LAW OFFICE OF
TRICIA A. BLANCHETTE

October 3, 2017
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Cornell Devon Tyler v. State

Dear Sir:

For filing, attached please find a Notice of Appeal, Certificate of Service and copy of the Orders from the underlying PCR Application. I have not been retained to assist Mr. Tyler with this Appeal. By copy of this letter, I am providing these document to the Office of Appellate Defense, and I will be also forwarding a completed Affidavit of Indigency to their office upon receipt.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Aiken County Clerk of Court (without Orders)
Office of Appellate Defense
Julie A. Coleman, Office of the Attorney General
Cornell D. Tyler

PO Box 2147 • Leesville, SC 29070
803.908.3266 • blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 04 2017
S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

Case No.: 2013-CP-02-02859

Cornell Devon Tyler, 326023, Petitioner,

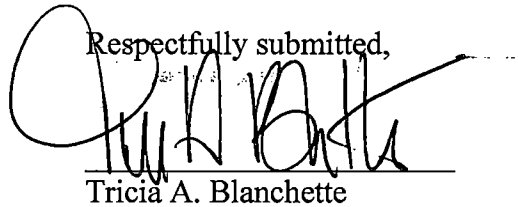
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

Cornell Devon Tyler, Petitioner, appeals the Order of Dismissal issued by the Honorable Maite Murphy on May 2, 2017, which was filed on May 19, 2017. Petitioner also appeals the Order of Dismissal issued by the Honorable Maite Murphy on August 15, 2017, which was filed on September 12, 2017. Petitioner, through counsel, received notice of the entry of the Order on September 12, 2017.

Respectfully submitted,



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October 4, 2017

THE STATE OF SOUTH CAROLINA
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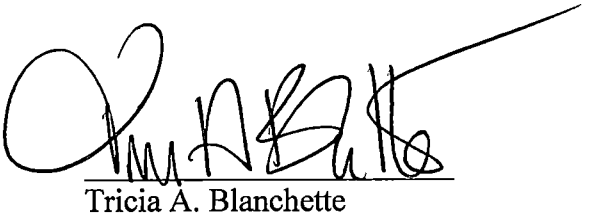
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that a copy of the Notice of Appeal, and accompanying Orders, were hand delivered to Julie A. Coleman, Assistant Attorney General, this 4th day of October 2017 at the following address:

Office of the Attorney General
ATT: Julie A. Coleman, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201



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October 4, 2017

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Cornell Devon Tyler, #326023, Applicant, v. State of South Carolina, Respondent.	)	2013-CP-02-02859 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on December 17, 2013. Respondent submitted its Return on July 29, 2014. An evidentiary hearing was convened on January 24, 2017, at the Bamberg County Courthouse. Applicant was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted at the April 2006 term of the Aiken County Grand Jury for Murder (2006-GS-02-552), Assault and Battery with Intent to Kill (2006-GS-02-551), and Possession of Firearm or Knife During Commission of Or Attempt to Commit a Violent Crime (2006-GS-02-550). Byron Gipson, Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable Clifton Newman. Applicant was convicted as indicted. On January 10, 2008 Judge Newman sentenced Applicant to thirty year term of imprisonment for Murder, twenty year term of imprisonment for Assault with Intent to Kill, and five year term of

imprisonment for Possession of Weapon During Commission of Violent Crime, with all sentences to run consecutively.

A timely Notice of Appeal was filed on Applicant's behalf by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Cornell D. Tyler, Op. No. 2012-UP-448 (Ct. App. filed July 18, 2012). The Remittitur was issued on February 21, 2013.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel
    a. "Counsel failed to investigate all of the facts and circumstance surrounding my case."

