- (b) your trial, if any? yes my trial
- (c) your sentencing? yes My sentencing
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes my Appeal
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. Cassandra Gorton Esq 1754 Woodruff Rd Greenville SC 29606
- ii. David L Paquola, Nelson Mullins Robert M Dudek 132 Main Street
- iii. Richey and Richey PA PO Office Box 10916 Greenville SC 29603
- (b) the proceedings at which each such attorney represented you:
- i. My trial
- ii. My Appeal
- iii. My PCR

19. State clearly the relief you seek in filing this application:

New trial or time serve

20. Are you now under sentence from any other court that you have not challenged?

NO

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STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

William J Phillips # 355787

SWORN to and subscribed before me this 30
day of May, 2007

[Signature] (L.S.)
Notary Public

My Commission Expires: 9/17/2009

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**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

William S. Phillips PS# 355787
Applicant

SWORN or affirmed to and subscribed before me this
30 day of May, 2017.

[Signature]
Notary Public

My Commission Expires: 9/16/2020

2

William J Phillips #355789

3rcI-127A Saluda

3road River Road
Columbia S.C 29210

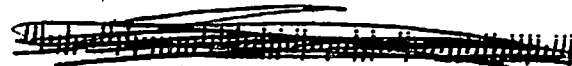
Paul B. Wick



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Clerk of Court for Greenville County
Greenville South Carolina 29601

2017-CP-23- 04462



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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
IN THE THIRTEENTH JUDICIAL CIRCUIT

William J. Phillips, #355787
Applicant,

Case No.: 2017-CP-23-4462

v.

RETURN AND MOTION TO DISMISS

State of South Carolina,
Respondent.

The State (Respondent), making its Return to the application for post-conviction relief filed by William J. Phillips ("Applicant") on July 20, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In January of 2013, Greenville County Grand Jury indicted Applicant for accessory before the fact to murder (2013-GS-23-0094A). Cassandra Gorton, Esquire represented Applicant. Assistant Solicitor Howard Steinberg, Esquire prosecuted the case. Applicant proceeded to trial before the Honorable C. Victor Pyle, Jr. The jury found Applicant guilty for accessory before the fact. On June 12, 2013, Judge Pyle sentenced Applicant to imprisonment for life.¹

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense and David L. Paavola, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phillips, Op. No. 2015-UP-100 (S.C. Ct. App. filed March 4, 2015). The remittitur was returned to the circuit court on March 24, 2015.

¹ The State subsequently nol prossed charges of murder (2012-GS-23-2841, count 1) and possession of a weapon during commission of a violent crime (2012-GS-23-2841, count 2).

The Applicant subsequently filed an application for PCR on August 7, 2015, in which he alleged the following grounds for relief:

1. "I never confessed to this crime, auto or written"
2. "General flaws in officers testimony"

Respondent filed its return and motion to dismiss on January 29, 2016. Respondent submitted an amended return on August 8, 2016. Applicant submitted an amendment on October 10, 2016. An evidentiary hearing into the matter was convened on December 6, 2016, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by Rodney W. Richey, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On December 8, 2016, the Honorable J. Mark Hayes, III, issued the order of dismissal denying Applicant's application for post-conviction relief.

On May 19, 2017, Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, filed a Johnson² petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. On October 6, 2017, by written order the South Carolina Supreme Court denied the petition. The Remittitur was issued on October 24, 2017.

II.

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

- a. "I never confessed to this crime auto or written"
- b. "Counsel was ineffective never did his job"

² Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (1988)

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Attached to and incorporated herein by reference are the Greenville County Clerk of Court records regarding the subject convictions, Applicant's prior post-conviction relief action records, Applicant's appellate records, and the records of this current PCR action. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

The Court should summarily dismiss this application for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act (the Act). S.C. Code Ann. §§ 17-27-10 et seq. (2003). Pursuant to the Act, an Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

S.C. Code Ann. § 17-27-20(a) (2003).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The Respondent therefore moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70(c) (2003).

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IV.

Respondent submits that this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was found guilty of accessory before the fact on June 12, 2013. The Remittitur from the direct appeal was issued on March 24, 2015. The application was therefore due on March 25, 2016. This application was filed on July 20, 2017, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

V.

The application should be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on

applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised ... in the previous application.” Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant’s current allegations were or could have been raised in the proceedings based on Applicant’s prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant’s current application is practically identical to his prior application. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-

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conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court should summarily dismiss the application as successive to Applicant's previous PCR application.

VI.

The application is barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant's present allegations are indistinguishable from those offered in his prior application for post-conviction relief. The prior PCR Court issued a final judgement on the merits on very same issues that Applicant now raises in his present action. The finality of the previous Court rulings should be respected, and the application should be summarily dismissed as barred by the doctrine of *res judicata*.

VII.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VIII.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired, is successive to Applicant's prior post-conviction relief action and barred by the doctrine of *res judicata*.

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Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General

By: DJm
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

October 9, 2018

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

WILLIAM J. PHILLIPS, 355787

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2017-CP-23-4462

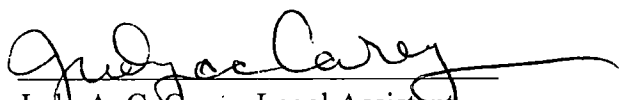
AFFIDAVIT OF SERVICE BY MAIL

18 OCT 31 AM 8:58
Paul Wickensimer 000 GUL SC

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

William J. Phillips, 355787
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

DATED this 9th day of October, 2018.


Judy A. C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

William J. Phillips, #355787
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
IN THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-23-4462

**CONDITIONAL ORDER OF
DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by William J. Phillips (Applicant) on July 20, 2017. Respondent made its Return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In January of 2013, Greenville County Grand Jury indicted Applicant for accessory before the fact to murder (2013-GS-23-0094A). Cassandra Gorton, Esquire represented Applicant. Assistant Solicitor Howard Steinberg, Esquire prosecuted the case. Applicant proceeded to trial before the Honorable C. Victor Pyle, Jr. The jury found Applicant guilty for accessory before the fact. On June 12, 2013, Judge Pyle sentenced Applicant to imprisonment for life.¹

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense and David L. Paavola, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phillips, Op. No. 2015-UP-100 (S.C. Ct. App. filed March 4, 2015). The remittitur was returned to the circuit court on March 24, 2015.

¹ The State subsequently nol prossed charges of murder (2012-GS-23-2841, count 1) and possession of a weapon during commission of a violent crime (2012-GS-23-2841, count 2).

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The Applicant subsequently filed an application for PCR on August 7, 2015, in which he alleged the following grounds for relief:

1. "I never confessed to this crime, auto or written"
2. "General flaws in officers testimony"

Respondent filed its return and motion to dismiss on January 29, 2016. Respondent submitted an amended return on August 8, 2016. Applicant submitted an amendment on October 10, 2016. An evidentiary hearing into the matter was convened on December 6, 2016, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by Rodney W. Richey, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On December 8, 2016, the Honorable J. Mark Hayes, III, issued the order of dismissal denying Applicant's application for post-conviction relief.

On May 19, 2017, Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, filed a Johnson² petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. On October 6, 2017, by written order the South Carolina Supreme Court denied the petition. The Remittitur was issued on October 24, 2017.

CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

- a. "I never confessed to this crime auto or written"
- b. "Counsel was ineffective never did his job"

² Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (1988).

Before this Court are the Greenville County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's prior post-conviction relief action records, Applicant's appellate records, and the records for this post-conviction relief action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Failure To State A Claim

The Court finds that this application should be summarily dismissed for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act (the Act). S.C. Code Ann. §§ 17-27-10 et seq. (2003). Pursuant to the Act, an Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

S.C. Code Ann. § 17-27-20(a) (2003).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The Respondent therefore moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70(c) (2003).

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Statute of Limitations

The Court finds that this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was found guilty of accessory before the fact on June 12, 2013. Remittitur from the direct appeal was issued on March 24, 2015. The application was therefore due on March 25, 2016. This application was filed on July 20, 2017, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive Applications

The Court further finds the application must be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and

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place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant's current application is practically identical to his prior application. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-

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conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

Res Judicata

The application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant's present allegations are indistinguishable from those offered in his prior application for post-conviction relief. The prior PCR Court issued a final judgement on the merits on very same issues that Applicant now raises in his present action. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

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CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: DeShawn H. Mitchell, Esquire
PCR Division – 13th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Greenville County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 18th day of Oct, 2018.



PERRY H. GRAVELY
Chief Administrative Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

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

C/A No.2017-CP-23-4462

William J. Phillips -- Applicant,

-vs-

State of South Carolina -- Respondent,

APPLICANT'S OPPOSITION AND REPLY
TO THE COURT'S CONDITIONAL ORDER

William J. Phillips
SCDC# 355787

Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Applicant, pro-se

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

William J. Phillips) C/A No.2017-CP-23-4462
Applicant,)
-vs-) APPLICANT'S OPPOSITION AND REPLY
State of South Carolina) THE COURT'S CONDITIONAL ORDER
Respondent,)
_____)

Introduction

This matter comes before this Honorable Court by way of an application for post-conviction relief that was filed by the above captioned Applicant, pro-se. Respondent filed a Return and Motion to Dismiss and "[proposed CONDITIONAL ORDER]". The Conditional Order was signed by the Honorable Perry H. Gravely, presiding Chief Administrative Judge on October 18, 2018. However, Respondent's "letter of correspondence to the Clerk of Court is dated "October 9, 2018." Applicant nonetheless, moved the Court for a thirty day (30) enlargement of time pursuant to Rule 6(b), SCRCiv.P.

The Conditional Order advised Applicant he must show the Court and provide, "...specific reasons, factual or legal," why the application should not be dismissed.

