THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Cornell D. Tyler, Petitioner.

Appeal from Aiken County
Clifton Newman, Circuit Court Judge

APPENDIX

Cornell D. Tyler
Lee Correctional Institution
990 Wisacky Highway
Richland Unit, Room B-187
Bishopville, SC 29010

Pro Se Petitioner

Alan Wilson
Attorney General

John W. McIntosh
Chief Deputy Attorney General

Donald J. Zelenka
Assistant Deputy Attorney General

all of Columbia

J. Strom Thurmond, Jr.
Solicitor
of Aiken

Attorneys for Respondent

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.

Cornell D. Tyler, Appellant.

Appeal From Aiken County
Clifton Newman, Circuit Court Judge

Unpublished Opinion No. 2012-UP-448
Submitted May 1, 2012 – Filed July 18, 2012

APPEAL DISMISSED

Senior Appellate Defender Joseph L. Savitz III, of Columbia, and Cornell D. Tyler, pro se, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of

Columbia; and Solicitor J. Strom Thurmond Jr., of Aiken, for Respondent.

PER CURIAM: Cornell D. Tyler appeals his convictions for murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime, arguing the trial court erred in neglecting to instruct the jury on the defense of alibi. Additionally, Tyler filed a pro se brief. After a thorough review of the record and all briefs pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's motion to be relieved.[1]

APPEAL DISMISSED.

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

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable Clifton Newman, Circuit Court Judge

RECEIVED
AUG 01 2012
SC Court of Appeals

2008-089629

The State of South Carolina,

Respondent,

v.

Cornell D. Tyler,

Appellant.

PETITION FOR REHEARING

The Appellant, above named, hereby makes a petition for rehearing pursuant to SCACR Rule 221 in the above-captioned matter from the decision of a panel of the South Carolina Court of Appeals on July 18, 2012 (Unpublished Opinion No. 2012-UP-448). The Appellant respectfully submits that the panel's decision overlooked and misapprehended certain information in the record that was preserved for appellate review.

TABLE OF CONTENTS

Table of Contents..1

Table of Authorities...2

Statement of Issues..3

Statement of Facts...4

Arguments..5

Proof of Service..12

TABLE OF AUTHORITIES

Cases

State v. Buckman, 555 S.E.2d 402 .... 7, 10

State v. Walker, 562 S.E.2d 313 (2002) 7

State v. Mitchell, 535 S.E.2d 126 (2000) 7

State v. Sharck, 322 S.E.2d 450 7

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) 8

State v. McConnell 350 S.E.2d 179 (1986) 8

U.S. v. Smith, 982 F.2d 681-684 (1st Cir., 1993) 9

U.S. v. Thomas, 246 F.3d 438, 439 (5th Cir., 2001) 9

State v. Woomer, 227 S.E.2d 696 (1981) 11

State v. Austin, 385 S.E.2d 832 11

State v. Leonard, 335 S.E.2d 270 11

STATEMENT OF ISSUES

1. Did the trial court lack jurisdiction over the cause as there is no indictment from grand jury?

2. Did trial court err in failing to properly voir dire the jury?

3. Did trial court err in failing to grant Appellant's motion for a change in venue?

4. Did the trial court err in denying Appellant's motion for directed verdict?

5. Did the trial court err in allowing the State to present to the jury a gun as demonstrative evidence when it had no relevance to the case at hand?

6. Was Appellant prejudiced by the State's misconduct in vouching for the credibility of its witness and its prejudicial remarks in opening and closing statements?

7. Is the evidence sufficient to uphold the guilty verdict when there was no evidence - only statements of a co-defendant - placing Appellant at the scene of the crime?

8. Did the trial court err in charging the jury with the hand of one, hand of all as an accessory aider and abetter pursuant to SC 16-21-140 for offenses of murder and ABWIK?

STATEMENT OF FACTS

On January 7 through January 10, 2008, the Appellant, Cornell Tyler, stood trial in Aiken County, before the Honorable Clifton Newman and a jury, on indictments charging him with murder, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime. The State alleged that Tyler fired on a newspaper delivery truck, wounding the passenger and killing the driver. The State's key witness was Edward Walker, who claimed that he was "laying on top of the car, on the sunroof," during the high-speed chase and saw Tyler firing from the back passenger window. ROA, page 201, line 3 through page 202, line 13. The defense contended that Walker himself was the perpetrator. ROA page 662, line 22 through page 663, line 1. When the shooting occurred, Tyler testified, "I was in my house." ROA page 566, lines 22-24. He accused the State's witness of lying, "so they won't go to jail for the rest of their life like they're trying to make me." ROA page 577, lines 7-10.

ARGUMENT

The Appellant, Cornell D. Tyler, appeals his convictions for murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. The Appellant's lawyer filed an Anders brief, arguing the trial court erred in neglecting to instruct the jury on the defense of alibi, which is a PCR issue and not even preserved for appellate review. After a thorough review of the record on all briefs pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), the court dismissed the appeal and granted counsel's motion to be relieved. The Appellant respectfully submits that the panel's decision overlooked and misapprehended certain facts and some of the issues that were preserved for the record and presented to the courts in Appellant's pro se brief. The Appellant is asking the Court to look over these preserved issues.

1. DID THE TRIAL COURT LACK JURISDICTION OVER THE CAUSE, AS THERE IS NO INDICTMENT FROM THE GRAND JURY?

Appellant contends he was denied his 6th Amendment right to a fair trial and his 14th amendment right to due process as well as S.C. Const. Art. I §II when he was tried on an indictment(s) that did not come from the grand jury, thus depriving the court of its jurisdiction over the cause.

FACTS

The State lost original indictment from the first trial and wanted to use copy of first indictment to proceed to a second trial. See page 35, line 13 - page 36, line 8. The State asked the defendant to stipulate that the grand jury

had indeed convened on April 17, 2006, and produced an indictment that alleged the facts of the case. However, the back of the indictment as to the "action of the grand jury" is blank as to whether or not the document was true-billed.

2. DID THE TRIAL COURT ERR IN FAILING TO PROPERLY VOIR DIRE THE JURY?

The Appellant contends the trial court erred in failing to properly voir dire the jury as to pretrial publicity that rendered the Appellant's trial unfair and denied Appellant his 6th amendment right to a fair trial and his 14th amendment right to due process of law.