Applicant filed an amended application on December 20, 2016, claiming the following additional allegations:

1. Ineffective assistance of trial counsel for failure to effectively prepare and investigate prior to trial.
2. Ineffective assistance of trial counsel for failure to obtain and/or communicate plea offers to Applicant.
3. Ineffective assistance of trial counsel for seating two jurors exposed to media thus resulting in the Court's denial of the change of venue motion.
4. Ineffective assistance of trial counsel for failure to utilize witnesses at trial.
5. Ineffective assistance of trial counsel for failure to properly utilize defense witnesses at trial. Alternatively, newly discovered evidence and/or prosecutorial misconduct regarding witness James Gleaton.
6. Ineffective assistance of trial counsel for failure to fully impeach and cross-examine the State's witnesses and failure to pursue matters of

prosecutorial misconduct alluded to in cross-examination and closing argument.

7. Ineffective assistance of trial counsel for failure to object to expert testimony that exceeded the expert's area of qualified expertise. Transcript pp. 417-419.

8. Ineffective assistance of trial counsel for failure to fully develop an alibi defense and request an alibi charge at trial.

9. Ineffective assistance of counsel for failure to make contemporaneous objections to the State's closing argument.

10. Ineffective assistance of trial counsel for failure to object to the trial judge's failure to use the permissive inference language approved in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), during the charge to the jury.

11. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal; specifically, but not limited to trial counsel's arguments regarding venue and the "hand of one" charge.

12. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

V. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Marcia Blizzard, Andrew McAllister, Joseph Savitz, Kaliah Felder, Tremain Tyler, James Gleaton, and Trial Counsel Byron Gipson (hereinafter "Trial Counsel"). Respondent presented testimony from Solicitor John Williams Weeks, Jr.

Marcia Blizzard testified that she is an art teacher at Busbee Corbett Elementary-Middle School in Aiken County, and Applicant is a former student of hers. She stated that she was called to testify at Applicant's first trial, which ended in a mistrial, as a character witness. She testified that Applicant was a good student in school. She stated that she was not contacted to testify at Applicant's second trial, at which he was convicted, but she would have been willing to testify.

Andrew McAllister testified that he is a retired educator from Aiken County and he was formerly an assistant principal at Applicant's school. He stated that in his role he was familiar with students who had to have correctional discipline, and Applicant was never one of those students. He stated that he testified as a character witness at the first trial, but was not asked to appear at the second trial.

Joseph Savitz testified that he is retired from the South Carolina Office of Appellate Defense, and he handled Applicant's appeal. He stated that he had no recollection of handling this case, but he had reviewed the brief that he submitted prior to the evidentiary hearing. He stated that his standard practice was to submit Anders briefs in cases where there were no meritorious issues for direct appeal but they could begin to set up a potential issue for post-conviction relief, and that is probably what he did in this case. He testified that Applicant's defense in this case was alibi, but no alibi charge was requested, so he noted it for PCR rather than briefing it on direct appeal.

Mr. Savitz testified that if he did not brief a meritorious issue in the direct appeal, it was because he did not think that it was meritorious at the time. He stated that he was familiar with the case of Israel Wilds v. South Carolina because he wrote the appellate brief in that case and he was found to be ineffective for his brief in the PCR action for failing to brief the issue of "hand of one, hand of all." He stated that he wished he had raised the "hand of one, hand of all" issue sooner because he believed that they probably would have won on appeal if the issue were preserved for appeal. However, he stated that if there was evidence presented in Applicant's case that there were two or more shooters acting in concert, then that evidence would differentiate the case from the Wilds case in which he was found ineffective.

Kaliah Felder testified that on the night of the crime she stopped at Applicant's house on her way to the club at 11:30 or 12:00 at night. She stated that she left the club that night at 2:30 or 3:00 A.M. and returned to Applicant's house, where she arrived between 3:00 and 3:30 A.M. She stated that when she arrived, she saw Applicant walking up the dirt road talking on his phone. Ms. Felder testified that she and her friend Misty, who was with her, stopped and talked to Applicant for a while, and Applicant asked them for a ride. She stated that Applicant, his brother, and an older man got in their car and they gave them a ride, but she does not recall where they took them. She stated that she did not hear about the shooting that happened that night until three or four days later.