Applicant's Opposition and Reply is as follows:

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PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to commitment orders of the Greenville County Clerk of Court. Application was indicted by a Greenville County Grand Jury in January 2013 for accessory before the fact of murder, (2013-GS-23-0094A). Cassandra Gorton esquire was appointed to represent Applicant. Applicant pled not guilty and proceeded to trial before the Honorable C. Victor Pyle, Jr. and a jury. On June 12, 2013 Applicant was convicted as indicted and Judge Pyle sentenced Applicant to life without parole in the South Carolina Department of Corrections.

A timely notice of appeal was filed on Applicant's behalf. Robert M. Dudek and David L. Paavola of the South Carolina Office of Indigent Defense perfected the appeal. The South Carolina Court of Appeals affirmed the conviction and sentence in an unpublished opinion. See State v. Phillips, Op.No.2015-UP-100 (S.C.Ct.App. filed March 4, 2015). The remittitur was handed down March 24, 2015.

POST CONVICTION RELIEF

Applicant filed a pro-se application for post conviction relief. (2015-CP-23-4910) on August 7, 2015. Applicant being a pro-se layman alleged (1). "I never confessed to this crime, auto or written", and (2). General flaws in Officers testimony.

The State made their Return and motion to dismiss on January 29, 2016 and subsequently filed an amended Return on August 8, 2016.

Applicant was State Statutory (Rule 71.1(d), SCRCiv.P) appointed PCR Counsel Mr. Rodney W. Richey (hereafter "Richey").

27.
Richey filed a basic amendment alleging "thirty-one (31) "allegations" without ever consulting with Applicant regarding his case on October 10, 2016.

A hearing was convened on December 6, 2016 at the Greenville County Courthouse. Applicant was present at the hearing, represented by Richey and the State was represented by Patrick Schmeckpepper represented the State. Two days after the hearing on December 8, 2016 the Honorable J. Mark Hayes, III, issued an order of dismissal denying the application with prejudice.

A timely notice of appeal was filed and on May 19, 2017, Robert M. Pachak, of the South Carolina Office of Indigent Defense filed a no merit Johnson petition for writ of certiorari.

On October 6, 2017, the South Carolina Supreme Court denied certiorari and the remittitur was handed down on October 24, 2017.

CURRENT APPLICATION

(2017-CP-23-4462)

In the instant application, applicant alleged (1). "I never confessed to this crime auto or written" and (2) "counsel was ineffective never did his job." Applicant in alleging claim (2) regarding counsel being ineffective and not doing his job, was referring to Rodney W. Richey who was the appointed PCR counsel (Rule 71.1(d), SCRCiv.P. in the original PCR proceedings, which will be addressed in detail infra. The Conditional Order found that the application fails to state a claim. (Conditional Order ("Order") at 3; Statute of Limitations, Order at 4, Successive Application, Order at 4-5 and Res Judicata, Order at 6. However, the Order at 7 has allotted Applicant 30-days to provide the

Court with sufficient reasons, factual or legal why the application should not be dismissed.

The previous PCR record is replete with evidence that Applicant in this matter for lack of better words is "functionally illiterate" and cannot "read or write" and therefore filed the instant pro-se application to the best of his ability.

Since the Applicant cannot read or write he has just recently gotten the assistance of an inmate with an educational background and is familiar with the mechanics of law to assist with these pleadings.

Applicant has conjunctively submitted an amendment to the instant application pursuant to Rule 15(c), S.C. Rules Civil Procedure to bring the application in compliance and state the grounds/claims asserted with specificity.

This Opposition and Reply to the Conditional Order is as follows:

**APPLICANT'S REASONS, FACTUAL OR LEGAL WHY THE APPLICATION
SHOULD NOT BE DISMISSED**

An individual under PCR effectively is granted one chance to argue for relief and must do so within one year of his final appeal. *Wade v. State*, 348 S.C. 264, 559 S.E.2d 843, 847 (2002).

S.C. Code Ann §17-27-90 states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or

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knowingly or voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reasons was not asserted or was inadequately raised in the original, supplemental, or amended application.

First and foremost Applicant did not knowingly, intelligently or willfully abandon or waive any of his available claims to which he was and is entitled to have heard and adjudicated on the merits in his one PCR application.

Secondly, as seen above, this statute does not absolutely bar a successive PCR application, where the applicant can "point to a sufficient reason" why the grounds he asserts were not raised properly in the previous proceeding. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392, 393-94 (1991).

In *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008), the Court recognized and noted that "although successive PCR applications are disfavored, they are not prohibited. Id.

In the case of *Terry v. Byars*, 2012 WL 6102938, *6 (D.S.C. 2012), the Court concluded that the State of South Carolina does allow for second PCR applications in limited circumstances... and "...although successive PCR cases are disfavored by courts of South Carolina, they are not absolutely precluded."

In the instant case as was seen in the procedural history supra Applicant timely filed his initial/Original PCR application August 7, 2015 and due to Applicant's inability to read and write he asserted (1). "I never confessed to this crime, auto or written" and (2) "General flaws in officers testimony." PCR

Counsel Rodney Richey was appointed in accordance with Post Conviction Relief Actions Rule 71.1(d), SCRCP to assist Applicant in the PCR proceedings.

As was noted Richey filed a cursory blanket PCR amendment alleging thirty-one (31) allegations without ever speaking to Applicant.

An evidentiary hearing was conducted on December 6, 2016 at the Greenville County Courthouse. At the onset of the PCR hearing PCR Counsel made the following statement to the Court as recorded:

The Court: All right. Mr. Richey.

Mr. Richey: Thank you, Your Honor. I've discussed with the Attorney General we're going on ineffective assistance of counsel because of his educational level. That's all we're doing.

The Court: All right. You ready to call your first witness?

App.685, 1.1-7.

As seen above, PCR Counsel advised the Court that he had spoken with the [Attorney General] and they were going only on ineffective assistance of counsel because of Applicant's educational level.

The Court without hesitation or any inquiry to or from Applicant, i.e. if he understood what PCR counsel was doing etcetera said "call your first witness" and the hearing began and was conducted on only [ONE] sole issue that PCR Counsel and the Attorney General had discussed and decided on.

PCR Counsel's incompetence is exploited to the maximum where PCR Counsel previously amended thirty-one (31) ineffective

31 assistance of counsel allegations and without notice or any discussion with Applicant, for reasons unknown at the eleventh hour on the day of the hearing PCR counsel decided he will proceed on only [ONE] claim after discussion with the State. The record is clear that PCR counsel was not competent to enable the indigent Applicant to make a meaningful case for post conviction relief.

In all reality Applicant has not received his "one bite at the apple" in any sense of the word as a result of PCR counsel's negligence and lack of professional obligation owed to Applicant.

The presumed innocence of Applicant was removed by the State and trial counsel via procedures which were fundamentally unsound and latent with structural defects. The trial procedures were not properly presented for review on post conviction relief, and were either overlooked, neglected or thrown-by-the-wayside by PCR counsel, not Applicant. (emphasis supplied and added).

PCR Counsel's complete abandonment and neglect of Applicant's meritorious available claims has resulted in an inadequate corrective process that failed to protect Applicant's States and Federal Constitutional rights and privileges. The trial and collateral process in this matter has resulted in a conviction of an innocent man amounting to a miscarriage of justice.

Applicant had the burden of proof at his PCR. See Post Conviction Relief Actions, Rule 71.1(e), South Carolina Rules of Civil Procedure. This encompasses and securing the right under Rule 71.1(d), SCRCP, that PCR shall be appointed and PCR counsel shall ensure all available grounds will be raised in the first

PCR application. It appears that PCR counsel is appointed just for this reason and thus has a duty to represent the client.

Because State post conviction procedures are prisoner initiated, and particularly because of the unforgiving nature of South Carolina statutes and case law disfavoring and almost forbidding review of second/successive PCR applications, the responsibility to conduct and ensure a "full and fair" State post conviction proceeding on "[ALL] available claims" belongs to State Statutory appointed PCR counsel.

It was PCR counsel's statutory, S.C. Code Ann. §17-27-60 (Supp.2010); Rule 71.1(d), S.C. Rules of Civil Procedure; Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001), duty as well as professional obligation to ensure all available grounds as defined by State statutes and case law that specify the attributes of the PCR proceedings. also see Post Conviction Relief Actions, S.C. Rules of Civil Procedure.

The issues that were available are ineffective assistance of counsel errors found on the face of the State trial record and could have readily been found with a simple "reading" of the trial transcript. The record is replete that Applicant cannot "read or write", and this was exploited to the maximum through PCR Counsel's colloquy with trial counsel at the PCR hearing, App.695, 1.14-19. Trial counsel described Applicant as "functionally illiterate" so any failure to raise these claims in the first application as required by law should be imputed to the State because PCR counsel being appointed by State statute should be considered an agent of the State and the State bears the responsibility of the agent.

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Applicant submits that after a review of the entire record, the Opposition and reply and attached Amendment to include the issues and supporting exhibits and the undisputed fact Applicant cannot "read or write" this Court should easily concluded Applicant's situation and facts warrant a hearing in this matter despite Respondent's assertion of successiveness. There is a genuine issue of material facts in dispute that requires a hearing.

The allegation of ineffective assistance of counsel raises questions of fact that the record does not conclusively refute, and Applicant's inability to read or write, Applicant requests a hearing at the Court's convenience. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Based on the foregoing Opposition and conjunctive Amendment with supporting facts and exhibits, Applicant respectfully prays this Court will reject Respondent's request for summary dismissal and appoint competent counsel to assist Applicant and conduct a hearing into this matter at the Court's earliest convenience and in the interest of justice.

Respectfully Submitted,

/s/ William J Phillips

William J. Phillips

Applicant, pro-se

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

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William J. Phillips) C/A No.2017-CP-23-4462

Applicant,)

-vs-)

CERTIFICATE OF SERVICE

State of South Carolina)

Respondent,)

The undersigned hereby certifies he has served a true and correct copy of the enclosed, Opposition and Reply to the Court's Conditional Order, Post Conviction Relief Amendment on the parties and persons whose names and addresses appear below.