FACTS

The trial judge admitted that he was unaware of any jurors in this case having stated at any time during these proceedings this week that they were aware of a prior trial in this case; he further admitted that he didn't ask any jurors whether they were aware of a prior trial. See page 123, lines 8-11 and lines 22-24. Trial counsel also presented affidavits of the jury that was present during the first trial that clearly indicated that Appellant would not receive a fair trial due to publicity. Trial counsel presented to the court numerous newspaper articles that made an issue of how Appellant's first trial "did not render justice," and how the people and the "Aiken Standard has full conviction that justice will be served." Being that the victim was an employee of the Standard numerous articles were run for her cause.

3. DID TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR A CHANGE OF VENUE?

Appellant contends that the trial court erred in failing to grant Appellant's

motion for a change of venue, when there exists a strong possibility that Appellant would not get a fair trial, as his first trial was a mistrial.

FACTS

Trial counsel also presented affidavits of the jury that was present during the first trial that clearly indicate that the Appellant would not receive a fair trial due to publicity. Appellant already had a trial that ended in a mistrial. The town's only newspaper ran numerous amounts of prejudicial articles (See pages 22-31) condemning the murder and calling for justice to be served. Since victim was an employee of the newspaper, clearly a large amount of inflammatory articles ran in the paper.

4. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT?

Appellant contends that the trial court erred in denying Appellant's motion for a directed verdict, especially when the State presented no evidence placing the Appellant at the scene of the crime.

FACTS

A motion for a directed verdict should be granted by the trial judge when the evidence merely raises a suspicion that the accused is guilty. See State v. Buckman, 555 S.E.2d 402. Likewise, when the evidence simply allows the jury to engage in speculation regarding the guilt of the accused, the trial court judge is required to grant the motion for a directed verdict. See State v. Walker, 562 S.E.2d 313 (2002); State v. Mitchell, 535 S.E.2d 126 (2000); See also State v. Sharck, 322 S.E.2d 450. Evidence was insufficient to convict

when the only evidence placing defendant at the scene of the crime was a statement by co-defendant; the State clearly had no evidence putting Appellant in the car or at the crime scene. See page 336 lines 21-23 and page 337 lines 1-6.

5. DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO PRESENT TO THE JURY A GUN AS DEMONSTRATIVE EVIDENCE WHEN IT HAD NO RELEVANCE TO THE CASE AT HAND?

There was no evidence showing the defendant owned a 7.62 caliber weapon and no 7.62 weapon was found. Cumulative prejudicial effect of 7.62 caliber weapon being shown to the jury outweighed the probative value of evidence in prosecution for murder committed by a weapon that fired a 7.62 round. Defendant was not in possession of any weapon that fires a 7.62 round. No evidence was introduced showing the Appellant ever owned or used a 7.62 caliber weapon and no such weapon was found. Appellant contends based on the record (page 353) in this case the gun should not have been presented to the jury because the cumulative prejudicial effect of the enumerated evidence far outweighed its probative value.

During Appellant's trial, the State called agent Ira Parnell to testify as a firearm identification expert. The State acknowledged that this weapon was not the weapon used. The SLED report stated that, "based on the general rifle firing characteristic size 11, 12, and 14, a list of firearms and/or origins of firearms that might have fired these items but is not limited to the following:" (Tr., page 343 lines 16-25, page 345 lines 6-13). See State v. McConnell, 350 S.E.2d 179 (1986), State v. Alexander, 377, 401 S.E.2d 146 (1991).

6. WAS APPELLANT PREJUDICED BY THE STATE'S MISCONDUCT IN VOUCHING FOR THE CREDIBILITY OF ITS WITNESS AND ITS PREJUDICIAL REMARKS IN ITS OPENING AND CLOSING STATEMENT?

Appellant contends he was prejudiced by the State's misconduct in vouching for its witness and labeling the Appellant's story as "unbelievable," and stating that Appellant is guilty.

FACTS

In the State's closing statements, the State clearly stated that "well, he just needs to sit down, because the State has shown us beyond a reasonable doubt that this man is guilty." (Tr. page 667 lines 12-16.) Further, the State vouched for its witness when the State stated that, "Joe Brower has told the truth from day one," (Trial, page 670 Line 5) "because you know he is not a liar." (page 671 lines 5-7). This after Joe Brower had testified to two different statements at trial. Then the State said, "Cornell Tyler has an unbelievable testimony." (page 673, lines 9-10.) It was also improper for the State to say defense witnesses were liars or not telling the truth (page 701 lines 22-25; page 702 lines 23-25; See also pages 671-705). See U.S. v. Smith, 982 F.2d 681-684 (1st Cir. 1993); U.S. v. Thomas, 246 F.3d 438, 439 (5th Cir. 2001).

7. IS THERE SUFFICIENT EVIDENCE TO UPHOLD THE GUILTY VERDICT WHEN THERE WAS NO EVIDENCE, ONLY STATEMENTS OF A CO-DEFENDANT PLACING APPELLANT AT THE SCENE OF THE CRIME?

At the close of the State's case, trial counsel moved for a directed verdict

(Tr. page 475, lines 16-17). The motion was denied. At the end of the defense's case, counsel again moved for a directed verdict based on the sufficiency of evidence. The motion was denied. Appellant contends that this was error. (See Corpus Juris Segundum, page 998 and State v. Buckman, 555 S.E.2d 402.)

FACTS

It has been held that the declarations of a co-conspirator or co-defendant can have no greater force than the testimony of an accomplice or co-defendant, and hence evidence of statement of a co-conspirator or co-defendant tending to inculpate the accused is not, in the absence of corroborative evidence, sufficient for a conviction. Unless corroborated, statements of a co-conspirator or co-defendant tending to inculpate the accused are insufficient to justify conviction.

The State presented no evidence that Appellant was in the car or even at the scene of the crime, and only used the statements of a co-defendant to convict him with no corroborative evidence.

8. DID THE TRIAL COURT ERR IN CHARGING THE JURY WITH THE HAND-OF-ONE,-HAND-OF-ALL "AS AN ACCESSORY AIDER AND ABETTER" PURSUANT TO S.C. 16-21-140 FOR OFFENSES OF MURDER AND ABWIK?