Tremain Tyler testified that he is 36 years old and Applicant is his younger brother. He stated that he grew up with learning difficulties and was in special needs programs throughout his life. He stated that he was criminally charged as a result of the shooting in this case and he spent eight years in the county jail as a result. He stated that he never testified at either of his brother's trials. He testified that he was asleep on the night of the event at his house when Mr. Walker came to the door. He stated that Mr. Walker left after speaking with Applicant and came back a short time later, and based on the conversation with Mr. Walker, he understood that they needed to leave the area, so they got a ride with Kaliah and Misty to the Aiken County area. Mr. Tyler testified that Applicant was at the house with him between when Mr. Walker spoke to him and left and when he came back. He stated that he was appointed an attorney to represent him on his criminal charges after the shooting.

James Gleaton testified that he testified at Applicant's first trial in November of 2006 and at the second trial in January of 2008. He stated that he gave a statement to law enforcement, stating that he was at Mr. Hartwell's house around 3:00 A.M. on the night of the shooting. He

saw a car come by, then a second car that he recognized as Willie Ware's car. He stated that he did not see anyone hanging from the car as it drove by. He heard shots fired, then Willie Ware's car drove by him again at a high rate of speed. He stated that he had given this story to law enforcement, and he testified to the same story at the first trial. After the first trial, he stated that he wanted to change his story and tell the truth at the second trial, and he and his attorney went to meet with Solicitor Bill Weeks, but the Solicitor told him that if he changed his testimony, he would not get out of jail.

Mr. Gleaton testified that the true story is when he saw the car drive by the second time, he saw Edward Walker hanging out of the car with a long rifle in his hand. He stated that he did not tell this version of the story at the first or second trial because he did not want his friends to go to jail, but now he wants to tell the truth. He stated that he could not see who else was in the car; he could only see Mr. Walker hanging out of the car.

Byron Gipson (Trial Counsel) testified that he met with Applicant countless times for countless hours preparing for the first trial. He stated that he met with Applicant's mother and father, he went to Wagener and to the area where the shootings took place, and he did extensive preparation with the witnesses that he was aware of. He stated that he did not use a private investigator, but he met with all witnesses himself. He stated that Applicant maintained his innocence before the trial, and there were no plea offers extended to him by the State. Before the second trial, Trial Counsel stated that he spent many hours reviewing and meeting with his client as well as other witnesses, and attempting to determine what new strategy the State would use in the new trial.

Trial Counsel testified that he strategically chose not to use the character witnesses at the second trial that were used at the first trial because they were very effectively cross-examine by

the Solicitor when they first testified. He stated that it did not seem like a very effective strategy the second time around because they had other witnesses to use. Trial Counsel testified that he made a motion for a change of venue before the second trial, but it was denied by the trial court because he had not used all of his jury strikes in the selection of the jury. He stated that he did not use all of his strikes because each of the jurors selected told the trial court that they could be fair and impartial in their decision, even if they had already been exposed to the facts of the case through the media.

Trial Counsel testified that he chose not to use Tremain Tyler as a witness at Applicant's trial because his testimony may have damaged Applicant's story, Tremain was facing the same criminal charges as Applicant, and Tremain's lawyer and family did not want him to testify. He testified that he never knew about Kaliah Felder and was not aware of her before the trial, but he did not think her testimony would have been helpful at trial because she did not testify about what happened during the crime, but after the crime took place. He stated that he had never heard the version of James Gleaton's testimony that he gave at the evidentiary hearing, but if he had known about it he would have had him testify about the "true story" at the second trial.

