STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	
	)	
	)	
	)	2012-CP-16-814
Timothy Michael Farris,	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	REPLY TO STATE'S OPPOSITION TO
State of South Carolina,	)	MOTION TO ALTER OR AMEND ORDER
	)	PURSUANT TO RULE 52(b)
Respondent.	)	AND RULE 59(E), SCRCP
	)	
	)	

This is in reply to Respondent's opposition to the Motion to Alter or Amend. The opposition is based on two primary grounds, hybrid representation and timeliness, and several lesser issues.

I. HYBRID REPRESENTATION

1. Hybrid representation does not exist when, as here, the attorney of record abandons the Applicant.

2. Tristan Shaffer, attorney of record and PCR counsel, did not contact his client once after the July, 2014 Evidentiary Hearing, and did not contact him after the Order to Dismiss was filed on December 19, 2014.

3. Throughout these months, PCR counsel did not respond to phone messages.

4. Shaffer did not respond to text messages. (*see*, attached text logs)

5. Shaffer did not reply to a letter from the Applicant asking if he would file a notice of appeal. "[I]t is appointed counsel's duty in PCR matters to serve and file the notice of appeal."[1]

[1] *Dennison v. State*, S.C.S.C. (Order, 2006).

6. The Order of Dismissal notified PCR counsel that "Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of notice of entry of judgment." It also noted, "Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief," and that "PCR counsel must serve and file a notice of appeal on Applicant's behalf." Apparently, PCR counsel had no intention of doing any of these required tasks.[2]

7. PCR counsel signed his own Motion to be Relieved on November 11, 2014 but did not serve or file it until January 7, 2015. Similar to *Mackay*, whose lawyer failed to notify the court of his intention to withdraw, this Applicant was deprived of the opportunity to proceed *pro se* and to personally receive docket notifications from the court.[3]

8. In order to timely file *pro se*, the Applicant asked attorney Shaffer for the mailing date of the notice of filing of the Order to Dismiss. It was imperative to know this, in order to calculate when a response was due. This time Shaffer replied. His text message: one word. "Recently." (*see* attached text logs) His refusal to be specific made it impossible to know the deadline for filing any motion or notice of appeal.

9. As in *Maples*, this Applicant was "left without any functioning attorney of record."[4]

10. Attorney Shaffer's refusal to reply to the Applicant's letter asking him to file a notice of appeal and his subsequent failure to file a notice are emphatic evidence of abandonment. "A lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner [citation].[5]

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[2]This pattern is similar to that of the attorney in *Holland v. United States*, 130 S.Ct. 2549 (2010).

[3]*Mackay v. Hoffman*, 682 F.3 1247 (9th cir. 2012).

[4]*Maples v. Thomas,* 132 S. Ct. 912 (2012).

[5]*Strickland* v. *Washington,* 466 U. S. 668

11. The U.S. Supreme Court held that attorney abandonment is an "extraordinary circumstance" that may excuse a procedural default caused by the abandonment during the state habeas proceedings.[6]

14. Due to repeated failed attempts to contact attorney Shaffer, on November 10, 2014 the Applicant filed a *pro se* Motion to Relieve Counsel. It was ignored by the Court.

15. When a friend noticed on the Public Index that the Court's Order of Dismissal was filed on December 19, 2014, the Applicant panicked. He knew the clock was ticking for any motion that might be filed. Yet he could not get a response from attorney Shaffer.

16. On January 2, 2015 the Applicant filed a second Motion to Relieve Counsel, adding the label, "Emergency." It was an emergency because, unless his *pro se* status was restored, the Applicant would be denied his right to access the courts. The Court ignored this motion, as well.

17. On January 7, 2015 attorney Shaffer filed his Motion to be relieved. When it, too, appeared to be ignored, the Applicant sent a letter directly to Judge Burch, as chief administrator for the Fourth Circuit, requesting that he act on the Motion to Relieve Counsel. He also asked for the Order to be back-dated so that the *pro se* Motion to Alter or Amend (served on January 7 and filed on January 9, 2015) would be accepted. It did not occur to him to ask for equitable tolling.