The Appellant contends that the hand of one, hand of all was an erroneous and ambiguous jury instruction.

FACTS

Prosecution failed to properly allege or prove a conspiracy of accessory theory under which all defendants could be found guilty or not guilty. Had the State charged defendant with conspiracy, it then could have pursued a conviction against both defendants under the hand of one, hand of all theory. Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981). To admit evidence under the theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown. However, the State didn't charge the defendants with conspiracy, so this approach was unavailable at trial. However, the State never presented any evidence that the defendant and co-defendant had joined with another to accomplish an illegal act. The State didn't even show prior knowledge that a crime was going to be committed; however, the State must prove beyond a reasonable doubt by competent evidence of that theory that the hand of one is the hand of all. See State v. Austin, 385 S.E.2d 832, State v. Leonard, 355 S.E.2d 270.

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable Clifton Newman, Circuit Court Judge

2008-089629

RECEIVED
AUG 01 2012
SC Court of Appeals

The State of South Carolina,

Respondent,

v.

Cornell D. Tyler,

Appellant.

CERTIFICATE OF SERVICE

I, Cornell D. Tyler, hereby certify that I have served this petition for rehearing on Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka at P.O. Box 11549, Columbia, SC 29211-1549 this 31st day of July, 2012.

Cornell D. Tyler
Appellant, pro se

The South Carolina Court of Appeals

The State, Respondent,

v.

Cornell Tyler, Jr., Appellant.

Appellate Case No. 2008-089629

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Few, C.J.

Thomas E. Huff, J.

Paul E. Short, Jr., J.

Columbia, South Carolina

cc:
Alan McCrory Wilson
John W. McIntosh
Joseph L. Savitz, III
Donald J. Zelenka
Barbara R. Morgan

FILED
August 27, 2012

ANDERS RESPONSE BRIEF

RECEIVED
AUG 0 5 2009
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Clifton Newman, Circuit Court Judge

THE STATE

RESPONDENT,

V.

CORNELL D.TYLER,

APPELLANT

PRO-SE BRIEF OF APPELLANT

Cornell d.Tyler#326023
Lee Coreect. Inst.
Kershaw South 2113
990 Wisacky Highway
Bishopville S.C.29010

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF FACTS	4
ARGUMENTS	5-
Certificate Of Service	30

TABLE OF AUTHORITIES

CASES:

Anderson v. State 527 S.E.2d616 (Ct.App.2000) p.13

Irvin v. Dawd 366 U.S 717(1961) p.10

Munn v. State 357 S.E.2d 460 p.13

Russell v. United States 369 U.S.749(1962) p.12

Shappard v. Maxwell 384 U.S. 333(1966) p.9

State v. Alexander 401 S.E.2d 146 p.20

State v. Bultron 457 S.E.2d 616(Ct.App.1995) p.13

State v. Edwards 379 S.E.2d 888(1989) p.16

State v. Grim 533 S.E.2d 329(2000) p.13

State v. Hann 12 S.E.2d 720(1940) p.12

State v. Kelsey 503 S.E.2d 63 p.15

State v. Lazarus 65 S.E.270 p.11

State v. Manis 51S.E.2d 320 p.18

State v. Martin - S.E2d___ p.17

State v. McConnell 350 S.E.2d 179(1986) p.21

State v. Mayfield 109 S.E.2d 716(1959) p.24

State v. Mitchell 1 bay(1s.c.1)267 (1792) p.11

State v. Mitchell 535 S.E.2d 126(2000) p.15

State v. Schmidt 342 S.E.2d 401 p.19

State v. Shrock 322 S.E.2d 450 p.15

State v. Stewart 295 S.E.2d 627 p.17

United States v.Guezar 160 F.3d 511(1988) p.23

U.S. v. Smith 982 F.2d 681(4th Cir.1993) p.23

U.S. v. Thomas 246 F.3d 438(5th Cir.2001) p.23

S.C.Code.Ann.§17-21-8 p.7

SC.Code.Ann.§17-19-10 through-20 p.11

S.C.Code.Ann.§

S.C.Const. Art.I§11 p.12

OTHER:

U.S.CONST.5th,6th,and 14th.

STATEMENT OF ISSUE ON APPEAL

1. Did the trial court committed reversible error failing to properly voir dire the jury?

2. Did trial court erred failing to grant appellant's motion for a change of venue?

3. Did the trial court lacked jurisdiction over the cause as there is no indictment from the grand jury at the time the jury was sworn?

4. Did the trial court erred in denying appellant's motion for a directed verdict?

5. Did the trial court erred in allowing the State to present to the jury a Rinko 7.62-by-39 millimiter assault rifel as demostrative evidence when it had no relevancy to the case at hand?

6.Was appellant prejudice by the State's misconduct in vouching for the credibility of it's witnesses and it's prejudicial remarks in it's opening and closing statements?

7. Did the trial court committed reversible error charging the jury with "the hand of one the hand of all?

8. Did the State commit prosecutorial misconduct when the States main witnesses were placed all in one room to plan and colobarate theirtestimony?

9. Did the trial court erred in allowing the State to introduce testimony about the thickness of the metal of the truck bed when there is no evidence that the second victim was shot with a gun that fired a 7.62.-by-39 millimiter?

10. Should the trial court judge have granted appellant's motion for a reconsidaration to run appellant's time concurrent?

11. Is the evidence sufficient to uphold the appellant's conviction?

STATEMENT OF FACTS

On January 7 through 10,2008, Cornell Tyler, Jr., stood trial in Aiken County, before Judge Clifton Newman and a jury, on indictments charging him with murder, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime. The State alleged that Tyler fired ona newspaper delivery truck wounding the passenger and killing the driver. The State key witness was Edward Walker, who testified that he was "[l]aying on top of the car on the sunroof", during the high speed chase and that Tyler was inside the vehicle shooting. Tr.p.201,L.3-p.202,L.13. Tyler testified that he was in his house and that he has no knowledge of the incident. Tr.p.566,L.22-24.

The jury found Tyler guilty as charged and the judge imposed consecutive sentences of thirty(30) years for the murder,twenty (20) for the assault and battery with intent to kill and five (5) years for possession of a firearm during the commission of a violent crime.

