THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 14 2018
S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

App. Case No.: 2017-002055

Cornell Devon Tyler, 326023, Petitioner,

vs.

State of South Carolina Respondent.

PETITION FOR WRIT OF CERTIORARI

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

INDEX

Statement of Issues....................1

Standard of Review....................1

Procedural History....................2

Argument....................4

The lower court erred by failing to find that trial counsel provided ineffective assistance when he failed to call witnesses at trial, failed to fully develop an alibi defense and failed to request an alibi charge and/or object to the trial court's failure to give an alibi instruction. The lower court further committed an error of law by failing to properly rule upon the issues raised as required by Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) and South Carolina Code Ann. § 17-27-80....................4

The lower court erred by failing to grant a new trial on the allegations related to the testimony of James Gleaton....................13

The lower court erred in failing to find resulting prejudice from trial counsel's failure to object to the trial court's omission of the permissive inference malice instruction....................22

Conclusion....................25

STATEMENT OF ISSUES

I. The lower court erred by failing to find that trial counsel provided ineffective assistance when he failed to call witnesses at trial, failed to fully develop an alibi defense and failed to request an alibi charge and/or object to the trial court's failure to give an alibi instruction. The lower court further committed an error of law by failing to properly rule upon the issues raised as required by Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) and South Carolina Code Ann. § 17-27-80.

II. The lower court erred by failing to grant a new trial on the allegations related to the testimony of James Gleaton.

III. The lower court erred in failing to find resulting prejudice from trial counsel's failure to object to the trial court's omission of the permissive inference malice instruction.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law.[1] The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate

[1] Recently, in Smalls v. State, Op. No. 27764 (S.C. Sup. Ct. filed February 7, 2018) (Shearouse Adv. Sh. No.6 at 45-46, n.2), this Court held: In numerous cases, this Court has incorrectly stated an appellate court "gives great deference to the PCR court's . . . conclusions of law." See, e.g., Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). The court of appeals repeated our misstatement, quoting Porter. Smalls, 415 S.C. at 496, 783 S.E.2d at 820. We clarify that appellate courts review questions of law *de novo*, with no deference to trial courts. While we uphold the analysis and result of the following decisions, we now direct that none of these decisions should be read to suggest an appellate court gives any deference to a PCR court's conclusions of law: Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017); Gibbs v. State, 416 S.C. 209, 218, 785 S.E.2d 455, 459 (2016); McHam v. State, 404 S.C. 465, 473, 746 S.E.2d 41, 45 (2013); Hyman v. State, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012); Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011); Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011); Robinson v. State, 387 S.C. 568, 574, 693 S.E.2d 402, 405 (2010); Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010); Terry v. State, 383 S.C. 361, 371, 680 S.E.2d 277, 282 (2009); Jones v. State, 382 S.C. 589, 595, 677 S.E.2d 20, 23 (2009); Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009); Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008); Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008); Harris v. State, 377 S.C. 66, 73, 659 S.E.2d 140, 144 (2008); Lorenzen v. State, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008); Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 528 (2007); Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 643 (2006); Porter, 368 S.C. at 383, 629 S.E.2d at 356; Simpson v. Moore, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006); Bright v. State, 365 S.C. 355, 358, 618 S.E.2d 296, 298 (2005); Winns v. State, 363 S.C. 414, 417, 611 S.E.2d 901, 903 (2005); Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); Sellers v. State, 362 S.C. 182, 187, 607 S.E.2d 82, 84 (2005); Magazine v. State, 361 S.C. 610, 615, 606 S.E.2d 761, 763 (2004); Huggler v. State, 360 S.C. 627, 632, 602 S.E.2d 753, 756 (2004); Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Aiken County Clerk of Court. Petitioner was indicted during the April 2006 term of the Aiken County Grand Jury for Murder (2006-GS-02-551), Assault and Battery with Intent to Kill (ABWIK) (2006-GS-02-551), and Possession of a Weapon during a Violent Crime (2006-GS-02-550). App. p. 758.

On November 27, 2006, Petitioner was called to trial in front of the Honorable Thomas A. Russo at the Aiken County Courthouse. Petitioner was represented by Byron Gipson, Esquire. On November 30, 2006, the trial concluded with a hung jury.