18. Finally, on January 21, 2015, the Court consented to the requested relief but did not back-date the order. And it did not occur to the Court to extend equitable tolling *sua sponte*.

19. It should be obvious that this is not hybrid representation. The Applicant was not represented.

20. Once the Applicant was officially *pro se*, hoping to prevent the loss of his rights he again served and filed the Motion to Alter or Amend and also served and filed a Notice of Appeal.

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[6] *Maples v. Thomas,* 132 S. Ct. 912 (2012).

21. The Applicant requests this court to consider equitable tolling of his *pro se* pleadings. "A 'petitioner' is 'entitled to equitable tolling' if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing.'"[7]

22. The equitable principles recognized in *Maples*, *Holland* and *Mackay* warrant relief based on attorney abandonment.

II. TIMELINESS

1. The *pro se* Motion to Alter or Amend, served on January 7, 2015, was timely. "A motion under Rule 59(e) is timely if it is `served not later than 10 days after receipt of written notice of the entry of the order."[8]

2. The Respondent's timeliness argument ignores the fact that weekend and holidays when courts are closed do not count. Therefore, ten days after the December 19, 2014 filing of the Order is January 9, 2015. Add two days for delivery of the notice of filing to attorney Shaffer, and the Motion to Alter or Amend, served on January 7, clearly meets the deadline.

3. But attorney Shaffer did not notify the Applicant. Nor did he make any effort to comply with the requirements of appointed counsel described in *Dennison*, supra.

4. Similar to *Martinez v. Ryan*, this Applicant "has been denied fair process and the opportunity to comply with the State's procedures and obtain adjudication on the merits of his claim."[9]

5. The denial of fair process pervades this entire case. There are constitutional

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[7] *Holland*, supra, n.2, citing *Pace* v. *DiGuglielmo*, 544 U. S. 408, 418.

[8] *USAA Property and Casualty Insur. Co. V. Clegg*, 377 S.C. 643 (2008), 661 S.E.2d 791.

[9] 132 S.Ct. 1309 (2012).

violations throughout, from the defective arrest warrant to the illegal extradition from North Carolina, to the attorney general's office refusing to appoint counsel for the PCR, despite knowing he had been denied a direct appeal and qualified for an Austin appeal. Then it took three requests and notice of intent to file for mandamus relief before an attorney was appointed. Unfortunately, the PCR attorney was Tristan Shaffer.

Then the refusal of the court to relieve the Applicant of this faux representation and, finally, an Order of Dismissal, rife with errors of law.

III. ALL OTHER ALLEGATIONS

Cut-and-paste was used by this court when it stated, "As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations."[10]

Not only was evidence presented–exhibits filed in August 2013 with the Motion for Summary Judgment–but the South Carolina Supreme Court has repeatedly chastised courts for the use of this paragraph as a substitute for addressing issues. Too often the justices must remind courts, "This paragraph does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law. This language should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented."[11]

This court should amend its order to address all allegations and evidence in the Motion for Summary Judgment. The PCR counsel was derelict at the hearing, as well as afterward. The Applicant's future should not be determined by the acts and omissions of an attorney who has

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[10] *Marlar v. State*, 375 S.C. 407 (2007), 653 S.E.2d 266.

[11] *Id.*

demonstrated the pattern of behavior summarized here.

If this court is willing to revise and reissue the final judgment, while doing so kindly attend to the errors of law. This will save time and resources for the courts as well as the Applicant.

If this is not done, it would be prudent to expect remand from the Supreme Court, demanding specific rulings from the PCR judge.[12]

IV. ERRORS OF LAW

To paraphrase federal Judge Robert Holmes Bell, "This is what happens when you take judging, which is a judge's job," and you give it to prosecutors to write the judge's opinions.[13] If the court chooses to amend its Order to address the ignored issues and exhibits, it should take time to correct these errors of law, which do prejudice the Applicant.

The Order drafted by the prosecutor states that the court reviewed Applicant's *pro se* filings. That's it. One sentence (p.3, p1). And the Order claims–falsely–"the Applicant failed to present any evidence regarding such allegations." This is on p.13, in the paragraph entitled "All Other Allegations."