On May 4,2009 Tyler's appellant counsel Joseph L.Savitz,III filed an initial "Anders" brief, and a motion to be relieved as counsel, a final "Anders" brief was submitted, This pro-se brief now follows.

ISSUE(1) <u>Did the trial court committed reversible error failing to properly voir dire the jury pool?</u>

The appellant contend, that trial court committed reversible error failing to properly voir dire the jury pool as to pre-trial publicity, that rendered appellant's trial unfair denying appellant his 6th amendment right to a fair trial one that is guarantee by the 14th amendment Due Process Clause.

Trial counsel presented to the trial court, numerouss news paper articles that made an issue on how in appellant's first trial justice was not served, and how the people and the Aiken Standard has full conviction that justice will be served. The victim was an employee of the Aiken Standard, and the paper ran numerous articles up and during the appellant's trial.

Counsel for appellant presented to the trial court an affidavit of a juror that was on appellant's 1st trial. The affidavit clearly indicated that appellant could not recieve a fair trial due to the amount of negative publicity . The trial court did not ask any of the potential jurors if they were aware of appellant's 1st trial. Tr.p.123,L.22-25.

It is reversible error where the trial judge failed to question potential juros about appellant's 1st trial when large amount of negative publicity was being generated and public opinion calling for "justice" for the decedent. Potential jurors could have formed an opinion that justice was not served based on the fact 1st trial was a mistrial. Furthermore the court prevented trial counsel from bringing to the attention of the jury that

there was in fact a 1st trial and that justice was in fact served because those responsible has admitted their guilt. See Tr.p123, L.1-16,p.122,L.7-25.

Based on the numerous amount of negative press that appellant's trial genarated and the trial court's failure to properly voir dire the jury pool, it is reversible error to allow a jury so contaminated by the negative press to decide the fate of the appellant in violation of the appellant's 6th amendment right to a fair trial and 14th amendment Due Process Clause. Thereby appellant's conviction must be set aside.

ISSUE(2), <u>Did trial court erred failing to grant appellant's motion for a change of venue?</u>

FACTS

Trial counsel made request for a change of venue pursuant to S.C.Code.Ann.§17-21-8. Appellant's 1st trial was in November 2005 the jury declared a mistrial. As a result appellant's trial counsel had an opportunity to speak with Cathrine Thomas,a juror that served on the appellant's trial. A copy of her affidavit was submmitted to the trial court, concerning what had accured during delibaration in the jury room. 27 articles plus numerous editorials were presented to the trial court that were still being publish during the time of appellant's 2nd trial in 2008. At least 25% of the juror pool those that steped foward stated they had "some exposure to the case".

DISCUSSION

Appellant contends, that trial court erred, failing to grant appellant's motion for a change of venue, when there exist a strong possibility that appellant would not get a fair trial. The town's newspaper "The Aiken Standard" ran numerous amount of prejudicial articles calling for justice to be served. The victim was an employee of the "Standard". It exist that many people in town would have read the paper. Due to the amount of negative publicity there exist a substantial likelyhood that many members of the jury pool read about the case, and had formed an opinion on the issue of guilt.

Affidavit submitted by juror from appellant's 1st trial, indicated that based on her experience on appellant's trial the amount of prejudicial and statements made by the juros, it is clear to her, that appellant would not recieve a fair trial.

This affidavit contains 3 major of importance to the change of venue. (1)Is the ability of the appellant to recieve a fair trial.

There are essentialy two newspaper that cover the area where the crime accured. The victim worked for "The Aiken Standard" one of the newspapers. After the incedent there were a series of articles that catplogued what happened, and different of opinions as to what should happened as a result of the victim death.

There have been no fewer than 27 articles publish and numerous editorials from citizens throught calling for justice. At least 25% OF THE JURY pool have read those articles and editorials.

Cathrine Thomas express her concerns about appellant recieving a fair trial based on: During deliberation the jurors talked about the different things they had read about the case, and their opinions about those things. There exist base on what was submitted in the newspapers juros that could possibly withhold information of bias from the court, as with the juror who with hold that she was related by marriage to the sherrif. The affiant mentioвs that based on her experience the appellant could not get a fair trial.

Where potential jurors have read of or heard prejudicial publicity a trial judge should enquire into the nature and extent of the exposure, to prove juror partiality appellant msut show that the publicity either or actually prejudiced a juror or

that the publicity either or actually prejudiced a juror or pervaded the proceedings that it raised a presumption of inherent prejudice. See Shappard v. Maxwell 384 U.S. 333(1966). Appellant presented to the trial court one juror who on her own steped foward after appellant's 1st trial, and based on her experience felt that appellant could not get a fair trial, because of the amount of publicity that has prejudice the jurors against the appellant.

The Court noted in Shappard (supra) that; "where there is a reasonable likelyhood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abase, or transfer it to another county not so permeated with "publicity".

[O]rdinarily the effects of pre-trial publicity on the pool from which jurors are drawn is determined by a careful and searching voir dire. Clearly trialcourt did not conduct a "careful and searching" voir dire, due to the fact that trial judge failed to question the juror pool about appellant's 1st trial. See Tr.p.123,L.22-25. Not quetioning juror pool about 1st trial was error due to the amount of publicity calling for justice for the decedent and the amount of editorials calling and pressing for a "conviction".

Although jurors need not be completely ignorant of the facts and issues a trial judge [m]ust assess the juror's opinions to determine whether the jurors can impartially decide the case.

In Irvin v. Dawd 366 U.S. 717(1961) where petitioner was convicted of murder following a trial that was extensively covered by the news media and "aroused" great excitement and indignation, the trial judge granted a change ofvenue.

Appellant's circumstances mirrors Dawd (supra) on all four feet. There was extensive coverage of the crime that if effected the appellant's 1st trial enough to make a juror come foward and speak out against the unfairness and the biasness of some jurors based on what they had read.

Where publicity of a case is so much as to contaminate the jury pool as in this case it is the duty of thecourt to grant a change of venue.

Appellant was denied his right to a fair and impartial jury trial when the appellant was forced to go to trial with a jury that was tinted by the amount of negative publicity generated by the town's newspapers. The jury pool would have for over one year been bambarded with numerous prejudicial articles on the case therby having a predispose opinion as to the appellant's guilt.