On January 7, 2008, Petitioner was called to trial in front of the Honorable Clifton Newman at the Aiken County Courthouse. App. p. 1 Petitioner was represented by Byron Gipson, Esquire. On January 10, 208, Petitioner was found guilty as indicted. Judge Newman sentenced Petitioner to a term of thirty years for Murder, a term of twenty years for ABWIK, and a term of five years for Possession of a Weapon. App. p. 756. A motion for reconsideration was timely filed. A hearing was held on April 30, 2008, by which the motion was denied. App. p. 766. Thereafter, a direct appeal was timely filed.

Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, perfected Petitioner's appeal by filing an Anders Brief. App. p. 788. Thereafter, 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). App. p. 797. The Remittitur was issued on February 21, 2013.

On December 17, 2013, an Application for Post Conviction Relief was filed. App. p. 822. Respondent submitted a Return July 29, 2014. App. p. 830. On December 20, 2016, Petitioner, through counsel, filed an Amendment to his Application, which amended his claims of ineffective assistance of trial counsel as follows:

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.

App. p. 844.

On January 24, 2017, an evidentiary hearing was conducted at the Bamberg County Courthouse in front of the Honorable Maite Murphy. App. p. 847. Petitioner was present and was represented by Tricia A. Blanchette, Esquire. The State was represented by Julie A. Coleman, Assistant Attorney General. At the close of the hearing, both parties requested the opportunity to obtain the transcript prior to the submission of proposed orders. By way of an email prior to the receipt of the transcript, the parties were instructed that the Honorable Maite Murphy intended to deny the Application and only requested a proposed order from Respondent. On May 2, 2017, an Order of Dismissal was issued, which was filed on May 19, 2017. App. p. 1219.

On May 25, 2017, Petitioner, through counsel, submitted a Motion pursuant to Rule 59, SCRCP, which was filed on May 30, 2017. App. p. 1245. By way of written Order, the Motion was denied on August 15, 2017. App. p. 1253. Thereafter, Petitioner through counsel, timely filed a Notice of Appeal, from which this Petition follows.

ARGUMENT

I. The lower court erred by failing to find that trial counsel provided ineffective assistance when he failed to call witnesses at trial, failed to fully develop an alibi defense and failed to request an alibi charge and/or object to the trial court's failure to give an alibi instruction. The lower court further committed an error of law by failing to properly rule upon the issues raised as required by Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) and South Carolina Code Ann. § 17-27-80.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to establish that counsel was ineffective, a PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for

counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

By way of Amendment, Petitioner alleged that trial counsel failed to utilize witnesses at trial, failed to fully develop an alibi defense and failed to request an alibi charge at trial. In support of these allegations, Petitioner testified and called Marcia Blizzard, Andrew McCallister, Kaliah Felder, Tremain Tyler, Byron Gipson, Esquire, and Joseph Savitz, Esquire. In the Order of Dismissal, the lower court briefly summarized the testimony of each witness under the heading entitled "Summary of Relevant Testimony." Thereafter, the lower court committed an error of law by failing to properly address these issues under the heading entitled "Findings of Fact and Conclusions of Law." Additionally, the minimal findings made by the lower court require reversal since the evidence in the record does not support such findings.

By way of the Petitioner's Motion Pursuant to Rule 59(a) & (e), SCRCP, Petitioner noted that in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Petitioner argued that the lower court made erroneous findings, (i.e. stating that Attorney Savitz did not brief the alibi issue), failed to make complete findings and failed to address counsel's failure to request an alibi charge. App. pp. 1223, 1232, 1248-51. Petitioner submits that the lower court committed an error of law in failing to properly address the matters raised at the evidentiary hearing and in Petitioner's Rule 59, SCRCP, Motion. Also, the findings that were made are not supported by the record as discussed below. As a result, Petitioner submits that the

lower court's denial of relief must be reversed or at a minimum remanded for proper findings of fact and conclusions of law.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Without a doubt, a criminal defense attorney has a duty to investigate, but that duty is limited to reasonable investigation. When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the this Court reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. This Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. Lounds, 380 S.C. at 460, 670 S.E.2d at 649, See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). In McKnight, this Court held: "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (S.C. 2014), Walker alleged that his counsel was ineffective in failing to conduct a complete investigation, specifically regarding a

potential alibi witness (Reed). At the evidentiary hearing, Reed testified that she was not contacted by counsel for Walker until the PCR stage. She could not provide specific dates or times, but she ultimately testified that she spent every weekend with Walker up until the time he was arrested. The Court of Appeals reversed the granting a new trial, holding that while trial counsel's failure to interview Reed was deficient performance, it was not prejudicial. Id. at 235–39, 723 S.E.2d at 615–17.