Trial Counsel testified that he saw nothing in his interactions with the prosecutor in this case to cause him to think that he had done anything improper. He stated that he did not feel the need to object to expert witness Joel Sexton's testimony about shooting pistols and weapons because his testimony was cumulative at that point in the trial and he could probably gather a lot of information about the weapon from the exit wounds in the body, and he did not want to lose credibility with the jury by objecting to every witness. Trial Counsel testified that he chose not to call Johnny Miles as a witness because you never know what he will say, and he had told him before that there was a long rifle in the house, that Applicant ran out of the house with a rifle,

and that they hid a rifle later, which obviously would have damaged Applicant. He stated he chose not to object to the Solicitor's closing argument because sometimes objecting looks fearful and irritates judges and juries.

Applicant testified that he spoke with Trial Counsel about the witnesses they would use at trial, and they never discussed using his brother, Tremain, as an alibi witness because he was mentally challenged. He stated that, before the trial, Trial Counsel did not think that using Misty as an alibi witness would change the jury's verdict.

Solicitor Weeks testified that he prosecuted Applicant's case, and took part in both trials. He stated that he interviewed James Gleaton as part of his pre-trial investigation and he called him as a witness at the first trial. He stated that he strategically decided not to call him as a witness at the second trial because he would rather cross-examine a witness than direct examine them, and he let the defense use him instead. He stated that Mr. Gleaton had been arrested on other charges between the first and second trial. He stated that he did not recall meeting with Mr. Gleaton and his attorney before the second trial, but if Mr. Gleaton had met with him and changed his testimony, the first person Solicitor Weeks would tell is Trial Counsel.

Solicitor Weeks testified that he does not recall threatening Mr. Gleaton in any way, and he did not withhold anything from the defense in this case. He stated that if Trial Counsel had been successful on his motion for a change of venue and the trial had been held in another county, he still would have prosecuted the case, called the same witnesses, used the same evidence, and had the same trial strategy. He stated that he never considered this an alibi case.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. Each allegation presented at the evidentiary hearing is addressed below.

Failure to prepare and investigate prior to trial

Applicant alleges that Trial Counsel was ineffective for failing to investigate and prepare for trial. This allegation is meritless.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances,

applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

At the hearing, Trial Counsel put forth several reasons why he chose not to use certain witnesses to support an alibi defense, including the witnesses' credibility, questions about their usefulness to his case, and the potential for the prosecution to elicit harmful testimony. The Court finds trial counsel's testimony to be credible and supported by the evidence in the record. Trial Counsel credibly testified, and Applicant agreed, that they met countless times to discuss and prepare for both trials. Trial Counsel investigated every witness he was able to and spent numerous hours of his time investigating this case and preparing for trial. Applicant has failed to prove that any further investigation or preparation would have changed the outcome of the trial, and this allegation is denied and dismissed with prejudice.

Failure to obtain or communicate plea offers

Applicant alleges Trial Counsel was ineffective for failing to obtain or communicate plea offers from the State. Trial Counsel credibly testified that there were no plea offers extended to Applicant before his trial. He stated that the allegations against Applicant were extremely heinous, and most solicitors are unwilling to make an offer that is less than murder for thirty years, day for day, which is no better than being convicted at trial, but he does not recall the State offering any plea deals at all. PCR tr. 58. Applicant has failed to prove that any plea offers were extended to Applicant and that Trial Counsel failed to communicate them to his client. Trial Counsel could not have been ineffective for failing to communicate plea offers to Applicant because there were none offered, and therefore Applicant has not proven any deficiency or prejudice in this regard.

It is clear from Trial Counsel's credible testimony that the State was unwilling to extend any plea offers in this case because of the severity of the charges and the high-profile nature of the case in the community. Trial Counsel cannot be held ineffective for failing to make the State do something that is within their discretion to do or not to do. The solicitor has broad discretion in choosing the offenses with which a defendant will be charged and in plea negotiations leading up to trial. See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).