Let's begin with the arrest warrant. The court cites *U.S. v. Ventrusca* to support the conclusion "no facial deficiencies." The warrant in *Ventrusca* is far more detailed than Exhibit B of the Motion for Summary Judgment. Moreover, *Ventrusca* requires "an affidavit [that] must recite the underlying circumstances, and not mere conclusions as to probable cause, the affidavit must be tested in a common sense way."[14] Does this appear to meet those requirements?

SGT. JOHN SPECHT, A HARTSVILLE POLICE INVESTIGATOR STATES TO THE AFFIANT

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[12] *Id*.

[13] *U.S. v. Grossman*_____(W.D. Mi. 2007).

[14] *U.S. v. Ventrusca*, 380 U.S. 102, 108-9 (1965).

THAT THE DEFENDANT, TIMOTHY MICHAEL FARRIS, DID IN THE CITY OF HARTSVILLE, DARLINGTON COUNTY, ON OR ABOUT THE DATE OF MAY 17, 2008, COMMIT THE OFFENSE OF CRIMINAL SOLICITATION OF A MINOR IN THE FOLLOWING PARTICULARS: THAT THE DEFENDANT (TIMOTHY MICHAEL FARRIS) DID KNOWINGLY CONTACT AND COMMUNICATE, VIA THE INTERNET, WITH A PERSONAL REASONABLY BELIEVED TO BE UNDER THE AGE OF SIXTEEN. WITH THE INTENT OF PERSUADING, INDUCING, ENTICING OR COERCING THE PERSON TO ENGAGE OR PARTICIPATE IN SEXUAL ACTIVITY. THIS PERSON WAS AN UNDERCOVER OFFICER, USING A DECOY ACCOUNT OF A THIRTEEN YEAR OLD FEMALE NAME "ALLIE", WHICH WAS SET UP AND OPERATED BY LAW ENFORCEMENT. THIS INCIDENT OCCURRED AT 626 NORTH FIFTH STREET.[15]

Now examine this affidavit through *Giordenello*, cited in the Motion for Summary Judgment, which found "the arrest warrant was defective on any of several grounds." *Giordenello* denounced an affidavit based on "*suspicions* of petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, *none of whom either appeared before the Commissioner or submitted affidavits*.[16] (Italics added)

How could attorneys Little and Swilley (and the PCR court) believe the arrest warrant was valid in North Carolina? Upon what authority does this court approve the extradition of an unindicted suspect from his North Carolina home to a jail in Darlington, South Carolina? The Respondent's reply repeats that *Spiker v. Com*. is an excuse for illegal extradition.[17] To shore up that defense, the Reply suggests looking at other jurisdictions cited in *Spiker*. But the other states

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[15]Copied with errors from Exhibit B, filed with the Motion for Summary Judgment.

[16]*Giordenello v. United States*, 357 U.S. 480 (1958).

[17]711 S.E.2d 228, Va. Ct. App. 2011).

similarly address counties within their own state–not an invalid arrest warrant that limits the officer to his own state, not the kidnapping of an unindicted suspect from another state. If federal law allowed such seizures, every person who lived near the border of a neighboring state would be at perpetual risk.

Ironically, *Spiker* is an excellent reference–but not for the reasons the Respondent advances. Contrast the Applicant with George Spiker, a 55-year-old man who solicited minors. For this purpose, he used the internet name "Mustangman." The *Spiker* court had proof the defendant "groomed" the decoy with offers of gifts, and sent photos of his genitals. George Spiker proposed meeting with the person he believed to be a 13-year-old girl, and was nabbed by the police when he went to the meeting place. Each of these elements is missing from the case against the Applicant.

At sentencing the jury learned that George Spiker had a previous conviction in another state for second degree sexual assault of a minor. George Spiker is a villain. He needed to be locked away.

Unlike Spiker, the Applicant was a 20-year-old who had never been indicted anywhere. The police officer acted on suspicion, but never had evidence of a crime.[18] There was no evidence in the chats that he claimed to be thirteen, no plans to meet, etc.[19] How could this court choose to ignore the complete lack of evidence, unless denying post-conviction relief was a foregone decision?