This was done by placing the aforesaid in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this _____ day of December, 2018.

Those Served:

Respectfully Submitted,

DeShawn H. Mitchell
Assistant Attorney General
P.O. Box 11549
Columbia, SC. 29211

/s/ William J. Phillips
William J. Phillips

Applicant, pro-se

Paul B. Wickensimer
Clerk of Court, Greenville County
305 East North Street; Room 224
Greenville, SC. 29601-2121

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 13th DAY OF December, 2018

Nancy C. Murchant
NOTARY PUBLIC

MY Comm. Expires 1-23-2023

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William J. Phillips #355787

Perry, Cal. Inst.

430 Oaklawn Rd

Pickens, SC
29669

SC Assistant Attorney
General,

Deshaun H. Mitchell

PO Box 11549

Columbia, SC
29211

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

(36)

C/A No.2017-CP-23-4462

William J. Phillips -- Applicant,

-vs-

State of South Carolina -- Respondent,

POST CONVICTION RELIEF AMENDMENT
PURSUANT TO RULE 15(c), SCRPC.

William J. Phillips
SCDC# 355787
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Applicant, pro-se

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

William J. Phillips) C/A No.2017-CP-23-4462
Applicant,)
-vs-) POST CONVICTION RELIEF AMENDMENT
State of South Carolina) PURSUANT TO RULE 15(c), SCRCiv.P.
Respondent,)
_____)

COMES NOW, above captioned Applicant, William Phillips, pro-se, respectfully moving this Honorable Court to amend the Original application in the above captioned case number pursuant to South Carolina Rules of Civil Procedure 15(c).

The issues and or allegations to amend are as follows:

I.

Trial Counsel rendered ineffective assistance when counsel failed to object when the trial court failed to instruct the jury on the essential element of "criminal intent" and this failure resulted in a structural error in the constitution of the trial and as a result of counsel's failure the Court of Appeals concluded the issue was not preserved for appellate review.

II.

Trial Counsel rendered ineffective assistance when counsel failed to request a proper jury instruction on the element of "criminal intent" and as a result the Court of Appeals found the issue was not preserved for appellate review.

TO SAVE THE COURT'S TIME APPLICANT WILL ADDRESS BOTH THESE ISSUES TOGETHER SINCE THE FACTS OF ONE ENCOMPASSES THE OTHER.

FACTS

During the charge conference trial counsel requested a jury instruction on accomplice liability from another jurisdiction, which the trial court denied. App.578, 1.9-p.579, 1.17. Trial Counsel told the court she was new to this jurisdiction. A number of years in Missouri and Florida but not this jurisdiction, App.578, 1.12-13.

At that time trial counsel advised the court that she had another request, App.579, 1.20-21. Counsel made the following statement to the court as recorded:

Ms. Gorton: I'm also asking for an instruction on "criminal intent". And this is the Tammie Timmons issue.

I believe that the facts could reasonably be construed by the jury that Joe was upset about Christine and -- Christina and Charlie and that he made many, many comments which caused JJ to ultimately act. But if he didn't have the **"criminal intent"** to do so, then he can't be guilty of this charge. If he complained about it and talked about how upset he was and something needed to be done about Charlie, but he had **"no intent"** for anyone to kill Charlie.

App.579, 1.22-p.580, 1.6.

As is seen above trial counsel "specifically" request a charge on "criminal intent." Id. The trial court asked counsel if she had a specific charge she wanted to present, then give it to the court in writing and it would be part of the record and considered by the court. App.580, 1.7-10. Counsel attempted to address the court and the court told counsel "I want you to give

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me something in writing so the court could look at it. App.580, 1.11-21. The trial court never instructed the jury on the "element of criminal intent", App.627, 1.13-p.636, 1.7.

On direct appeal the State conceded that "criminal intent" is an essential element of accessory before the fact of murder. See. Initial Appeal Brief of Respondent at page 18. The State also conceded that the trial court did not give a "criminal intent" charge to the jury. Id at page 18-19. The State did point out that the single issue in the appeal is "whether the trial judge erred by refusing to charge the specific intent charge requested by trial counsel." Id.

The State on direct appeal argued that Appellant neither requested a charge on general criminal intent nor objected to the absence of such a charge, and that issue is not preserved for review. State's Initial Brief on Appeal at pages 18-19.

Subsequently thereafter the South Carolina Court of Appeal denying relief in it's per curiam opinion in footnote 2 noted: "To the extent Phillips is arguing the trial court erred by not including in it's charge any language regarding criminal intent, we find this argument is not preserved. See attached **Exhibit (A)**."

Trial Counsel's statement during closing argument to the jury, while arguing the facts surrounding Tammie Timmons, (App.625, 1.21-626, 1.10) argued "...and in this case the element of criminal intent is huge, (App.626, 1.2-3), suggests that counsel knew or should have known that "criminal intent" is an essential element and it was error for the trial court to not instruct the jury on all the elements the State must prove beyond a reasonable doubt. This failure relieved the State of it's

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burden in violation of due process. Trial Counsel should have researched the law in this State regarding the offenses for which Applicant was on trial for. Trial Counsel's lack of understanding regarding the laws of South Carolina is deficient performance that unduly prejudiced Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

The criminal intent instruction counsel should have researched and requested is found in the leading book on criminal jury charges in South Carolina:

Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation.

There is no way to prove intent to a mathematical certainty. There is no way medical science can dissect a persons brain and determine what that person had in mind, so the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present.

It is not necessary to establish intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact taking into consideration the acts of the parties and all the facts and circumstance of the parties.

Criminal intent is a mental state, a conscious wrong doing. It is up to you to determine what the defendant intended to do based on the circumstance shown to have existed.

Criminal intent can arise from an action or a failure to act. It may arise from negligence, recklessness, or indifference to duty or the consequences that are considered by the law to be equivalent of criminal intent.

See Ralph King Anderson Jr. South Carolina Requests to Charge

-Criminal (2012).

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The record reveals trial counsel had taken her requested charge from a web site of the Charleston Bar. Id. Applicant suggests that trial counsel merely had to contact the South Carolina Bar regarding jury charge requests in South Carolina.

For a conviction to comport with due process, the State is required to prove "every element" of the charged offense beyond a reasonable doubt. *Dervin v. State*, 386 S.C. 164, 168, 687 S.E.2d 712, 713 (2009) ("Due process requires the State to prove every element of a criminal offense beyond a reasonable doubt." (citing *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004) ("It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant)).

The failure of trial counsel to request a proper instruction regarding an essential element, "criminal intent", substantially relieved the State of it's burden of proof on each and every element that has resulted in structural error in Applicant's conviction. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), a Five-Majority of the Supreme Court elucidated this rule of per se prejudice (sometimes called the "rule of automatic reversal") by distinguishing between the concepts of "structural" and "trial" errors. Structural defects in the constitution of the trial mechanism (Id. at 294) are per se prejudicial and must be corrected regardless of their affect on the trial because they violated basic protections without which a criminal trial can reliably serve it's function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. Fulminante, 499 U.S. at 310, also see *Neder*

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v. United States, 527 U.S. 1, 7 (1999), the United States Supreme Court held: "[W]e have recognized a limited class of fundamental constitutional errors that defy analysis by 'harmless error' standards... Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. affect substantial rights) without regards to their affect on the outcome."

Applicant is entitled to a new trial on these issues.

III.

Trial counsel rendered ineffective assistance when counsel failed to introduce the first and second statements of the State's star witness Jerry Allen once the State introduced his third statement into evidence as substantive evidence.

FACTS

During Applicant's trial Jerry Allen (hereafter "JJ") testified for the State. App.408, 1.2-p.462, 1.25; App.473, 1.14-p.573, 1.11).

It is undisputed that JJ shot and killed the decedent in this case. JJ gave three written statements to law enforcement containing three different scenerios surround the incident in question. The first statement JJ implicated himself as being the [only] person who committed the homicide. After sitting in jail for a while JJ gave authorities a second written statement, only this time negating any responsibility from himself and solely implicating Applicant has have committed the offense. After a while longer in jail JJ gave a third written statement, only this time alleging that he did commit the offense but only because

43 Applicant allegedly paid him to kill the decedent. See attached Exhibits (P)(Jerry Allens Three (3) written statements).

During his trial testimony the solicitor was able to elicited parts from each of the three statements as to what was true and what was false. However, upon questioning JJ regarding his final and third written statement to law enforcement the solicitor entered [only] the Third Statement into evidence (State's exhibit 47) App.448, 1.8-p.449, 1.7.

During cross-examination of JJ, trial counsel did impeached JJ with his prior inconsistent statements. However, Applicant submits that once the State introduced JJ's Third Statement into evidence during it's case in chief, trial counsel should have introduced JJ's First and Second statements into evidence for the jury's consideration along with the Third statement introduced by the State.

Counsel did not move and introduce JJ's First or Second into evidence during cross-examination and during deliberations the jury sent out a note and the following colloquy was recorded:

The Court: There's another question from the jury. Can we have JJ's first and second statements? Those are not in evidence. So I can't give them to them. All right. Bring the jury.

The Court: Madame Foreman, you have asked can we have JJ's first and second statements. This statements are not part of the exhibits in this case.

Madame Foreman: Okay.

The Court: And, therefore, I'm sorry, but I can't send those into you at this time.

Madame Foreman: Okay, We couldn't remember if it was ---

The Court: So please retire and continue with your deliberation.

Madame Foreman: Okay.

The Court: Thank you.

App.648, 1.8-24.

After the above colloquy the jury went back to deliberating at 4:08 pm. and by 5:02 pm the jury returned with a guilty verdict as indicted. Id.