Denial of Appellant's motion for a change of venue is reversible error and appellant's conviction must be set aside.

ISSUE(3). Did the trial court lacked jurisdiction over the cause as there is no indictment from the grand jury at the time the jury WAS SWORN?

FACTS

The State lost the original indictment[s] and wanted to use copy of first indictment[s] to proceed to trial. The State asked the appellant to consent to the usage of the "copy". The face of the indictment[s] alleges that the Grand Jury convened on April 17,2006. The body of the indictment[s] seems to sufficiently alleges the offenses. The back of the indictment[s] as to the "action of the Grand Jury" is blank, and does not show whether the the indictment[s] were true billed or not.

DISCUSSION

Appellant contends, he was denied his 5th,6th,and 14th amendment rights and a fair trial when he was tried on an indictment[s] that did not come from a Grand Jury. Denying the trial court juridiction over the cause.

The 5th amendment requires that prosecution for a serious crime "may only be instituted" by an indictment "from a Grand Jury". See also S.C.Const.art.I§11; State v. Lazarus 65 S.E.270, S.C. Code.ANN.§17-19-10-20.(1985) Compare e.g. State v. Mitchell 1(1s. c.l.)267 (1792) and S.C.const. art.3§2. Which requires that serious criminal case come before the court of general jurisdiction "through the medium of a grand jury by indictment.

In State v. Hann 12 S.E.2d 720(1940) the court held that; "Grand Jury presentment is needed for trial". S.C.Const.Art.I§11 requires the presentment of a grand jury as a condition precedent to the trial of a crime, except for certain minor offenses. The grand jury is a constituent part of the court and without its presentment the court has no jurisdiction over the caûse.

The court in Russell v. United States 369 U.S 749, 763-764(1962) explained that "the very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens [a]cting independently of either prosecuting attorney or judge. This fundamental protection is designed as a means not only ofbringing to trial persons accused of public offenses upon just grounds but also as a means of protecting the citizen of unfounded accusations, whether it comes from the government, or be prompted by partisian passion or private enmity." The grand jury is there to afford a safeguard against oppressive actions. See also U.S. v. Cox 342 F.2d 167, 88 S.Ct. 1767, Stirone v. United States 80 S.Ct.270

Therefore, the content of the charge as well as the decision to charge at all is entirely up to the grand jury. The grand jury decision not to indict at all or not to charge the facts alleged by the State is not subject to review.

As to the instant case, the appellant's indictment[s] does not indicate that the grand jury did in fact pass on the appellant's indictment[s]. The State alleged that it had lost the original

and therefore wanted to used a copy of the original. Appellant contends, that the copy failed to demostrate that the original indictment]s] were also true billed by the grand jury. In absence of showing a true billed indictment a hearing must be held to determine whether the appellant's indictment[s] were true billed by a grand jury, pursuant to State v. Grim 533 S.E.2d 329(2000) Anderson v. State 527,S.E.2d 616(Ct. App. 2000) and State v. Bultron 457 S.E.2d 616(Ct. App.1995).

Failure of the indictment to show action of the grand jury is clear violation of the standard of our constitution and that of Due Process as guarantee by the 14th amendment of the U.S. constitution.

Because appellant has been convicted on an indictment which did not come from the grand jury. This right cannot be waved it is a prerequisite to trial in fact without an indictment from the grand jury there can be no trial, [except for some minor offenses]. The record does not contain any record of a valid waiver of presentment. Which appellant could not do. By taking a trial appellant demand the rights attached to the right to a fair trial that are guarantee by the 6th and 14th amendments,and those of the 5th amendment as well as S.C.Constitution Article I§11;that (1)the indictments come from a valid grand jury, (2)and that he be given a chance to repel or rebut the charges. The appellant has a right to be tried only upon an indictment from the grand jury. See Munn v. State 357 S.E.2d460, Due process requires no less.

Therefore, Appellant require a hearing to determine whether in fact the indictment[s] were true billed by a valid grand jury. A fact the appellant contends cannot be proven. Thereby appellant request that his conviction be set aside due to violations of his 5th, 6th, and 14th amendment of the United States Constitution and of his S.C.Constitution Article I§11 and statutory requirement §17-19-10 through-20.

ISSUE(4). <u>Did the trial court erred in denying appellant's motion for a directed verdict?</u>

FACTS

Trial counsel moved at the end of the State presentation of its case for a directed verdict. Tr.p.475,L.16, and at the end of the defense presentation Tr.p.614,L.11

DISCUSSION

Appellant contends, that trial court erred in denying appellant motion for a directed verdict, when the State presented no evidence placing the appellant at the scene of the crime.

When reviewing the denial of a motion for directed verdict the evidence must be viewed in the light most favorable to the State. And if there is any direct or any substantial circumstantial evidence reasonably tending to prove the guilt of theaccused State v. Kelsey 502 S.E.2d 63

A motion for a directed verdict should be granted by the trial judge when the evidence merely raises a suspicion that the accuse is guilty. Likewise when the evidence simply allow the jury to engage in speculation reguarding the guilt of the accused, the trial court judge is required to grant the motion for a directed verdict. See <u>State v. Walker</u> 562 S.E.2d 313(2002), <u>State v. Mitchell</u> 535 S.E.2d 126(2000) see also <u>State v. SHrock</u> 322 S.E.2d 450.

At trial the State establish that; the Victim was shot and one killed with a high powered gun that fired a 7.62-by39 mill. bullet. (2) The co-defendants were indeed there and committed theact, by their confession and willingness to plea guilty. Various experts testified that the victims were shot by a high caliber weapon and that the victims were shot from the back. Finger print analisys showed that the finger print found inside the car belonged to the appellant's co-defendants. Foot print found where the incident started belonged to Mr. Walker the appellant's co-defendant.

The appellant coming into the court is clothed with the presumption of innocence. He does not have to prove that he is not guilty of the murder and Abhan. On the other hand the State by issuing an indictment and bringing the case to trial assumes the burden of proving appellant's guilt beyond a reasonable doubt.

The State failed to present "any evidence" to warrant that finding. The lower court is only concerned with the existence or no existence of evidence, not with its weight. State v. Edwards 379 S.E.2d 888(1989). Because it is the jury who must weigh the evidence, but when there is an absence of evidence it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court.