In reversing, the Court of Appeals relied on this Court's decision in Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), that a failure to interview an alibi witness is only prejudicial where the witness's testimony, if true, would actually establish an alibi defense by making it physically impossible for the defendant to have committed the crime. Id. at 237–39, 723 S.E.2d at 616–17. The Court of Appeals concluded Reed's testimony did not establish an alibi because "it leaves open the possibility that Walker is guilty." Id. at 239, 723 S.E.2d at 617.

After granting certiorari, this Court addressed the Court of Appeals reliance on Glover as follows:

> Here, in reversing the PCR court, the court of appeals relied on this Court's language in Glover that "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" and its holding that a PCR petitioner is not prejudiced by his counsel's failure to interview a potential alibi witness who cannot present testimony that meets the legal definition of an alibi. Glover, 318 S.C. at 498, 458 S.E.2d at 540.
> In Glover, the petitioner was convicted of crimes that occurred in Williamsburg County and sought PCR on the basis his trial counsel failed to contact alibi witnesses who would have testified that he was in Florida at 8:00 a.m. on the day the crimes were committed. Id. at 497, 458 S.E.2d at 539. The Court found that because the crimes occurred at 8:30 p.m. and the drive between the petitioner's location in Florida and Williamsburg County was only approximately six and a half hours, the fact he was allegedly in Florida that morning did not make it physically impossible for him to have committed the crimes. Id. at 498, 458 S.E.2d at 540. Therefore, the Court held the alibi witnesses were not sufficient to create an alibi defense and the petitioner was not prejudiced by his counsel's failure to interview them. Id.

> The court of appeals found Reed's testimony did not qualify as an alibi because "her testimony does not account for Walker's whereabouts on March 2, 2002, such that it was physically impossible that he committed the crimes." Therefore, the court concluded that under Glover, Walker could not establish the prejudice prong. Given our limited scope of review over findings of the PCR court, this was error. Moreover, the court of appeals misapprehended the applicability of Glover to this case.

Thereafter, this Court explained: "Unlike Glover where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-7, 756 S.E.2d at 147. Here, the lower court failed to find that the testimony offered at the evidentiary hearing established that it was not possible for Petitioner to have committed the crime.

In the instant case, Petitioner testified at trial in detail regarding the events from the afternoon of August 26, 2005 through the early morning hours of August 27, 2005. App. p. 554-565. He had a cookout at his house; then, he played video games and hung out at his house with his brother and Johnny Miles. App. pp. 554-5. Around 11:00 p.m., his friend Misty came by on her way to the club, and she wanted to know if she could come by afterwards. App. p. 556. He went to bed and his brother was still playing video games. App. p. 557. He heard knocking around 4:00 a.m. App. p. 558. He thought it was Misty, but it was Edward Walker (hereinafter "Walker"). App. p. 558. Mr. Walker wanted to borrow twenty dollars. App. p. 559. He gave Walker the money and told him to leave since Walker had previously gotten into an altercation with his brother over a girl. App. p. 559. He closed the door, laid back down, heard shots, waited a minute, got up, went outside, did not see anybody or anything, so he went back and laid down. App. p. 560. After a few minutes, Walker was back knocking on his door, he explained:

> I opened the door. He told me, "I believe something happened" which I asked him what happened, and he wouldn't tell me what happened. He just said, "You just need to get from around here." So, at that point, I closed the door. I got my brother and Mr. Johnny Miles up. I said, "Man, Walker said something happened. We need to get up and leave. I don't know what it is or what happened."

App. p. 561, lns. 12-20. He was going outside to make a call when Misty pulled up. App. p. 563. Mr. Miles offered that they could go to his niece's house, and Misty took them there. App. pp. 563-5. Johnny Miles, Tremain Tyler nor Misty were called at the second trial.