It cannot be disputed that the jury thought JJ's first and second statements were essential during deliberations with regards to Applicant's guilt and innocence. The Jury Foreman's half stated answer shows the first and second statements were critical where the foreman stated: "We could remember if it was ---" and the Trial Court interrupted and instructed the jury to retire."

Trial counsel should have moved JJ's first and second statements into evidence after the State "cherry picked" what it wanted out of the first and second statements and then only introduced the Third statement into evidence because it best suited the State's position. In State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied 460 U.S. 1103 (1983), the Court held a prior statement [is] admissible [as] "substantive evidence", as well as for impeachment, when a declarant testifies at trial and is available for cross-examination. A "prior" statement can only be used as "substantive evidence" in a criminal trial when the opposing party has an effective opportunity to cross-examine the declarant.

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Once the State successfully "cherry picked" facts from the (3) three statements, only to then introduce the third statement into evidence, trial counsel after cross-examining JJ should have in all fairness moved and introduced JJ's First and Second statements into evidence for the jury's consideration with the State's introduced Third statement. (emphasis added and supplied).

Trial counsel's failure here is deficient performance under Strickland v. Washington, 466 U.S. 668 (1984). The prejudice is easily seen from the jury's request for JJ's first and second statements during deliberations regarding the guilt and innocence of Applicant.

Applicant is entitled to a new trial with [ALL THREE] of JJ's statements in evidence for the jury's consideration.

IV.

Trial Counsel rendered ineffective assistance when counsel failed to object to the Solicitor's numerous improper egregious statements during closing summation that in essence "vouched" for and improperly "bolstered" the State's case and denied Applicant his right to a fair trial.

FACTS

Applicant submits he was denied the effective assistance of counsel when counsel failed to object to the Solicitor's improper statements during closing that were intentionally injected in order to impermissibly "bolster" JJ's testimony and the State's case against Applicant.

During trial the State presented the testimony of Carl Rider ("Rider"), App.183, 1.22-p.188, 1.8. The essence of Rider's

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testimony was when the State asked Rider if he had any children and he answered in the affirmative. The State specifically asked Rider if "[Travis Rider]" was one of his children and he answered in the affirmative. App.184, 1.16-19.

Later on during trial the State's star witness Jerry Allen ("JJ") testified that on numerous occasions had previously driven Applicant by the decedent house supposedly to see if Applicant's ex-girlfriend was there with the decedent, App.416, 1.12-p.417, 1.2.

During JJ's testimony the Solicitor asked JJ if he recalled an incident on a porch on Long Shoals Road where Applicant made any statements, App.418, 1.20-21. JJ answered in the affirmative. The Solicitor then asked JJ who is Travis Rider and what is his nickname in the community" To which JJ answered "Grover." App.418, 1.23-25. The Solicitor asked JJ "what is Grover's relationship with -- and JJ answered "Jobo (Applicant's) cousin. The Solicitor then asked if Dakota Oliver was also there, to which JJ answered in the affirmative. The Solicitor then asked JJ "what did Jobo say?" JJ answered: "He wanted to kill Charlie or have somebody kill Charlie. The Solicitor asked JJ who was he (Jobo) was talking to and JJ answered "Me". App.419, 1.1-9.

During closing argument the solicitor was allowed to improperly "bolster" JJ's testimony as recorded:

Jobo tells JJ that he and Jobo has to kill Charlie. He has to get him out of the way. Dakota Oliver also hears this conversation, recalls the conversation. He recalls it a little bit different. App.590, 1.5-8.

47
As was seen in the above the solicitor argues Dakota Oliver hears the conversation JJ has just testified to, yet remembers it "a little bit different" than JJ.

The solicitor then argues:

Jobo's cousin was present. We obviously did not present Jobo's cousin in this case, also a juvenile. App.590, 1.12-13.

As is seen in the above the Solicitor has injected "testimonial" evidence outside of the evidence, injecting an arbitrary and irrelevant factor into their deliberations. A solicitor must confine himself to the record in the case presented to the jury. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). Here the solicitor has improperly vouched for and improperly "bolstered" the State's case through a alleged witness who was not only a juvenile but also allegedly corroborated JJ's testimony even though the State didn't present him at trial because he was a juvenile.

It is error for the solicitor to "bolster" or vouch for a witness. United States v. Somad, 754 F.2d 1091, 1100 (4th Cir.1984). Vouching generally occurs when the solicitor's actions are such as here that indicate that a jury could reasonably believe that the solicitor was indicating a personal belief in the credibility of a witness.

Consequently, the solicitor may not, among other things, make explicit personal assurances that implicitly "bolster" the witness by indicating that "information not presented to the jury supports the testimony. United States v. Lewis, 10 F.3d 1086, 1089 (4th Cir.1993)(citations omitted).

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A solicitor cannot vouch for the credibility of a witness, either expressly, or by indicating information not presented supports the witnesses testimony. - State v. Schuler, 545 S.E.2d 805, 815 (S.C.2001).

The solicitor then argued:

Jobo calls Roy Barrett to buy a throw-away pistol because he has a man to do a job. I believe I even asked Mr. Barrett, who also did not want to be here. Apparently, I and the marshals had a word with him. Roy Barrett gave a statement dated October 11, 2011, Roy recalls the date wrong.... App.592, 1.22-593, 1.4.

As is seen in the above the solicitor "bolstered" Roy Barrett's testimony by informing the jury that although Mr. Barrett did not want to be testifying at trial, his testimony is supported because the solicitor informed the jury "I and the marshals had a word with him" and in essence the jury can be assured, even though Barrett "recalls the wrong date" is corroborated by the solicitor and marshals talk with Barrett.

The solicitor then argued:

Again, Jobo's not a dummy. I've never said he's a dummy. I'll never say he's a dummy. He knows to speak in code, but he doesn't know enough code. He doesn't realize we're actually paying attention to these jail phone calls. App.604, 1.7-10.

September 3rd, again, a very important date, 2011 at 23:50 hours, Jobo, Jobo Phillips again says, tell JJ to keep his mouth shut, two times. Now you've heard these phone calls. I've had the opportunity to listen to them for thousands of hours, these phone calls. I can understand them. You might have some trouble. The audio might not be very good. We can play it for you again. App.604, 1.11-17.

49

As is seen in the underlined portions of the solicitor's closing, the solicitor was relying on portions of recorded jail phone conversations in order to corroborate JJ's testimony and to convict Applicant. The solicitor here assured the jury that he has "personally" listened to the phone calls for thousands of hours and even though the jury might have trouble because of the audio, he has personally listened to them for "thousands of hours" and in essence the jury can believe the State's case against Applicant. This is not only "impermissible bolstering" it is also an indirect form of improper vouching, supra.

The solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated. *Bennett v. Angelone*, 92 F.3d 1336, 1345-46 (4th Cir.1996)(internal quotation marks omitted).

Here JJ's testimony was critical to the State. These statements were deliberated and not just isolated. All of the comments curved the evidence towards and in favor of corroborating JJ's testimony for the State.

The State's closing violated established rules regarding closing arguments. The State's contained numerous egregiously improper arguments which, when taken as a whole, satisfies the Donnelly standard. Trial counsel should have objected and given the trial court a chance to cure the error. Applicant is entitled to a new trial.

V.

50

Trial counsel was ineffective for failing to object to the trial court's malice instructions that were, incomplete, confusing and misleading that shifted the burden of proof in violation of due process.

FACTS

Applicant asserts he was denied the effective assistance of counsel when counsel failed to object to the trial court's erroneous, incomplete and confusing malice instructions that shifted the burden of proof in violation of due process.

The trial court instructed the jury that "The burden is on the State in this case to prove the defendant guilty and to prove each and every element of the offense for which he is charged beyond a reasonable doubt." App.631, 1.5-8.

During the trial court's instructions the court told the jury "the defendant in this case is indicted for being an accessory before the fact, and in this case, that being murder. Now, in this case -- in this case I charge you that an accessory before the fact is one who while being absent at the time a crime is committed did nevertheless procure, counsel or commend someone else to commit that crime. App.632, 1.1-7.

The trial court went to instruct the jury, as recorded:

Now the defendant in this case is not charged with murder. He is charged with being an accessory before the fact of murder. Therefore, the evidence in this case must satisfy you beyond a reasonable doubt that this defendant counseled, hired or otherwise procured Mr. Allen to commit the murder. App.632, 1.8-13.

51
As is seen in the above the trial court again instructed the jury that Applicant is not charged with murder, he is charged with accessory before the fact of murder. Id and the evidence in the case must satisfy the jury beyond a reasonable doubt that Applicant, counseled hired or otherwise procured Mr. Allen to commit the murder. App.632, 1.8-13.

The court then further charged the jury as recorded:

Now, murder, ladies and gentlemen, is the killing of any person with malice aforethought either express or implied. And as a necessary element of murder it must have been committed without just cause or excuse. App.632, 1.14-17.

As is seen the court instructed the jury that "murder is the killing of any person with malice aforethought either express or implied. And as a necessary element of murder it must have been committed without just cause or excuse. App.632, 1.14-17.

Applicant submits counsel should have objected to this incomplete, confusing instruction on malice aforethought.

This incomplete and confusing instruction on malice is only a "half-truth" presented to the jury.

The leading book on criminal jury charges defines malice as the "doing of a wrongful act intentionally and without just cause or excuse." Ralph King Anderson Jr., South Carolina Requests to Charge -- Criminal 2012, §2-1.

Judge Anderson's implied malice charge simply states: "Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experience there was a

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plain and strong likelihood that death would follow the contemplated act." Id.

Instead of properly instructing the jury regarding malice the trial court erroneously instructed the jury as to [CIE] of the essential elements of murder.