Criminal defendants have no constitutional right to a guilty plea. State v. Kerr, 330 S.C. 132, 143, 498 S.E.2d 212, 217 (Ct. App. 1998). Instead, they have a right to a trial by a jury of their peers, and they may waive this right by choosing to plead guilty. Id. Applicant had no right to an extension of a favorable plea deal, and Trial Counsel cannot be found ineffective for failing to obtain something that Applicant is not entitled to. Furthermore, even if Applicant were correct in his argument that Trial Counsel should have gotten him a plea deal, there is no prejudice because his choice to plead guilty would result in the same outcome as his trial: a conviction with a sentence for murder.

Applicant has failed to prove both deficiency and prejudice, and this allegation is denied and dismissed with prejudice.

Change of venue motion

Applicant alleges that Trial Counsel was ineffective for seating two jurors who had been exposed to the media, resulting in the denial of his motion for a change of venue. This allegation is meritless and must be denied.

Trial Counsel's motion for a change of venue is thoroughly argued and explained beginning on page 22 of the trial transcript. He explained the high-profile nature of the case to

the trial court and the issues of concern for this specific murder case within their community. The trial court denied the motion, explaining that Trial Counsel chose to seat two jurors who admitted they had been exposed to the media in this case but he had not used all of his jury strikes. Trial tr. 33. The jurors who were seated told the trial court that, although they had been exposed to the media, they could be fair and impartial in deciding this case.

Trial Counsel explained in the trial transcript and testified at the evidentiary hearing that he chose to seat those jurors because they indicated they could be fair and impartial, and there were other potential jurors on the list that he had researched and wanted to save his jury strikes for. The trial court clearly felt that the jury selected could be fair and impartial and that the *voir dire* process corrected any potential issues with the case's exposure to the media. This Court finds that Trial Counsel was not deficient in his handling of the change of venue motion. He argued vigorously and used his strikes appropriately according to the strategy that he indicated both at the trial and at the evidentiary hearing. This Court will not question his strategy with the benefit of hindsight.

Further, Applicant has failed to prove that he was prejudiced by the denial of his motion for a change of venue. Testimony presented at the evidentiary hearing clearly indicated that, even if the motion had been granted and the trial had been held in another venue, the State would have prosecuted the case the same way, with the same witnesses, evidence, and strategy. This Court finds that the outcome of the trial would not have been different if the trial were held elsewhere, and there is no prejudice. Because Applicant has failed to prove deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Failure to utilize witnesses at trial

Applicant has failed to meet his burden of proving that Trial Counsel was ineffective in any way for failing to utilize any witnesses at trial. Trial Counsel presented a valid trial strategy for his use of and choice not to use every witness at trial. Furthermore, this Court finds that none of the testimony presented from additional witnesses at the evidentiary hearing would have changed the outcome of the trial, so there can be no prejudice to Applicant. Therefore, this allegation is denied and dismissed with prejudice.

Newly Discovered Evidence regarding James Gleaton

Applicant alleges that the testimony of James Gleaton presented at the evidentiary hearing constitutes newly discovered evidence that should allow Applicant a new trial. This allegation is meritless.

A party requesting a new trial based on after-discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 329-30, 256 S.E.2d 737, 739 (1979)).

This Court finds that Applicant has failed to prove that Gleaton's new testimony fits all five of these requirements. The testimony likely would not change the outcome of the trial because Gleaton would be impeached with his prior testimony from multiple statements to law enforcement as well as testimony from the first and second trial, which directly rebuts his new testimony. Applicant must also prove that the new testimony could not have been discovered before the trial with due diligence, yet Applicant himself testified that he knew of Gleaton's new

testimony before the second trial, yet they did not use it. The testimony is not material to the issue of guilt or innocence; his new testimony involves seeing another codefendant, Edward Walker, hanging out of the vehicle with a gun. This new testimony does not prove that Applicant was not also in the car or shooting at the victim, as well. At the trial, there was testimony presented that there may have been more than one shooter in the vehicle. Gleaton's testimony that he saw Edward Walker with a gun does not mean that Cornell Tyler could not possibly have been in the car with a gun, as well.