In contrast to Petitioner's testimony, Walker testified that he went to John Hartwell's house with Kendall Seawright and Willie Ware. App. pp. 198-99. Mr. Seawright wanted to go to Petitioner's house, so they did. App. pp. 199-200. He went to the side of the house to relieve himself, he saw headlights, heard shots and ran back out front where he saw Tremain shooting at a car driving away. App. pp. 200-201. He hopped on the roof of the car as it was pulling out and saw Petitioner with a gun in his lap. App. p. 201. He remained on the roof as they followed the vehicle, Petitioner shot several times, he saw the vehicle flipping, and they took off. App. pp. 201-3.

On cross-examination, trial counsel pointed out numerous inconsistencies in the stories of Kendall Seawright, Edward Walker and Willie Ware and exposed their joint meetings in the Solicitor's office while preparing for trial. In closing, counsel argued that the witnesses had new stories, implicating Petitioner, after a powwow in the Solicitor's office. App. p. 647, lns. 7-21. He further argued: "Edward Walker is the logical person that who did all of these things, who has covered, who has lied, who has weaved this web of lies." App. p. 662, lns. 22-24.

During closing, he also argued that the only footprints by where Walker said Petitioner came to the car where Walker's, the testimony established that Walker and Ware were in the car when the shooting occurred, and there simply was no evidence Petitioner was involved. App. pp.

627, 628, 631. In sum, he argued: "The only thing that exists is three people lying and covering for one another." App. p. 653, lns. 6-7.

At the evidentiary hearing, Attorney Savitz testified about his typical process in including an issue that is not preserved in an Anders Brief to point it out to potential PCR counsel. App p. 863. Referring to the brief, he explained: "His defense was alibi, no alibi charge was requested so, obviously, I noted it for PCR." App. p. 864, lns. 5-8. In the Order, the lower court errantly stated: "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." App. p. 1223. By way of an Anders Brief, Joseph Savitz, Esquire, raised the following issue: "The trial judge committed reversible error when he neglected to instruct the jury on the defense of alibi." App. p. 791. The following arguments were included in the brief appellate argument, along with citations to supporting case law:

> 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.
>
> Since Tyler's defense was solely alibi, there could have been no valid strategic reason for waiving an instruction on that defense.
>
> 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.

App. p. 793.

When asked about requesting an alibi charge, trial counsel concluded that he did not request an alibi charge during the off the record charging conference and conceded he did not request or object to the lack of an alibi charge on the record. App. pp. 944-45. When asked about his development and presentation of an alibi defense, he explained that "alluded" to alibi but deemed it "dangerous" to actually say the word alibi. App. pp. 944-947. He did not

specifically explain his reasoning behind his concerns. When asked if he felt there was a viable basis for an alibi charge request when he only called Petitioner at trial, he responded that he did not think he would have had one. App. p. 947, lns. 9-15.

Specifically, as to the alibi defense, Tremain Tyler was called at the evidentiary hearing since he was referenced in Petitioner's trial testimony as being present with Petitioner in his home at the time of the shooting. When he took the stand, Tremain acknowledged that he graduated with a certificate and had some learning difficulties, but he understood what was taking place. App. pp. 880-82. He recalled being charged following the shooting on August 27, 2005 and remaining in the county facility for eight years, which culminated in treatment for leukemia. App. pp. 882-83. After being charged, he did not give a statement, was not called at trial, nor did he recall speaking with Petitioner's trial counsel. App. pp. 883-84. He testified that he would have been willing to speak with trial counsel and would have been willing to testify at trial. App. p. 884. Regarding the night in question, he recalled Walker coming to the door and returning a short time later. App. p. 884. After Walker's return, he recalled understanding that they needed to leave and catching a ride with Misty and Kaliah. App. pp. 884-85. He testified that in between Mr. Walker's appearances at the house, Petitioner was home with him and did not leave with any individuals in a car. App. p. 885. On cross-examination, he was asked if he recalled his attorney's name and if he knew if his attorney spoke with trial counsel. App. p. 886.