The trial court then erroneously and confusingly instructed the jury that "stated differently and on other words, ladies and gentlemen, an accessory before the fact is one who aids, or abets principal alleged to have committed the offense but who was not present at its commission. App. 632, 1.17-21.

Applicant submits the courts malice instructions were incomplete, confusing and misleading under the facts and charge for which Applicant was being tried.

Trial counsel should have objected to the erroneously confusing, incomplete and misleading malice instructions.

A reasonable jurist could have interpreted this instruction as a "necessary element" it must have been committed without just cause or excuse. Applicant submits this is only a half-truth and erroneous when compared to Judge King's malice instruction that "malice is the doing of a wrongful act intentionally and without just cause or excuse. Especially in light of the fact the trial court told the jury from the onset that the State had to prove "each and every element" and then specifically instructed the jury that "a necessary element" of murder is it must have been committed without just cause or excuse. Applicant submits that malice aforethought "express or implied" means more than "without just cause or excuse" as an element and this charge could have easily confused the jury and

53 substantially lessened the State's burden especially coming directly after the trial court's half-truth malice instruction the court instructed the jury "stated differently and in other words", and then instructed that an accessory before the fact is one who aids, or abets principal alleged to have committed the offense, but who was not present at it's commission. App.632, 1.17-21.

The trial court never instructed the jury what the terms "aids, or abets principal alleged" means. A layman surely is not equipped to know the legal terms and meanings from one "who aids, or abets principal alleged". Especially here where the trial court incorporated such into his malice instructions and charged "stated differently and in other words.

Clearly, counsel should have objected to this erroneous, incomplete and misleading jury instruction that relieved the State of it's burden. Strickland v. Washington, 466 U.S. 668 (1984). The error here is structural when coupled with the fact the trial court never instructed the jury on the essential element of "criminal intent". Murder in South Carolina is a crime of specific intent.

Applicant is entitled to a new trial on this issue.

Applicant's
Exhibit (A)

SC Court of Appeals
Per Curiam Opinion
State v. Phillips

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

William Joseph Phillips, Appellant.

Appellate Case No. 2013-001339

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-100
-Heard February 12, 2015 – Filed March 4, 2015

AFFIRMED

David Lee Paavola, Nelson Mullins Riley &
Scarborough, LLP, of Columbia, and Chief Appellate
Defender Robert Michael Dudek, of Columbia, both for
Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and
Assistant Attorney General Kaycie Smith Timmons, all
of Columbia; and Solicitor William Walter Wilkins, III,
of Greenville, for Respondent.

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PER CURIAM: In July 2011, Jerry Allen shot and killed Charles Roberts. In connection with Roberts' death, the State indicted William Joseph Phillips on the charge of accessory before the fact of murder. Phillips appeals his conviction, arguing the trial court erred in refusing to give a proposed jury charge concerning the mental state required for liability as an accessory before the fact.

The trial court is required to charge the correct law applicable to the case. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "This court will not reverse a trial court's decision to refuse a specific request to charge unless the trial court committed an error of law." *State v. Marin*, 404 S.C. 615, 619, 745 S.E.2d 148, 151 (Ct. App. 2013). The trial court commits no error of law in refusing to give a proposed charge when "the charge requested is an incorrect statement of law." 404 S.C. at 620, 745 S.E.2d at 151.

A person is an accessory before the fact if he "aids in the commission of a felony" or commissions a felony "by counseling, hiring, or otherwise procuring the felony to be committed." S.C. Code Ann. § 16-1-40 (2003). In charging the jury on the crime of accessory before the fact, the trial court tracked the statutory language of section 16-1-40. Phillips argues, however, the court erred in refusing to instruct the jury regarding the mental state required for the crime—that Phillips specifically intended for Allen to kill Roberts.

The type of criminal intent that is required to prove a defendant guilty of a statutory offense is a question of legislative intent. *State v. Ferguson*, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990). When a criminal statute does not express a particular mental state, courts "look to common law and the development of the statute to determine whether the legislature intended the crime to require" a particular mental state. *State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994).

Section 16-1-40 does not provide, and the State concedes South Carolina courts have not established, the mental state required to prove guilt as an accessory before the fact. Phillips argues the crime requires proof of a "purposeful" mental state, or specific intent. Our supreme court in *Jefferies* addressed a similar situation with respect to the statute criminalizing kidnapping, which contained no explicit mental state requirement. 316 S.C. at 18, 446 S.E.2d at 430; *see also* S.C. Code Ann. § 16-3-910 (1985). In that case, the appellant submitted proposed jury charges to the trial court that required the State to prove "specific intent" or "purpose." 316 S.C. at 19, 446 S.E.2d at 431. The supreme court first examined the statutory

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development of the crime of kidnapping, which originally required two acts—the "act of carrying a [child] . . . out of the State" and "the act of procuring the child." 316 S.C. at 18 n.5, 446 S.E.2d at 430 n.5. The court held a mental state was implied in the original kidnapping statute, stating, "Implicit in the word 'procure,' as used in the statute, is taking possession of the minor with some degree of . . . knowledge." *Id.* The supreme court then rejected the appellant's argument that the requisite mental state should be "purpose," stating "'[p]urpose' is the highest level of *mens rea* known in criminal law and it is not required under the South Carolina kidnapping statute." 316 S.C. at 19, 446 S.E.2d at 431. Instead, the court held only "knowledge" was required under the statute because the legislature intended "to require a lesser *mens rea* than 'purpose.'" 316 S.C. at 19, 446 S.E.2d at 430-31.

In this case, we hold the General Assembly did not intend for the mental state of "purpose" to be an element of the crime. Similar to the court's interpretation of the kidnapping statute in *Jefferies*, the words of section 16-1-40—"counseling, hiring, or otherwise procuring" the commission of a felony—imply a degree of knowledge to be guilty as an accessory before the fact. However, the State did not have to prove Phillips specifically intended that Allen commit the felony he "counsel[ed], hir[ed], or otherwise procur[ed]" Allen to perform—murdering Roberts. Instead, it was sufficient for the State to show a lesser degree of criminal intent.¹ Our case law supports this conclusion, as decisions by our supreme court have never listed an intentional or purposeful mental state as an element of the crime. *See, e.g., State v. Bixby*, 373 S.C. 74, 75 n.2, 644 S.E.2d 54, 55 n.2 (2007); *Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005); *State v. Prince*, 316 S.C. 57, 64, 447 S.E.2d 177, 181 (1993).

Because Phillips' requested charge did not reflect South Carolina law, the trial court properly refused to instruct the jury that Phillips must have intended for Allen to kill Roberts to be liable as an accessory before the fact of murder.² *See*

¹ We do not decide what level of intent was necessary for conviction.

² To the extent Phillips argues the trial court erred by not including in its charge any language regarding criminal intent, we find this argument not preserved. At trial, Phillips requested the trial court instruct the jury that Phillips "inten[ded] that a murder be committed by [Allen]," and Phillips neither requested a charge on a lesser mental state nor objected to the absence of such a charge. *See State v.*

Jefferies, 316 S.C. at 19-20, 446 S.E.2d at 431 ("Because the charges requested by [defendant] . . . included a level of *mens rea* not required under [the kidnapping statute], the trial judge correctly refused to give the requested charges."); *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996) ("[The defendant] sought only a specific intent . . . charge. As that is not the law of this State, the charge was properly refused.").

AFFIRMED.

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

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Applicant's
Exhibit (B)

STATE'S witness
Jerry Allen's 3
~~Statements~~

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

01-2011-100146 August 16, 2011 @

I, Jerry Leonard Allen
Investigator Chris T. Miller

do hereby give freely and voluntarily this statement to
and Investigator S. Peeples

who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 24 years old, and I reside at: 196 Long Shoals Road Marietta, SC 29661

I have a 8th grade education, and I can read and write.

I am at the Law Enforcement Center with my lawyer Charles Marchbanks and Frank Eppes. I did not finish the ninth grade, but I can read and write. I went to school in Thomasville Georgia. I have known of Charlie for about eleven months. The first time I met him I saw him at the bottom of the driveway on a motorcycle. I have kind of been like a watch dog at JoBo's house. I was more or less an associate with Charlie. I have gotten into it with Charlie before; it was like a petty argument. I did not know that Charlie was dating my sister Christina until JoBo found out. The day that all of this happened, JoBo talked to Charlie first. When JoBo hung up I called Charlie back. We talked about me coming over to his house. We did not talk about the pills over the phone. Charlie met me at the mailbox, it was around 0930 or 1000 m. I walked from JoBo's house to Charlie's. Charlie's first intentions was to take me home after I sold him the pills. I don't know what he did with the pills. The exchange was made when we got to the intersection of Chestnut and Geer. Charlie was getting ready to take me home, and told him that I didn't really want to go home. Doing the same thing everyday really irritates me. We got to talking about hunting and fishing that is what got me over to where you guys found him. I told Charlie that I had deer feeders up there and a deer stand. Charlie thought that it sounded interesting so he wanted to see what I was talking about. We went to Carl Rider's old place and parked out in front of the downed trees. I showed him where the house burned down and we went inside the barn. I got on the subject of motorcycles; I think that Charlie has one of them. I told him about a nice motorcycle that I had in the past, I guess that you could say that it was in my previous life. Charlie did not believe me at first. I was trying to explain to him how much money I put into the motorcycle. I put \$5,000 into the bike. I only put 230 miles on it. Shortly after I got it I lost it in the divorce. Charlie started getting on the subject that I was lying about the bike. I told him that I made about \$75,000 a year and that I was telling the truth. I told him that I swore on my daddy's grave. Anytime someone doesn't believe me I am telling the truth after I swear on my daddy's grave, I start flipping out. When I swear on his grave, I don't lie. I started flipping out before I knew it I blanked out, I had done meth and pills for four days. Coming back to myself I saw Charlie; I looked down and started reeking out. I don't remember doing it but, I must have shot him in the back of the head. I saw blood squirting out of the front of his head then now I know that I shot him in the back of the head, he was laying on his belly. I freaked out and got in his truck and left. I drove it up to Sap Creek and hid it behind a hill on a little trail off the road. I think it was by the end of River Falls. I did not wear any gloves I wiped down everything so that I would not have any fingerprints. I used my shirt to wipe down the truck. I walked back to the house; it took me about four and a half hours. It was about a week before I went back to where the body was. When I got there, the body was swelled up. I moved it by myself; I grabbed him by the feet and dragged him to the creek. I took about four totem poles before I moved him. I did this at night. I did not have any help. I did not do anything with his wallet or his cell phone. Honest to God nobody else had anything to do with this. I just flipped out after I swore on my daddy's grave and Charlie did not believe me. I was the only one who had anything to do with this. I got the gun from the Texaco on 276. I stole it out of a truck, the window was rolled down and the gun was there in the side pocket on the driver's side. This was a week before I killed Charlie. I was going to use the gun for protection. I walk a lot and dogs follow me sometimes. I carry rings for protection from animals. After I shot Charlie with the gun, I got to the house, there was nobody there. I took a cutting torch and cut up in pieces. The gun only had two bullets. I threw away the other bullet and cut up and threw away the magazine also. I put a piece here and a piece there. If you were to go to JoBo's house right now there is a set of cutting torches. Nobody paid me, I acted alone. I did not do this as an act of revenge for Charlie messing with my sister; I didn't have a problem with him messing with my sister. The pills that I sold Charlie, I was given a script for them for an abscess in my back. It was given to me at North Greenville Hospital. I used JoBo's phone to make it look like suspicious on him. I did not take Charlie out there to kill him. We were laughing and getting along while we were talking in the truck. I did not take him out there to rob him. I had been up for four days straight and anything can set you off. JA