The evidence presented by the State in the instant case may raise a suspicion of guilt but it does not point, conclusively points, nor to a moral certainty nor beyond a reasonable doubt to the guilt of the appellant.

The State assumes the burden of proving that the appellant was at the scene of the crime and that the appellant and noone else committed the offense. The appellant contends the State did not meet this burden.

First; there is no evidence placing the appellant at the scene of the crime. (2) Finger print expert could not obtain any latent prints belonging to the appellant in the vehicle alleged to have benn used. (3) No finger print were found on the shell cassing found near the scene. (4) Firearm examiner testified that there is numerous guns that could have fired the 7.62-by-39 millimiter. (5) None of the weapons that could have fired the spent shell were found at the appellant's home or on him. (6) The shoe print found where "someone" approched the victims vehicle belonged to Mr.Walker.

The co-defendant's statements relied on by the State does not in itself constitute positive proof of the facts and circumstances alleged by the State, proof which reasonably tends to prove guilt or from which guilt may fairly and logically deduced tothe exclusion of any other hypothesis. State v. Stewart 295 S.E.2d627

The co-defendant's statement merely create a "suspicion" that the appellant was guilty.

"Suspicion" implies a belief or opinion as to guilt based upon facts and circumstances which do not amount to proof. Furthermore it is not sufficient that an acomplice is corraborated as to time and place and circumstances of transaction, [I]f there is nothing to show any connection of the defendant therewith, except a statement of acomplice. See State v. Martin

As Shrock, (supra) is the standard for the proposition that a conviction will not stand where there is a complete absent of any "competent evidence". Therefore, appellant's conviction cannot stand pursuant to Shrock.

The State has under taken to prove that the appellant and him only shot, and killed the victims, that the appellant was inside the vehicle that chased the victims car, that it was appellant and him only that ran up to the victim's car when it approached his resident. None of these facts alleged were not proven and taken together does not conclusively points to the appellant to the exclusion of any other hypothesis.

It is not sufficient to establish a probability of guilt arising from the doctrines of chances, that the facts alleged are true. State v. Manis 51 S.E.2d 320. Outside the co-defendant's statements which does not in itself constitute as proof, the State presented [n]o evidence that the facts in the indictments the State has under taken to prove was committed by appellant to the exclusion of any other reasonable hypothesis. See Stewart (supra).

Therefore, the trial court erred whenit failed to direct a verdict in favor of the appellant. Therefore this Court must direct a verdict in favor of the appellant pursuant to Shrock or vacate appellant's convictions.

ISSUE(5). Did the trial court erred in allowing the State to present to the jury a Rinko 7.62-by-39 millimiter assult rifel as demostrative evidence when it had no relevancy to the case at hand?

FACTS

During appellant's trial the State called agent Ira Parnell to establish as a firearm expert that; (1) the bullet that killed one victim and injured another was a 7.62.-by-39 millimiter round and that there exist numerous other weapons that could have fired the said round, one of which was the Rinko assault rifel. The state acknowledged that the weapon shown was not the weapon used. Tr.p.343,L.16-25, p.345,L.6-13.

DISCUSSION

Appellant contend that allowing the State to use as demostrative evidence a "Rinko 7.62-by-39 millimiter semiautomatic rifel was error. The weapon that was used to demostrate to the jury was not relevant to establish or make more or less some matter in issue upon which it directly base. See State v. Schmidt 342 S.E.2d401. This weapon did not assist the jury at reaching or arriving at the truth of an issue, it was not relevant, and therefore inadmissible.

First; the State presented no evidence that appellant owned a 7.62.-by-39 millimiter caliber weapon, and no 7.62-by-39 millimiter weapon was found.

The cumilitive effect, prejudicial effect of the Rinko 7.62-by 39 millimiter weapon being shown to the jury, out weight its probative value. The appellant was not in possession nor was it establish that the appellant ever posses a weapon that fire a 7,62-by-39 millimiter round.

The State could have used pictures to demostrate what type of guns could fire a 7.62.-by39 millimiter round. The weapon presented to the jury was only used for one purpose, which was to shock the jury into a guilty verdict, clearly causing appellant an unfair prejudice. The Court have ruled in State v. Alexander 401 S.E.2d 146, [u]nfair prejudice within its concept means an undue tendency to suggest decision on an improper basis commly though not necissarily an "emotional one".

The appellant contends that base on the facts presented in the instant case the(Rinko) should not have been used, and for that matter no weapon that could not be proven fired the fatal shot should have been presented to the jury. The cumilitive prejudicial effect of the enumerated evidence far outweight its probative value.

The expert presented by the State establish that the round that injured and killed the victims was a 7.62-by-39 millimiter round, a shell of the same caliber was found. The expert witness establish numerous weapons could have fired that round. See Tr.p378,L.4-12.

The weapon and the mechanica use of the weapon was used to shock the jury, and no amount of instruction could have cured such error. See State v. McConnell 350 S.E.2d 179(1986). The court instruction did not cure the effect and devastation caused by the demostrative evidence. The weapon use, was used only to shock the jury into an unfair prejudicial verdict. This weapon had no relevancy to the issue at hand. The issue is who shot the victims not what could have shot the victims. Presenting a weapon that had nothing to do with the crime, a weapon the defendant did not own, did not assist the jury at arriving at the truth of the issue and therefore irrelevant.

Appellant was prejudice by the demostrative evidence and was denied his 6th amendment right to a fair trial as guarantee by the Due Process Clause of the 14th amendment.

ISSUE(6). <u>Was appellant prejudice by the State's misconduct in vouching for the credibility of its witnesses and its prejudicial remarks in its opening and closing statements?</u>

Appellant contend he was prejudice by the State misconduct in vouching for its witnesses and its implication that the appellant version of the facts presented was "unbelieveable" and that the appellant was guilty.

It is an establish fact that the State may not vouched for the credibility of its witness and the courts in many other circuits including this circuit has overturn many cases for this error.