Kaliah Felder was also called at the evidentiary hearing and corroborated Petitioner's version of events, as was acknowledged during trial counsel's evidentiary hearing testimony. App. pp. 871, 924-25. Ms. Felder recalled regularly stopping by Petitioner's home on the way to and from the club on the weekends back in August of 2005 with her best friend Misty. App. p. 872. Specifically, she recalled August 27, 2005 and going by Petitioner's home around 11:30 or

12:00 on the way to the club with Misty. App. pp. 872-73. She remembered going by Petitioner's home after being at the club around 3-4 a.m., but she admitted her memory would have been better regarding the time in 2005. App. pp. 873-74, 878. She recalled seeing Petitioner on the road trying to use his phone and explained that she knew it was hard to get cell service by Petitioner's home. App. pp. 874-75, 878. She admitted she was intoxicated, but she remembered Misty speaking with Petitioner then giving him, his brother and an older guy a ride. App. p. 875. She also remembered everything seeming typical, as they regularly gave Petitioner rides, including Petitioner being his usual sweet self. App. pp. 874-75. She heard about the shooting several days later and it did not make sense to her since she had been with the Petitioner and everything seemed normal. App. pp. 876-77. She was never contacted by investigators or any attorneys prior to trial, and she affirmed that she would have been willing to testify.[2] App. p. 877.

At the evidentiary hearing, Petitioner testified that counsel never discussed alibi with him and that he wanted Misty, Kaliah and his brother called at his trial. Evidentiary Hearing Transcript pp. 973-978, 988-89. In contrast, trial counsel gave a lengthy explanation of his reasons for not calling Tremain that culminated in his assertion that Petitioner and his family did not want Tremain called. App. pp. 918-920. Regarding Kaliah, counsel ultimately agreed that her testimony corroborated Petitioner's testimony. App. pp. 924-5.

As was noted in the direct appeal brief, Petitioner urges this Court to find that the trial court erred in failing to properly address the issues presented and grant relief on the above discussed issues. The lower court excused counsel's failure to call witnesses to corroborate Petitioner's alibi and version of events, and the lower court did not address counsel's failure to request an alibi charge when it is obvious that the defense hinged on alibi.

---

[2] On cross-examination, Ms. Felder testified that she moved to New York three months after the shooting and returned in 2008 or 2009. App. pp. 878-79.

As addressed above, in Walker, this Court explained: "Unlike Glover where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-7, 756 S.E.2d at 147. In the instant case, the lower court failed to find that the testimony offered by Tremain Tyler at the evidentiary hearing established that it was not possible for Petitioner to have committed the crime, yet the court assigned no error in failing to call Tremain Tyler. Additionally, the lower court found no error in failing to utilize both Kaliah and Tremain, to corroborate Petitioner's version of events. For these reasons as argued in detail above, Petitioner submits that counsel was ineffective and resulting prejudice was demonstrated under Strickland requiring a new trial.

II. The lower court erred by failing to grant a new trial on the allegations related to the testimony of James Gleaton.

Through his Amendment, Petitioner alleged: 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. In response, the lower court found that the testimony of James Gleaton did not amount to newly discovered evidence. The lower also held that the allegation of prosecutorial misconduct is "a direct appeal issue that is procedurally barred." App. p. 1234. Petitioner submits this finding amounts to a clear error of law. See Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). Finally, the lower court failed to address the allegation that counsel was ineffective for failing to properly utilize defense witnesses at trial (James Gleaton), which was argued in Petitioner's Motion Pursuant to Rule 59(a) & (e), SCRCP. App. pp. 1247-51.

On October 3, 2005, James Gleaton gave a statement recounting the events of August 27, 2005. App. p. 1215. He recalled hearing a shot, seeing one car and then a second car he recognized as Willie Ware's car. App. p. 1215. He did not see anyone in the car or hanging out of the car. He heard additional shots, saw Ware's car pass by at a high rate of speed. Then, he headed home. App. 1215.

During Petitioner's first trial, James Gleaton was called by the State. He explained that he knew Petitioner and the State's witnesses. App. p. 1022. He testified that he was at Petitioner's house for a cook-out earlier in the day, and he was at Hartwell's house waiting for his car to be returned when he heard gunshots prior to seeing Ware's car race by. App. p. 1018. He saw a truck go by, he saw the car go by, and he heard more shots. App. p. 1018. He only saw Ware's car come back by and he could not see anyone in the car. App. p. 1019-20. On cross-examination, he testified that he did not see Petitioner in the car. App. p. 1025.