I have read the above statement of 11 pages and it is true and correct as best I recall.

WITNESS:

Chris T. Miller
Frank Eppes

Jerry Allen

I HAVE RECEIVED A COPY OF THIS STATEMENT

Jerry Allen

Sworn before me this _____ day of _____ 20 _____

NOTARY PUBLIC FOR SOUTH CAROLINA

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

11-121145 August 25, 2011 Beginning time : 15:32 hrs. JA

erry Leonard Allen Jr. JA

Investigator H.C. Hammett *449/613 JA

do hereby give freely and voluntarily this statement to
and Investigator C.T. Miller *545/614 JA

who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 24 JA years old, and I reside at: 196 Long Shoals Road Marietta, S.C. 29661. Phone # 434-0045 JA

I have a 7th JA grade education, and I can read and write.

Additional particulars on statementee : Date of birth February [REDACTED] / Ssn [REDACTED] / I completed the seventh grade in school and was working on my GED. I can read and write definitely and I understand and know what I am doing. I am not currently under the influence of drugs or alcohol. I am currently an inmate at the Greenville County Detention Center and have been charged with murder. I got word to the detectives that I wanted to talk to them again about the Charlie Roberts case. Frank Epps is not my attorney but he is the attorney that I called when I turned myself into the Sheriff's Office and he went there with me. Frank Epps told me that he was going to make sure that I never got a bond and that I was pretty much buried so I don't want him representing me. Right now I do not have an attorney representing me but I wanted to tell the truth about what happened. I have not been promised or threatened in any way for this statement and I am giving this statement freely and voluntarily. I am allowing Investigator Hammett to type this statement for me as I tell it to him JA

This all started probably about a month before the disappearance of Charlie Roberts. That was the night when JoBo (William Phillips) threatened to beat Charlie's ass. That's when the police got involved and they got on the phone with JoBo. After that night everything was supposed to be good between Charlie and JoBo. They started going to the races up in TR and that's when JoBo was trying to supposedly be Charlie's friend. That's when I kept hearing JoBo talking about having Charlie killed. A couple of weeks went by and that's when I noticed JoBo had bought a .380 pistol. JoBo showed me the pistol and it was a black .380 Hi Point pistol. Another week went by and that's when JoBo got more agitated about Charlie seeing Christina and JoBo said he had to do something. That's when I started seeing JoBo acting kind of weird. The next week went by and JoBo told me come on we're going to get Charlie and get him by himself and get rid of him. JoBo then called and said he needed him to take him somewhere to get an alternator for his van. JoBo called Charlie from his cell phone on the morning of the 1st of July and asked Charlie to take him to get the alternator. I drove JoBo's van and dropped JoBo off at the end of Lion's Park Road and he walked to Charlie's house and met Charlie at the mailbox. JoBo told me he wanted me to drop him off so that Charlie would think the van wasn't running. I didn't want to do this but I felt obligated to JoBo because he gave me a place to stay and money to buy drugs. I felt like I was indebted to JoBo. I actually seen Charlie standing at his mailbox and saw JoBo walk up to him there. I left there and went back to JoBo's for a few minutes. JoBo called me on my phone which was a prepaid phone and told me to meet him over at Carl Rider's old house where it had burnt down. I drove to Ingle's and parked in the parking lot and walked over to Carl's place. I didn't drive over there because only one car could get in the drive at the time because a tree had fallen. I got there and saw a truck parked in the driveway. It was Charlie's truck. I had seen Charlie's truck before so I knew it was his. It was a goldish color truck. There was no one in the truck when I got there. I walked on down right up under the shed and Charlie and JoBo were under the shed. Charlie turned his back to JoBo and started walking another direction and about the time I looked up I seen JoBo pointing the .380 pistol at the back of Charlie's head. That's when I got stunned and scared and didn't know what to do. When I heard the gunshot I was looking in that direction and I saw JoBo shoot Charlie in the head. I took off running back towards Ingle's and got in the van and hauled ass back to the house. That's when I got a phone call from JoBo to meet him up in River Falls on Gap Creek Road. I drove JoBo's van up there and met him while he was walking. I picked him up by a light pole. Then we went and met a dope dealer. I bought a gram of dope and went back to JoBo's. I was scared shitless and took a bunch of Xanax's and Roxy's and Loritabs. I got myself pretty much blitzed. When Charlie was shot we just left him laying in the shed. I knew he was dead when we left, he wasn't breathing or moving. About a week after that JoBo realized that we couldn't leave his body in the open so he said we need to go back and moved the body. We drove JoBo's van back to the area of Rider's place and parked down the road and walked to where Charlie was so it wouldn't be suspicious. Me and JoBo drug Charlie to the creek bed and threw him in the creek and covered the body with dirt to hide it. The body was real bloated and had a bunch of bees and flies and maggots all over it. I got really sick and threw up while I was moving the whole way down. It JA

I have read the above statement of 2 pages and it is true and correct as best I recall.

WITNESS:

H.C. Hammett *449/613

C.T. Miller *545/614

JA

I HAVE RECEIVED A COPY OF THIS STATEMENT

JA Jerry Allen

Sworn before me this day of 20

NOTARY PUBLIC FOR SOUTH CAROLINA

OF

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

11-121145 August 25, 2011 Beginning time : 15:32 hrs. JA

2
second

(62)

by Leonard Allen Jr. JA
Investigator H.C. Hammett *449 / 613 JA

do hereby give freely and voluntarily this statement to
and Investigator C.T. Miller *545 / 614 JA

who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 24 years old, and I reside at: 196 Long Shoals Road Marietta, S.C. 29661. Phone # 434-0045 JA

I have a 7th grade education, and I can read and write.

helled really bad, it was probably one of the worst smells I have ever smelt. I took a handful of totem poles just to get the nerve up to go
love the body. After that we went back to JoBo's and never spoke of it again. I stayed in the bedroom by myself for a while in the dark
ecause I was too scared to come out and I didn't know what to think JA

hen JoBo found out from Carl Rider and the news that a body was found on Carl's property and that's when JoBo freaked out and talked me
to taking the blame for the murder. Me being a drug addict it helped influence me to do it because JoBo gave me close to \$500.00 in cash
ver a period of time. I wasn't in my right mind or I wouldn't have agreed to it. JoBo pretty much kept freaking out about it until I offered to take
ie rap for it. He kept saying I can't go down, I've got kids and stuff like that. Being out of my mind I offered to take the rap for it because of
ie money and drugs. The day the body was found JoBo told me to take the gun he shot Charlie with and a 9mm pistol and get rid of them. I
ook the guns down to the shoals on Long Shoals Road and buried them on a sandbar next to the river. I also took several other shotguns and
id them behind JoBo's house. There were three 12 gauges, a 410 bolt action and a 22 rifle. One of the shotguns was a sawed off shotgun. After
at I went back to the house and called Frank Epps and told him I killed Charlie and that I wanted to turn myself in. Frank asked me if I could
urn myself in that night and I asked him if I could have one last supper and a good breakfast before I turned myself in and he told me to meet
im at Judge Cagle's office at 9:30 in the morning that next day. That's when I turned myself in and gave a statement to Investigator Miller.
hat's about it when I ended up here. I didn't shoot Charlie but I did witness JoBo do it. Christina doesn't know anything about this and there is
obody else involved in this but me and JoBo. There was nobody else there when Charlie was shot or when we moved the body and nobody
s about it except me and JoBo that I know of. The only thing JoBo never said anything to Charlie when he shot him. JA

***** END OF STATEMENT *****

Ending time 4:55 PM JA

This is all the truth I know about this case
Jerry Allen

I have read the above statement of 2 pages and it is true and correct as best I recall.