In the instant case the facts are irrefutable, the State in its closing arguments stated that: "well he just needs to sit down... the State has shown us beyond a reasonable doubt that this man is....guilty. Tr.p.667,L.14-16..."Joe Brewer has told the truth.. from day one. Tr.p.670,1.5..."Because you know he's not a..liar Tr.p.671,L 4-7. "Even with Cornell Tyler's unbelieveable ... testimony" Tr.p.673,L.9-10...."Forensic will colaborate and show you why... Cornell Tyler is..guilty. Tr.p.681,L.8-9..."So all of that is going to show that they...are believeable.. Tr.p.698,L.21-22 "You have to give witnesses some..credibility when they..come foward..Tr.p.701,L.6-7.."I suggest to you the evidence that Mr. Scott came foward and testified to is...equally unbelieveable. Tr.p.701,L.22-24.."as Cornell Tyler's..Tr.p.701,L.24.

"You know a pistol is the same thing as a rifel. On the street its the samething".."It's not..believable". Tr.p.703,L.16-18.. "Now is he more believable than Wallow Ware...Is he more believable than Kendall". Tr.p.704,L.21-25,p.705,L.1-5. .. "Corroborating these guys story, because they dont want to... put a liar on the stand. Tr.p.706,L.1-6.

The Court in United States v. Garcia Guezar 160 F.3d 511-521(1988) clearly establish that prosecutors statement describing defendant as "liars" improper because constituted personal opinion reguarding defendant's credibility. It is also improper for the State to state that appellant is guilty, as it indicate personal belief. See U.S. v. Smith 982 F.2d 681,684(4th Cir.1993). As it is also improper for the State to say that defense witnesses were, "liars" or not telling the truth. The State cannot tell the jury who to believe. See U.S. v. Thomas 246 F.3d 438(5th Cir.2001).

Appellant contend that, due to the numerous prejudicial remarks of the State on its witnesses and their varacity and the " unbelievable" testimony of the appellant and his witnesses clearly amounts to vouching of an witness by the State And are improper conduct by the State. Such misconduct is reversible erro, appellant contends that this error requires setting aside his conviction.

ISSUE(7). Did the trial court committed reversible error charging the jury with "the hand of one the hand of all" ?

Appellant contend that the trial court erred and committed reversible error in charging the jury with an erroneous and ambiguos jury instruction, of "The hand of one The hand of all".

The appellant's defense was that he was not at the scene of the crime, he was not in any way was in agreement with anyone who committed the offense.

The appellant was entittled to a proper jury instruction and the trial court's failure to give a proper jury instruction along with its erroneous and ambiguos jury charge did impaired the appellant's ability to present an effective defense.

By indicting the appellant with murder, and abhan(assault and battery with intent to kill) and not indicting the appellant with conspiracy, the State assumed the burden of prooving that the appellant and his co-defendant were (1)each at the scene when the crime happened (2) They both committed the crime. See State v Mayfield 109 S.E.2d 716, 724 (1959)

The State failed to charge appellant with conspiracy and the state failed to prove that the appellant participated in the crime.

To admit evidence under this theory (hand of one/hand of all) the existance of the common design and the participation of the against whom the evidence is offered should first be show,

Because under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. See State v.Woomen 277 S.E.2d 696(1981)

Had the State charged appellant with conspiracy it then could have pursued conviction agaisnt the appellant and co-defendant under the hand of one, the hand of all theory.

The State did not charge the appellant with conspiracy so this approach should not have been available to the State at the appellant's trial. Charging the jury with the hand of one and the hand of all was errorneous as imbiguos the instruction impaired the appellant's ability to present his defense which was simply he; was not there nor did he participate with anyone to help committ this crime.

The trial court thereby committed reversible error in charging the jury under the the hand of one/the hand of all theory. Appellant's conviction must therefore be set aside.

ISSUE(8). Did the State commit prosecutorial misconduct when the State's main witnesses were place all in one room to plan and colobarate their testimony?

The appellant contend that, he was denied a fair trial under the 6th and 14th amendment, when the State placed all their Key witnesses in the same room to plan their testimony, when the State case relied only on the [k]ey witnesses testimony and had no other evidence. See Tr.p.142,L.5, P.183,L.2.

ISSUE(9). Did the trial court erred in allowing the State to introduce testimony about the thickness of the metal of the truck bed when there is no evidence that the second victim was shot with a gun that fired a 7.62-by-39 millimiter?

In trial the gun expert testified that he believed that the bullet could have traveled through the truck bed and hit the victim Mr.Joseph Brewer. Tr.p.366,L.15-22.

The appellant contend that, this testimony was prejudicial, Ms.Dorch, the murder victim was shot by a rifel a bullet was recovered from her body. The State introduce no evidence that the bullet who injured Mr.Brewer was fired by the same gun, and there is evidence that someone other then the appellant had in his possession another weapon.

Allowing the expert witness to opinioned that Mr.Brewer was hit with the same caliber bullet that killed Ms. Dorch waserror and prejudice the appellant.

This was reversible error and the appellant's ABWIK should be overturned.

ISSUE(10). Should the trial Judge have granted the appellant's appellant's motion for a reconsidaration to run appellant's time concurrent?

The appellant contend he was denied Due Process and Equal Protection under the law, when his co-defendants recieved, noviolent sentences for the same offenses that appellant was tried for.

The appellant was found guilty of murder and ABWIK, and possession of a weapon during a violent crime. The appellant's co-defendants went to court the next week and Mr.Ware got 15 years noviolent, Mr.Walker got 10 years nonviolent. After this fact became known to the appellant, appellant motioned the trial court for reconsidaration, his motion was denied.

Appellant contends that this denied him Equal Protection under the law. Since the State made clear that appellant's co-defendant's were guilty of the same offense then appellant should have recieved a concurrent sentence at least.

This court should reconsider the facts and grant appellant his Equal Protection under the law and remand for new sentencing.

ISSUE (11) Is the evidence sufficient to uphold the appellant's conviction?

Appellant contend that there is insufficient evidence to uphold his conviction, and that the State failed to place him at the scene of the crime and therby the State failed to meet it's burden of beyond a reasonable doubt. (SEE ARGUMENT 4)

CERTIFICATE OF SERVICE

I, Cornell D.Tyler, do hereby swear under the penalty of law that I have placed this [Pro-Se Brief] in the U.S. Mailroom here at Lee Correctional Institution, with sufficient postage affixed.
Thus, the said document[s] were placed in the mailroom and addressed to the person[s] whose names and addresses appear below.