The failure of attorneys Little and Swilley to investigate–words uttered in self defense and contradicted by evidence (i.e., the arrest warrant, the empty spaces on the Fugitive Waiver, the two dozen-plus IP addresses used by the Yahoo account, etc.)–did this prejudice the Applicant?

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[18] See, *State v. Barksdale*, 428 SE 2d 498 (Ct. Appeals, 1993). ("The State is required to prove every element of the crime for which an accused is charged. *Jackson v. Virginia,* 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Mere suspicion alone is insufficient to send the case to the jury. There must be substantial evidence which reasonably tends to prove the guilt of the accused. [citations]")

[19] Exhibit O, Motion for Summary Judgment is a print from of the video screen shots PCR counsel did not introduce.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Was the Applicant prejudiced by the failure of any public defender to contact him for more than a year after his arrest? Was he prejudiced by their failure to explain his rights to him? Was he prejudiced by their warning that if he did not appear for all court dates he would be re-arrested? Was he prejudiced by their failure to challenge personal jurisdiction? Was he prejudiced by their failure to investigate?

Was he prejudiced by their failure to discuss the case with him, ask about and thus learn he had alibi witnesses? Was he prejudiced by their philosophy that every defendant is guilty, therefore it is sufficient to "meet 'em and plead 'em"?

How could a judge who takes time to consider the issues conclude that lawyers such as Tonya Copeland Little and Matthew Swilley were not only above reproach but "very competent"? Would any judge want lawyers such as these to represent their own children?

To presume the Applicant waived his rights by appearing at court when ordered to do so by his lawyers is sheer naivete. The first arrest dragged him from his bed in North Carolina and brought him to jail in Darlington. The Applicant had no reason to think this could not happen again. It never occurred to the Applicant to challenge personal jurisdiction–because it never occurred to his lawyers.

Respondent's repeated dependence on *State v. Adams* is inappropriate for five reasons.[20] (1) Unlike Adams, the Applicant was a suspect, not a fugitive; (2) *Adams* is based on Interstate Agreement on Detainers, not Extradition law;[21] (3) Adams had some legal knowledge (he was, after

[20]354 S.C. 361, 580 785 S.E.2d (Ct. App.003).

[21]Numerous courts have held the rights created by the IAD are statutory in nature and do not rise to the level of constitutionally guaranteed rights. Extradition Law *does* protect constitutionally guaranteed rights.

all, in federal prison in North Carolina);[22] (4) Adams had previously confessed to the South Carolina burglery; (5) When he was about to be released from federal prison, Adams sent the solicitor a letter with the subject line "IAD-Notice of Untried Indictments." A Waiver of Extradition, dated and signed, was enclosed.

The contrast is striking. The Applicant was young, legally naive, not a fugitive, and he never spoke with an attorney who explained his rights.[23] He has been betrayed, repeatedly, by court-appointed lawyers. It is time for justice.

Had the Court allowed Applicant to review the proposed order, the Court would know termination of probation was in Darlington, not Horry. And the Court would know that "Remand to Custody" is yet another violation of the Applicant's rights. He completed his sentence.

Numerous courts recognize that "the right to effective trial counsel is a bedrock principle in this Nation's justice system."[24] Numerous courts recognize that "the special value of the right to the assistance of counsel explains why '[it] has long been recognized that the right to counsel is the right to the effective assistance of counsel.'[citation.]"[25] No one knows this more keenly, more painfully than an innocent person whose trial attorneys and appeal attorney abandon their duty to advocate.

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[22]The IAD is an interstate compact by which the states, the District of Columbia, and the Federal Government have established uniform procedures for the transfer of prisoners serving sentences in one state to another state[1] for the disposition of pending charges. South Carolina enacted the IAD into law in 1962. S.C. Code Ann. § 17-11-10 (2006).

[23]*Wirth v. Surles*, 562 F.2d 319 (1977) ("'The alleged fugitive has a right not to be imprisoned or dealt with by the states in disregard of those safeguards provided by the Constitution and statutes of the United States.' [citation]."

[24]*Id.*

[25]*United States v. Cronic* (1984) 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657.

Respectfully submitted,

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