WITNESS:

[Signature] *449/613
[Signature] *545/614

[Signature]

I HAVE RECEIVED A COPY OF THIS STATEMENT

[Signature]

Sworn before me this _____ day of _____ 20 _____

NOTARY PUBLIC FOR SOUTH CAROLINA

OF

103



STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

29 JA 3 third
11-121145 August 28, 2011 Beginning time : 13:40 hrs. JA

I, ry Leonard Allen Jr., do hereby give freely and voluntarily this statement to
Investigator H.C. Hammett *449 / 613 JA and Investigator C.T. Miller *545 / 614 JA

A who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 24 JA years old, and I reside at: 196 Long Shoals Road Marietta, S.C. 29661. Phone # 434-0045 JA

I have a 7th JA grade education, and I can read and write.

A Additional particulars on statementee : Date of birth February 27, 1987 / Ssn 255-71-1166 / I completed the seventh grade at Thomasville Central Middle School in Thomasville, Ga. I can read and write and I understand and know what I am doing. I am not currently under the influence of drugs or alcohol. I have not been promised anything or threatened in any way for this statement and I am giving this statement freely and voluntarily. I am allowing Investigator Hammett to type this statement for me as I tell it to him. I am currently an inmate at the Greenville County Detention Center and I do not have an attorney at this time. I am willing to speak with Investigator Hammett without a lawyer at this time. JA

A This all started when JoBo (William Joe Phillips) found out that Christina Gentry, JoBo's baby's mother and my sister, was dating Charlie Roberts. JoBo was mad as hell about it and he wanted to put on a front about it for a couple of weeks and make it seem like he was Charlie's best friend to make everybody believe he wouldn't kill Charlie. JoBo kept putting a front on and Christina even thought they were best friends. A couple of weeks went by and JoBo bought a .380 pistol. I don't know who he got it from. JoBo kept saying he had to do something to get rid of Charlie because he loved Christina and had never felt that way about a woman before. A few hours went by and I started thinking on it so I volunteered myself to shoot Charlie. I told JoBo I would shoot Charlie for him and JoBo said you can't choke on me, you gotta do this. So after a couple of days I went to Charlie's house about 5 am in the morning and was gonna break in the window. JoBo drove me over to the end of the road Charlie lived on and let me out and I went down and got in between a building and the house and waited. I was gonna go in the house and be waiting for Charlie when he came home. Then I was gonna take and wrap it around his neck after I held him at gunpoint to break his neck. Then after that I choked and didn't break in the house. I ran back up to the end of the road and called JoBo to pick me up from the little AT and T prepaid phone I had. I ran all the way to the end of Lions Park Road and there's a little dirt road in the woods right there and I waited there for JoBo to pick me up. JoBo picked me up and we left. I went and smoked a lot of ice and did a few pills and got my guts up and went back to Charlie's after daylight. I went into the woods across the road from Charlie's and waited for Charlie to pull up. I was gonna run up to him and catch him at gunpoint and make him go in his house but I never made it out of the woods because I choked again. Then I walked all the way back to Chestnut and down 276 to Long Shoals. I went in the house and woke JoBo up and told him that I had choked again. JoBo said he was real disappointed and asked me if he got me alone with Charlie would I choke and I said no that I would shoot him. That's when JoBo called Charlie the same morning and bullshitted with him for a minute. This was right after Charlie had got home from work because I saw Charlie pull up at his house while I was waiting in the woods. It was about 9:00 or 9:30 in the morning when JoBo called Charlie. JoBo asked Charlie if he could take me to get an alternator for the gray van which wasn't tore up. Charlie said yes that he was getting ready to go to bed but that he would take me. JoBo told Charlie to give me a few minutes and that I would be up at Charlie's. JoBo took me to Lions Park, the road Charlie lives on and dropped me off at the end of the street and I walked to Charlie's and he met me at the mailbox. That's when I offered Charlie \$10.00 for gas and he told me don't worry about it. We got in Charlie's truck and I directed him where to go. I directed Charlie to drive to Carl Rider's old place across from the Ingle's. I told him to bust a right at the Ingle's and it would be the first right in the curve. Me and JoBo had already made the plan to get Charlie to Carl's place so I could get him alone and pop him. On the way over there we were talking about fishing and hunting and Charlie said he hadn't been hunting last year so we were getting alone and I told Charlie there was a deer stand and feeder at Carl's. So when we got up there there was a tree in the driveway. I said hold on I'm gonna have to walk down there and Charlie volunteered to walk with me after I told him he might have to walk with me to look for the alternator. We got down in there and I said it's supposed to be in one of these buildings or sheds and we started looking around. JA

I have read the above statement of 3 pages and it is true and correct as best I recall.

WITNESS:

H.C. Hammett *449/613
C.T. Miller *545/614

+ Jerry Allen
I HAVE RECEIVED A COPY OF THIS STATEMENT
Jerry Allen

Sworn before me this 29th day of August 20 11

NOTARY PUBLIC FOR SOUTH CAROLINA



WJA MCE: 9/10/13

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

11-121145 August 29, 2011 Beginning time: 13:40 hrs. JA

ry Leonard Allen Jr. JA do hereby give freely and voluntarily this statement to
Investigator H.C. Hammitt *449/613 JA and Investigator C.T. Miller *545/614 JA

who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 24th years old, and I reside at: 196 Long Shoals Road Marietta, S.C. 29661. Phone # 434-0045 JA

I have a 7th JA grade education, and I can read and write.

Charlie started with me where I was looking in the building. I pretended to look and I stepped into one of the buildings and cocked the gun. The gun was a Hi Point .380 semi automatic that was black in color with a silver streak below the slider. That was the same gun that JoBo had given me before to shoot Charlie with. We supposedly couldn't find the alternator so that's when I got Charlie's attention over to the big shed. I told Charlie it might be in there and we walked in there and I pretended to look for the alternator. That's when Charlie said I doubt it'll be in there. I said somebody must have lied then so Charlie started walking off towards the right hand corner of the building and he turned his back to me and that's when I pulled the gun out and shot Charlie in the back of the head. When I saw him laying on the ground blood was coming out of the front of his head. I just shot him once from about fifteen to twenty feet away. I freaked out after the gunshot and ran to Charlie's truck. That's when I looked for the keys to the truck and they weren't in the truck. So I went back to Charlie and rolled him over and got the keys out of his pocket and grabbed his cell phone too because JoBo had wanted me get the phone so he could look through it and see what kind of messages was sent between Charlie and Christina to see if she said she loved Charlie or they were fucking. I got Charlie's wallet too and got in the truck panicking and couldn't get the truck started because I was flipping out. When I finally got it started I was barking tires leaving out of there and I got on 276. I passed Ingles and called JoBo from Charlie's phone and asked him where he wanted me to put the truck at. JoBo told me to go up to the end of Gap Creek Road that there was a pull off spot. JoBo said it was steep and you could run the truck off of the bank. So I pulled up at a different spot above where he was talking about. I pulled up behind a little road bed behind a hill in the bushes. I grabbed a camoflauge cloth and started wining the truck down. After that I walked about a quarter of a mile down the road to a light pole and got in the bushes and called JoBo.

JoBo to come pick me up alone. That's when he got his momma, Jimmy Poole and Billy, JoBo's youngest son, and they came and picked me up in JoBo's momma's black Nissan Maxima. Joanne, JoBo's mother was driving, Jimmy Poole was in the passengers seat up front and me and JoBo were in the backseat and Billy was between us. When I got in the car I still had the gun and it was stuck down in my pants so you couldn't see it. I had a black ET shirt, black pants, and brown boots on. The shirt was the same shirt I used to wrap the gun with when I buried. I burnt the pants and boots. After they picked me up we rode around and looked for Jimmy's motorcycle. So after that we went back home and we left again and I still had the gun. I kept it with me all the time for about a month after that. We went and I bought some ice, probably about \$40.00 worth. When we got home I gave JoBo Charlie's phone and he looked through it for any messages and didn't find any and he broke the phone and buried it behind Snuffy's house. I saw JoBo bury the gun while I was sitting on his back porch. Everybody with JoBo thought they were picking me up from doing some electrical work in River Falls. I threw Charlie's wallet in the river up in River Falls. JA

I drug him to the creek bed JA

About a week after I was still fucked up on dope and pills and me and JoBo went back to where the body was and JoBo dropped me off. I drug the body to the creek bed by myself. The body was bloated and had maggots and flies and bees around it. I didn't look at the face because I was scared to. I grabbed him by his pants legs at his feet and drug him. I covered the body up with a yellow round shovel and I was wearing read and black gloves and a black long sleeve shirt. All that shirt's back in the woods about two hundred yards. I took it all off there and walked back down White Horse Extension and made my way to a phone. I called JoBo's phone from the Spinx and I seen Gerald Childs in the parking lot. He was helping a girl get her car unlocked and he asked me if I needed a ride home and I said yes and he took me home and I woke JoBo up and told him I buried the body. After that I was back to my regular routine. I just want everybody to know that Charlie was a good guy from what I know and in my sober state I would have never shot him and I'm sorry. I felt like I was indebted to JoBo for everything he had done for me so that's why I shot Charlie Roberts. JoBo also paid me around \$500.00 in all to JA

I have read the above statement of 3 pages and it is true and correct as best I recall.

WITNESS.

x Jerry Allen

I HAVE RECEIVED A COPY OF THIS STATEMENT

x Jerry Allen

Sworn before me this 29th day of August 2011

NOTARY PUBLIC FOR SOUTH CAROLINA

OCR

MCE: 9/10/13

05

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

11-121145 August 29, 2011 Beginning time : 13:40 hrs. JA

I, ty Leonard Allen Jr. JA, do hereby give freely and voluntarily this statement to
Investigator H.C. Hammett *449 / 613 JA and Investigator C.T. Miller *545 / 614 JA
who have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South
Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can
be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney
of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent
me. I have not been threatened or promised any reward to make this statement. JA

I am 24 JA years old, and I reside at: 196 Long Shoals Road Marietta, S.C. 29661. Phone # 434-0045 JA

I have a 7th JA grade education, and I can read and write.