This Court further finds Gleaton's recantation testimony unreliable and incredible. South Carolina courts are held to a high standard when considering the credibility of recantation testimony. "We have said that " '(r)ecantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.'" State v. Wright, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977) (citing State v. Whitener, 228 S.C. 244, 89 S.E.2d 701." State v. Mayfield, 235 S.C. 11, 35, 109 S.E.2d 716, 729 (1959)). Gleaton testified twice under oath before a jury that he could not see anyone in the vehicle. Now, at the evidentiary hearing, he claims that he was lying on the stand at the first two trials and wants to explain what really happened, that he actually saw Edward Walker in the car with a rifle. This Court finds Gleaton's testimony incredible.

Because Applicant failed to prove all five elements of newly discovered evidence, and because Gleaton's testimony is unreliable and incredible, this allegation is denied and dismissed with prejudice.

Prosecutorial Misconduct regarding James Gleaton

Applicant alleges that Solicitor Weeks committed prosecutorial misconduct by threatening witness James Gleaton not to change his testimony at the second trial. This allegation is meritless.

Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be dismissed.

This Court finds Gleaton's testimony that he was threatened to be not credible. Solicitor Weeks testified that he did not threaten Gleaton in any way or tell him how to testify at trial. Solicitor Weeks chose not to use Gleaton as a witness for the State at the second trial, so he would not have had any reason to tell him how to testify. This Court finds that Applicant has failed to prove any kind of misconduct on behalf of the Solicitor in this case, and this allegation is denied and dismissed with prejudice.

Failure to object to expert testimony

Applicant has failed to meet his burden of proving that Trial Counsel was ineffective for failing to object to expert testimony that was outside the scope of his expertise. The expert's

testimony as to the type of weapon used was merely cumulative to what had already been presented to the jury and Trial Counsel gave a credible, strategic reason for not objecting. Any objection would not have kept the evidence of the firearm out of the trial and the jury's consideration, so there was no prejudice to Applicant. Therefore, this allegation is denied and dismissed with prejudice.

Failure to develop alibi defense

Applicant's allegation that Trial Counsel was ineffective for failing to develop an alibi defense is meritless. Applicant testified at the evidentiary hearing that he never discussed an alibi defense with Trial Counsel, but he wanted him to use his brother Tremain and other witnesses, such as Misty, Kaliah Felder and Johnny Miles, to corroborate his trial testimony as an alibi defense. However, Trial Counsel credibly testified that he had investigated Misty and was never able to get in contact with her. He stated that he was never aware of and never knew about Kaliah Felder because she moved to New York after the crime occurred, so he could not have gotten in contact with her to use her as a witness. Trial Counsel credibly testified that Johnny Miles was sick during the second trial and he chose not to call Johnny Miles as a witness because he was afraid his testimony would hurt Applicant. Finally, Trial Counsel credibly testified that he made a conscious decision not to use Tremain Felder as a witness for several reasons, including the fact that Tremain was facing the same criminal charges as Applicant and his attorney did not want him to testify and possibly incriminate himself at Applicant's trial. Because Trial Counsel offered a strategic reason for not using Tremain or Johnny Miles and attempted to investigate the other witnesses but was unable to reach them, this Court finds that Trial Counsel was not deficient in this manner.

Secondly, Applicant was not prejudiced by this failure to develop or request an alibi defense because the testimony presented at the evidentiary hearing and at the trial does not constitute an alibi. To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). "A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act. Alibi means elsewhere, and the charge should 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. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). "In other words, by an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible... And since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id.

Applicant's testimony at trial was that he was asleep; Edward Walker knocked on his door and woke him up to ask him for money, then left. Trial tr. 554-597. He stated that when Edward Walker first knocked on his door, it was "about three-something. Close to four" in the morning. Trial tr. 557-58. Shortly after, Applicant went back in his room to lay down, then he heard shots and went outside to see what happened. He did not see anything, so he laid down again until Edward Walker knocked on his door again and told him to leave because something had happened. He then testified that Misty came back to the house and gave he and his brother a ride to Aiken. Trial tr. 565.