The Honorable
Clerk of Court
Kenneth A Richstad
State of South Carolina
Court of Appeals P.O.Box 11629
Columbia SC 29211

Respecrfully Submitted
/s/ Cornell Tyler 326023
Cornell D.Tyler#326023

RECEIVED
AUG 0 5 2009
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPLALS

RECEIVED

AUG 05 2009

SC Court of Appeals

Appeal from Aiken County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

CORNELL D.TYLER

APPELLANT,

OBJECTION TO COUNSEL'S MOTION TO BE RELIEVED

COMES NOW, Cornell D.Tyler, pro-se before this Honorable Court. Asking this Court to deny appellant's counsel's motion "To be relieved as counse", base on the following:

1. Appellant counsel argue an issue that has not been preserved for appeal.

2 Trial counsel preserve for appellate review numerous issues.

3. Appellant as a layman has attempted to argue those issues that have been preserve for the record.

Appellant , now ask this Court in the interest of justice to deny motion "To be relieved as counsel" so that meritious issues be argue by appointed appellate counsel.

Respectfully Submitted

/s/ [signature]

Cornell D.Tyler#326023

This 4th day of Augst. 2009

RECEIVED
AUG 05 2009
SC Court of Appeals

Cornell D.Tyler#326023
Lee Corre[illegible], Ins[illegible].
Kershaw South 2111
990 Wisacky Highway
Bishopville S.C.29010

August 4th,2009

To the Honorable Clerk of
Court.
Kenneth A.Richstad
State of South Carolina
Court of Appeals
P.O.Box 11629
Columbia S.C.29211

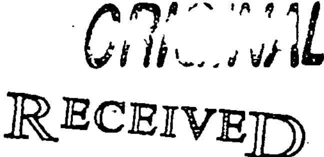
Re: State V. Cornell Tyler

Dear MrRichstad.

Find inclose my pro-se brief, would you please foward a copy to all parties involved, I'am at this time unable to obtain or make copies. Would you at your earliest convinaiance inform me of the cost to your office to get a "filed"stamp copy for my record.

I thank you in advance for your time and considaration in matter.

Respectfully Yours
/s/ Cornell Tyler
Cornell Tyler#326023



JUN 1 7 2009

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CORNELL D TYLER,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

JOSEPH L SAVITZ, III
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF FACTS 4

ARGUMENT 5

PETITION TO BE RELIEVED AS COUNSEL 6

TABLE OF AUTHORITIES

Cases

Ford v State, 314 S C 245, 442 S E 2d 604 (1994) 5

Riddle v State, 308 S C 361, 418 S E 2d 308 (1992) 5

State v Mayfield, 235 S C 11, 109 S E 2d 719 (1959) 5

State v Pagan, 369 S C 202, 631 S E 2d 262 (2006) 5

State v Robins, 275 S C 373, 271 S E 2d 319 (1980) 5

STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error when he neglected to instruct the jury on the defense of alibi

<u>STATEMENT OF FACTS</u>

On January 7 through 10, 2008, Cornell Tyler, Jr , stood trial in Aiken County, before Judge Clifton Newman and a jury, on indictments charging him with murder, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime The State alleged that Tyler fired on a newspaper delivery truck, wounding the driver and killing the passenger Its key witness was Edward Walker, who claimed that he was "[l]aying on top of the car, on the sunroof," during the high-speed chase and saw Tyler firing from the back passenger window ROA p 201, line 3 – p 202, line 13 The defense contended that Walker himself was the perpetrator ROA p 662, line 22 – p 663, line 1 When the shootings occurred, Tyler testified, "I was in my house " ROA p 566, lines 22-24 He accused the State's witnesses of lying "so they won't go to jail for the rest of their life like they're trying to make me " ROA p 577, lines 7-10

Defense counsel requested and received a charge on mere presence ROA p 605, lines 1 and 2, ROA p 720, lines 16-20 He did not request a charge on alibi, nor did he object to its omission from the judge's final instructions ROA p 724, lines 16-19

The jury found Tyler guilty as charged, and the judge imposed consecutive sentences of thirty years for murder, twenty years for assault and battery with intent to kill and five years for possession of a firearm during the commission of a violent crime

ARGUMENT

The trial judge committed reversible error when he neglected to instruct the jury on the defense of alibi

A charge on alibi must be given "when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission " *State v Robins*, 275 S C 373, 271 S E 2d 319, 320 (1980) Where it is an issue, the State must disprove alibi *State v Mayfield*, 235 S C 11, 109 S E 2d 719 (1959)

Tyler's testimony at trial supported a jury instruction on alibi Since it was omitted, either the trial judge or defense counsel committed reversible error "It is well-settled that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness " *Ford v State*, 314 S C 245, 442 S E 2d 604, 606 (1994) Since Tyler's defense was solely alibi, there could have been no valid strategic reason for waiving an instruction on that defense Compare *State v Pagan*, 369 S C 202, 631 S E 2d 262 (2006)

If the Court finds that this issue is barred procedurally because of defense counsel's omission, Tyler should file an application for post-conviction relief alleging that he did not receive effective assistance of counsel for this reason See, for example, *Riddle v State*, 308 S C 361, 418 S E 2d 308 (1992) If not, the Court should reverse Tyler's convictions and remand for a new trial

Respectfully submitted,

Katherine H Hudgins for
Joseph L Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CORNELL D TYLER,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Cornell D Tyler Jr states

1 He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant

2 He has reviewed the record of appellant's trial before Judge Clifton Newman, which was held on January 11, 2008, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial

3 He has, pursuant to Anders v California, 386 U S 738, 87 S Ct 1396 (1967), briefed an arguable legal issue which arose during the course of the trial

WHEREFORE, he asks the Court to relieve him as counsel for Cornell D TylerJr

Respectfully submitted,

Joseph L Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 17, 2009

Joseph L. Savitz, III
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED
JUN 1 7 2009
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CORNELL D TYLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant and Record on Appeal in the above referenced case has been served upon Donald J Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and on Cornell D Tyler, Jr , #326023 at Lee Correctional Institution, 990 Wisacky Hwy , Bishopville, SC 29010 this 17th day of June, 2009

Joseph L Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of June, 2009

(L S)
Notary Public for South Carolina

My Commission Expires August 23, 2014