JA kill Charlie. JoBo gave me money over time to go buy dope and pills or whatever I wanted to satisfy me. JoBo also paid me money to
confess to killing Charlie to keep him out of it. JoBo put me up to killing Charlie over Christina because he was in love or infatuated
with Christina and he didn't want nobody messing around with the love of his life. JA

JA The day the body was found I dropped Christina off at work and JoBo was with me. We talked about me turning myself in and I told
him I would but just give me some money for some Roxy's and some dope and JoBo did. He gave me the money to get the stuff and I
stayed up all night smoking dope. I did call Frank Epps and told him I was going to turn myself in and he told me to turn myself in
at 9:30 the next morning. That same day I went and buried the guns because JoBo was afraid the police were going to come to his house
so I buried the guns beside the river. This is my true statement and there is nothing else to tell that I know of. The other two statements I
gave are partly false. I didn't tell the truth then cause I was scared but this is the truth as God as my witness. JA

***** END OF STATEMENT *****

This is my true statement this is every thing i know and
have to say about this case JA

Pending time 3:33 PM JA

I have read the above statement of 3 pages and it is true and correct as best I recall.

WITNESS:

H.C. Hammett *449 / 613

C.T. Miller *545 / 614

X Jerry Allen

I HAVE RECEIVED A COPY OF THIS STATEMENT

X Jerry Allen

Sworn before me this 29th day of August 20 11

NOTARY PUBLIC FOR SOUTH CAROLINA

OF

WJ mcb: 9/10/13

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

66

William J. Phillips) C/A No.2017-CP-23-4462

Applicant,)

-vs-)

CERTIFICATE OF SERVICE

State of South Carolina)

Respondent,)

The undersigned hereby certifies he has served a true and correct copy of the enclosed, Opposition and Reply to the Court's Conditional Order, Post Conviction Relief Amendment on the parties and persons whose names and addresses appear below.

This was done by placing the aforesaid in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this _____ day of December, 2018.

Those Served:

DeShawn H. Mitchell
Assistant Attorney General
P.O. Box 11549
Columbia, SC. 29211

Respectfully Submitted,

/s/ William J. Phillips
William J. Phillips

Applicant, pro-se

Paul B. Wickensimer
Clerk of Court, Greenville County
305 East North Street; Room 224
Greenville, SC. 29601-2121

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 13th DAY OF December, 2018

Nancy C. Merchant
NOTARY PUBLIC

MY Comm. Expires 1-23-2023

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

C/A No. 2017-CP-23-4462

67

William J. Phillips -- Applicant,

-vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Applicant's Objection and Reply to respondent's Proposed Final Order on attorney for Respondent, Assistant Attorney General Kelly Oppenheimer, P.O. Box 11549, Columbia, SC. 29211, via U.S. Mail properly addressed, first-class postage affixed this ___ day of January 2019.

Sworn to and Subscribed Before Me

Respectfully Submitted,

This 7 day of January, 2019

/s/ William Phillips
William J. Phillips

Tamara Conwell
NOTARY PUBLIC

MY COMM. EXPIRES My Commission Expires
September 25, 2023

RECEIVED

JAN 07 2019

P.C.I. MAILROOM

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

68

C/A No. 2017-CF-23-4462

William J. Phillips -- Applicant,

-vs-

State of South Carolina -- Respondent,

APPLICANT'S OBJECTION AND REPLY
TO RESPONDENT'S PROPOSED FINAL ORDER

William J. Phillips
SCLC# 355787
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Applicant, pro-se

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

69

William J. Phillips) C/A No. 2017-CF-23-4462
Applicant,)
-vs-) APPLICANT'S OBJECTION AND REPLY
State of South Carolina) TO RESPONDENT'S PROPOSED FINAL
Respondent,) ORDER
_____)

INTRODUCTION

COMES NOW, above captioned Applicant, William J. Phillips, pro-se, respectfully lodging his Objection and Reply to Respondent's wholly inadequate and misleading proposed Final Order (hereafter "PFO") that was submitted to the Court December 27, 2018, and was received by Applicant January 2, 2019 via Institutional Legal Mail.

Applicant submits the Court should not sign Respondent's PFO in that the PFO is deficient as a whole and resembles more of a recitation of Respondent's initial argument in their Return and not a finding of fact and conclusions of law by the Court based on the record.

Respondent's PFO erroneously states "Applicant alleges prior post-conviction relief counsel was ineffective for filing a " cursory blanket PCR amendment " in which counsel Richey raised thirty-one (31) allegations without ever speaking to Applicant." PFO at p.2. To the contrary, this statement is erroneously articulated by Respondent. Applicant never claimed Richey was

70

ineffective [for] filing a cursory blanket amendment. Applicant in his statement of facts recited the fact that Richey after being appointed filed a blanket cursory amendment raising 31-allegations.

Respondent's PFO purports a deliberate deceptive and erroneous finding as that of the Court's. Specifically the Respondent's PFO states: "Applicant wholly fails to provide the Court with any reason why these allegations could not have been raised in his prior application for post conviction relief." PFO at p.3. To the contrary of Respondent's talismanic statement, Applicant's Opposition to the Conditional Order provided the Court with articulated, specific factual allegations and controlling citations of authority.

The Respondent's PFO suggests and inadequate and inaccurate finding "The Court finds no reason why Applicant could not have raised these claims in his previous state post-conviction relief action and/or federal habeas actions -- and indeed it appears Applicant has raised many, if not all, of these allegations." PFO at 3. This statement is profoundly misleading and not supported by the record in any manner at all. First, Applicant did provide sufficient reasons why the claims presented here were in fact not raised in the prior PCR applicant. Secondly, Respondent's PFO finding as to Applicant's "federal habeas action" has no direct correlation or application to the allegations, arguments, pleadings at hand. Thirdly, Respondent's PFO purports to supply a deliberate inaccurate, false and misleading finding, "and indeed it appears Applicant has raised many, if not all, of these allegations in prior actions." PFO at p.3. Respondent has no

business manipulating and creating intentional deceptive findings that are in no means correct or true. (emphasis added and supplied).

The Respondent's PFO, again makes an erroneous finding "In his amendment" to the application for post-conviction relief, Applicant wholly fails to provide this Court with any reasons why these allegations could not have been raised in his prior application for post-conviction relief." Respondent is correct that Applicant did not provide an argument in his "amendment", and that's because Applicant provided the Court with his reasons in his Opposition and reply to the Conditional Order. It is also entirely possible the instant allegations could have been raised in his first PCR application, had State statutory appointed (Rule 71.1(d), SCRCP) PCR Counsel "ensured" "all" ground for relief were included in the original, supplemental and amended PCR application, in which PCR Counsel failures in this regard are the basis for arguing them now which PCR counsel should have done then.

Respondent's PFO provides and erroneous finding "It is clear Applicant "enjoyed a complete adjudication" on the merits of his original application - "one full bite at the apple." PFO at 4. Applicant submits he only received a bite at the [one] issue raised by PCR Counsel and the Attorney General which is not a "full bite" which fundamentally would include "all the available grounds" as contemplated by Rule 71.1(d), SCRCP.

: Applicant submits a fair reading of the record and pleadings in this matter supports a finding Applicant has made a prima

(72)

facie showing he is entitled to relief, regardless of Respondent's assertion in the PFO "the Applicant has failed to make such a finding based on the information set forth in his responses, and therefore he is not entitled to an evidentiary hearing in this matter and the Court finds no reasons why the conditional order of dismissal should not become final." PFO at 5. To the contrary this finding is refuted by the underlying record, and pleadings.

Applicant would suggest the Court should not sign Respondent's wholly inadequate, deficient, misrepresented and misleading PFO which is not a finding of fact and conclusion of the law by this Court but merely recitation of Respondent's previous argument in an attempt to bolster and reargue their position. Respondent's PFO fails to address or articulate any rationale that the claims presented by Applicant do not have merit.

Applicant submits the Court should not sign Respondent's PFO that was not asked for by the Court, but was inadvertently advanced by Respondent's erroneous representation as a finding of this Court and gain a second chance to argue their initial Return and Motion to Dismiss.

A hearing should be convened into this matter at the Court earliest convenience in the interest of justice and fairness. Applicant's case meets that limited exception and is a rare case.

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CONCLUSION

Respondent's PFC should be rejected and Applicant would request the Court make it's own findings which accurately reflect findings of the Court and not misstatements and findings conjured by Respondents and a hearing should be convened in this matter.

Respectfully Submitted,

/s/ William Phillips

William J. Phillips

Applicant, pro-se

RECEIVED

MAR 07 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 07 2019

Appeal from Greenville
County Court of Common Pleas
[C/A No.2017-CP-23-4462]

S.C. SUPREME COURT

William Phillips -- Appellant,

-vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Written Explanation and Record on Appeal on the attorney for Respondent, DeShawn H. Mitchell, Assistant Attorney General, P.O. Box 11549, Columbia, SC. 29211 this 28 day of February, 2019, by placing the aforesaid in properly addressed, first-class postage affixed envelope and placed in the U.S. Mail the same day stated herein.

Those Served

SC. Supreme Court
Mr. Daniel Shearouse, Clerk
P.O. Box 11330
Columbia, SC. 29211

Assistant Attorney General
DeShawn Mitchell
P.O. Box 11549
Columbia, SC. 29211

Respectfully Submitted,

/s/ William Phillips
William Phillips, pro-se

Sworn to and Subscribed Before Me

This 28 day of February, 2019

Tamara Conwell
Notary Public

My Comm. Expires My Commission Expires
September 25, 2023

RECEIVED

FEB 28 2019

P.C.I. MAILROOM

n Phillips

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Can. Inst.
Elam Rd.
SC 29169

RECEIVED

MAR 04 2019

P.C.I. MAILROOM

Daniel Shearouse, Clerk

S.C. Sup. Court,

P.O. Box 11330

Columbia, SC

29211