Even if Applicant's story had been corroborated by alibi witnesses at trial, his story does not meet the definition of an alibi because it does not prove that it was physically impossible for him to have participated in the crime. Just because Applicant claims that he was at his house laying down when the shooting occurred, his testimony does not show that it was physically impossible for him to be in the vehicle shooting at the victims just outside his house. An alibi instruction would have been improper in this case.

Furthermore, Applicant cannot prove any prejudice from the failure to use Johnny Miles and Misty as witnesses because their testimony was not presented at the evidentiary hearing. In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

Because Applicant has failed to meet his burden of proving either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to object to State's closing argument

Applicant alleges Trial Counsel was ineffective for failing to object to portions of the State's closing argument. Trial Counsel credibly testified that he saw nothing objectionable in Solicitor Weeks' closing argument and strategically chose not to object to allow the jury to look more favorably upon the defense. Applicant has further failed to prove that any of the Solicitor's statements in his closing argument were improper, inappropriate, objectionable, or changed the outcome of the case. Therefore, this allegation is denied and dismissed with prejudice.

Failure to object to permissive inference language

Applicant's allegation that Trial Counsel was ineffective for failing to object to the lack of permissive inference language is denied. This Court finds that Trial Counsel was deficient in failing to object to the trial judge's malice charge. The malice charge given in this case clearly did not incorporate the permissive inference language approved in State v. Elmore[1]. Trial Counsel testified that he did not bring to the trial court's attention the fact that it had deviated from the standard Elmore instruction on permissive inference. However, this Court finds that Applicant was not prejudiced by this deficiency, so the allegation must be denied.

Applicant argued to this Court that Trial Counsel should be found ineffective for this failure to object based on a recent South Carolina Supreme Court case, Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), reh'g denied (June 15, 2016). Gibson granted post-conviction relief in the same situation, holding that trial counsel was deficient for failing to object at that the applicant was prejudiced "[b]ecause there was little evidence of malice aside from the use of a gun." Id. at 266, 786 S.E.2d at 124. The current case differs from Gibson in this regard. "In determining whether petitioner was prejudiced by trial counsel's deficient performance, this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury." Id. (citing Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101 (1986); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992)). "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the

[1] State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Elmore suggested that courts start using the following language in their jury charges: "The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, [sic] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

jury without the erroneous malice charge." Id. (citing Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008)).

This Court finds that Applicant was not prejudiced by the trial court's lack of permissive inference language because there was substantial evidence presented to the jury to allow them to infer malice aside from the fact that a deadly weapon was used. "Malice is defined as being hatred or ill-will. Malice is wrongful intent to injure another person. It indicates a wicked or depraved spirit intent on doing wrong. Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." State v. Fuller, 229 S.C. 439, 93 S.E.2d 463, 466 (1956); Heyward, 197 S.C. at 375, 15 S.E.2d at 671.

The evidence presented at trial showed the jury that Applicant and the men with him at the time saw a truck slow down in front of his house in the very early hours of the morning. Applicant's brother ran into the road with a pistol and shot at the truck as it sped away. The men piled into a vehicle, and, without knowing who was in the truck or why they were in front of their house, they pursued a high speed chase behind the truck. Applicant used a long rifle to shoot from his vehicle at the truck several times, striking both victims in the truck, until the truck ran off the road, flipped, and crashed in a field. Applicant then returned to his home and fled the scene.

This Court concludes that the erroneous malice instruction did not contribute to the verdict based on all of the evidence presented to the jury. In this case, the jury need not have relied on the presumption of malice from the use of a deadly weapon to find that Applicant acted with malice in the commission of the crime. In addition to there being no evidence that would have reduced, mitigated, excused, or justified the homicide, there was overwhelming evidence of

malice apart from the use of a deadly weapon. Accordingly, Applicant was not prejudiced by trial counsel's failure to object. Therefore, even though Trial Counsel was deficient for failing to object to this language, there was no prejudice to Applicant in this case. This allegation is denied and dismissed with prejudice.

INFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Applicant cannot satisfy either requirement of the Strickland test.

Appellate Counsel testified that if he did not brief a meritorious issue in the direct appeal, it was because he did not think that it was meritorious at the time. Although Applicant argued that his case was similar to State v. Wilds, 407 S.C. 432, 756 S.E.2d 387 (2014), this Court finds otherwise. In Wilds, the evidence presented at trial showed that there was only one shooter, Wilds. The South Carolina Court of Appeals held that "because no evidence in the instant case indicated anyone other than Wilds was the shooter, we find the PCR court correctly determined the trial court erred in charging the jury on accomplice liability." Wilds at 440, 756 S.E.2d at 391. The court granted Wilds a new trial, holding that his appellate counsel was ineffective for failing to brief the issue of the trial court's accomplice liability instruction.

In the current case, however, there was evidence presented at Applicant's trial that there may have been more than one shooter. This sets Applicant's case apart from Wilds entirely. Testimony at the trial indicated that Tremain Tyler, Applicant's brother, had a gun and shot a handgun at the victims' vehicle. Trial tr 155, 257. Willie Ware testified at trial that he had a gun inside the vehicle at the time of the shooting. Trial tr. 264. Willie Ware testified on cross-examination that Edward Walker could have been shooting a gun from the top of the car, as well, Trial tr. 276, and that he heard multiple shots coming from the vehicle he was in, Trial tr. 284. After Ware testified that he did not tell law enforcement that Edward Walker had a gun in the car, Trial Counsel impeached him with a portion of his videotaped statement to law enforcement, in which Ware told them that Edward Walker had a pistol. Trial tr. 299.

Willie Smith testified at trial that Ware told him that Edward Walker got into the car with a gun and shot at the victims' truck. Trial tr. 511-2. He stated that Edward Walker told him that he was shooting a pistol. Trial tr. 521. Fredrick Scott testified that Edward Walker told him he needed to hide a gun after the shooting took place. Trial tr. 533.

Trial Counsel testified at the evidentiary hearing that, although he did not like it, there was evidence in the record that supported the trial judge's accomplice liability instruction. When the trial court instructed the jury on accomplice liability, Trial Counsel requested a "mere presence" instruction.

Based on the trial testimony and the testimony from the evidentiary hearing, this Court finds that there was evidence presented at trial that more than one person in the vehicle had a firearm and could have shot at the vehicle. This is the exact opposite of the fact pattern in Wilds, and the Court finds that the trial court's "hand of one, hand of all" charge was proper. Therefore, Appellate Counsel could not have been ineffective for failing to brief this issue because it would not have been successful on appeal. This Court finds that Appellate Counsel was not deficient in choosing not to brief this issue based on the evidence presented at trial, and there was no prejudice to Applicant by the failure to brief this issue because the result of the appeal would not have been different. Because Applicant failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

VII. CONCLUSION

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

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

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2 day of May, 2017.

Maite Murphy

MAITE MURPHY
Presiding Judge
Second Judicial Circuit

St. George, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Cornell Devon Tyler, #326023, Applicant, v. State of South Carolina, Respondent.	)	2013-CP-02-02859 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on December 17, 2013. An Order of Dismissal was filed on May 19, 2017, denying the application for post-conviction relief. Applicant filed its Motion Pursuant to Rule 59(a) & (e), SCRCP on May 25, 2017. After careful consideration of Applicant's motion, the record before the Court, and the evidentiary hearing testimony, this Court finds the motion should be denied.

IT IS THEREFORE ORDERED:

1. That Applicant's Motion Pursuant to Rule 59(a) & (e), SCRCP is denied.

AND IT IS SO ORDERED this 15th day of Aug., 2017.

MAITE MURPHY
Presiding Judge
Second Judicial Circuit

St. Mary's, South Carolina