He recalled going home and law enforcement pulling in his driveway. He met with law enforcement a couple times later that day. App. p. 1020. He recalled speaking with the other State witnesses about the case. App. p. 1025. Specifically, he recalled being in a room with Mr. Seawright and discussing some of the details that were not right. App. p. 1025-26. Thereafter, a proffer was conducted regarding his conversation with Mr. Seawright. App. p. 1028-1031.

At the second trial, Mr. Gleaton was called by the defense. App. p. 480. He again explained how he knew the parties from both sides. App. p. 482-3. He testified that he was at Hartwell's house around 3:00 a.m., and Edward Walker, Kendall Seawright, and Wallow Ware came up and asked for a beer. Mr. Ware was driving a green Buick similar to his car. App. p. 484. He went inside, but they left before he came back out. App. p. 483. So, he decided to walk to Petitioner's house. App. p. 485.

While walking, he heard gunshots, which was typical for the area. App. p. 485. He saw two vehicles and thought it was someone racing his car. He heard gunshots further down the road. App. p. 486. He saw the car come back by and heard someone yell, which he thought was Walker. App. p. 486. He said he did not know who was in the car, but he saw gunfire from the passenger's side. App. p. 487.

When asked, he also testified about conversations he had with Walker at the jail. Mr. Walker told him he appreciated him not telling on anyone, but he later accused him of being a "snitch." App. pp. 491-3. The State did not cross-examine him. App. p. 495.

While on the stand, Walker testified that he never asked Mr. Gleaton to change his story. App. p. 218.

At the evidentiary hearing, Mr. Gleaton took the stand and affirmed that he testified at Petitioner's trials and gave a voluntary statement on October 3, 2005, which was admitted as Applicant's Exhibit Three. App. pp. 887-893, 1215. He further affirmed that his proffered testimony regarding his meeting with Mr. Seawright was the truth. App. p. 893.

He recalled meeting with Mr. Gipson twice between Petitioner's trials. When asked about meeting with the Solicitor, he explained:

> Actually, what happened was I was --- at the first trial, I caught a charge and I was in the county jail on a charge too. And then, you know, while I was in there, I started thinking about things. I was like, we got a woman dead and a man could be going to prison, and I know the truth and I ain't doing nothing about it. So I took my public defender and I went to Mr. Weeks. And he specifically told me if I change my testimony, I would not get out of jail.

App. p. 893, ln. 20 – 894, ln. 4. He further explained that he told Attorney Gipson about the meeting with the Solicitor, was called by the defense at the second trial, but he chose to stick with his original story because he was "so scared" due to his serious pending charge. App. p. 894, lns. 11-16.

Thereafter, the following testimony was elicited:

Question: When you say left it how it was, can you explain that to me?

Answer: Because, see, what happened, when the car went by, I didn't see who was shooting, but when the car came back by, I seen Edward Walker hanging out the car with the gun.

Question: And all you testified to at the second trial, specifically in reference to the transcript on pages 486 and -87, is you heard someone yell and you thought it was Walker.

Answer: Right.

Question: But was there more to that story?

Answer: I knew --- I knew exactly who it was. I raised --- I --- I knew exactly who it was.

Question: Okay, so you withheld that information when the defense called you?

Answer: Yes, ma'am, I did because, like I said, I grew up around all of them, I'm the older one out of all of them, and I didn't – you know, I didn't want nobody to go to jail. But after being in jail, I realized that a woman is gone, a woman is dead, you know, and this man, I been knowing him a long time, you know, and then, like, his father, he's doing everything he can to get his son out of jail for something I know he didn't do.

Question: Sir, I have to ask the obvious question then: Are you here today giving us this information because you just want to help Mr. Tyler?

Answer: Ma'am, I'm here to help my conscious first because 11 years --- I ain't sleep in --- I haven't sleep in 11 years because I know a man is in jail and a woman is dead all because of somebody else action.

App. p. 894, ln. 17 – p. 895, ln. 24. When asked, he further recounted, in detail, what he witnessed on the night in question. App. pp. 897-899.

He affirmed that he told Mr. Gipson this information, but he chose to withhold it when called at the second trial. He explained that if pressed by Mr. Gipson, he would have disclosed it, along with the fact that he felt threatened by the Solicitor. App. pp. 896-7.

When Mr. Gibson took the stand and was asked about Mr. Gleaton, he responded: "I think the easiest thing I can explain is that the things he testified today about, seeing a gun in Edward Walker's hands, I've never heard that before today." App. p. 925, lns. 10-17. He explained that if he would have known that Mr. Gleaton saw a gun in Walker's hand, "there would have been a change in how things were presented." App. p. 926, lns. 11-15. He explained that he simply called Mr. Gleaton at the second trial because the State did not. App. pp. 926-27. He did not specifically recall Mr. Gleaton informing him that he felt threatened by the Solicitor's Office, but he explained it was not "uncommon for someone to feel uncomfortable." App. p. 925, ln. 18 – p. 926, ln. 9. In conclusion, he repeatedly stated that he would have loved to have the testimony offered by Mr. Gleaton at the evidentiary hearing at Petitioner's trial. App. pp. 928-29.

When John William Weeks, Jr., Esquire, took the stand, he explained that he had been with the Second Circuit Solicitor's Office for going on eighteen years, and he recalled prosecuting Petitioner's case. App. pp. 1002-3. He recalled meeting with James Gleaton. App. p. 1003. When asked if he was familiar with the testimony Mr. Gleaton offered at the evidentiary hearing, he responded: "I've heard a bunch of versions of the stories in this case." App. p. 1004, lns. 2-5. He could not specifically recall why he did not call Mr. Gleaton at the second trial. App. p. 1004-5. He testified that if any witness had changed their story, the "first person that got told about it was Byron Gipson." App. p. 1005, lns. 10-17. When asked about threatening Mr. Gleaton, he explained how his physical stature and voice can be intimidating, but he did not remember threatening Mr. Gleaton. App. p. 1006.

When Petitioner took the stand, he recalled Mr. Gipson coming to the county jail a week prior to the second trial and telling him "we got new evidence." App. p. 971, lns. 18-25. He recalled being informed that Mr. Gleaton had met with the Solicitor and given new information

that was helpful to Petitioner. App. p. 972. Specifically, he knew prior to his second trial that Mr. Gleaton was going to testify about seeing Walker with a gun when the vehicle came back by. App. pp. 972-3. To clarify, the following testimony was elicited:

> Question: So, it's your testimony that prior to Mr. Gleaton testifying today, you were aware that he could testify and place a gun in Mr. Walker's hand?
>
> Answer: Yes, ma'am. That's the reason we called him.

App. p. 973, lns. 3-6. Petitioner remembered that when trial counsel was questioning Mr. Gleaton "he couldn't get out the information that he felt like he was going to say," so Petitioner conferred with counsel that something was not right. App. p. 988, lns. 1-10. Petitioner explained how trial counsel should have done more to ensure that Mr. Gleaton provided the testimony he knew about prior to trial and elicited at the evidentiary hearing, which would have directly incriminated Walker. App. pp. 980-82.

Prior to the evidentiary hearing, Petitioner made allegations in the alternative regarding Mr. Gleaton, as is addressed above. By way of the Order, the lower court addressed the allegation of prosecutorial misconduct and errantly held that the allegation "is not an issue for post conviction relief." App. p. 1234.

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). With this in mind, the Constitution requires only that a defendant receive a fair, not a perfect trial. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), Riddle v. Ozmint, 369 S.C. 69, 631 S.E.2d 70 (2006). In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the Supreme Court of the United States explained the importance of the prosecutor's role in the judicial process:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as

> compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), the prosecution failed to disclose that a witness, whose credibility was already in question, was taken to the scene and gave an additional version of events. After Gibson pled guilty, the information was discovered during the course of a civil trial. The South Carolina Supreme Court addressed prosecutorial misconduct in the form of a Brady violation and reasoned:

> The prosecutor committed a Brady violation by not disclosing certain evidence to Gibson. A Brady violation is one type of prosecutorial misconduct. It is misconduct of a different type than, for instance, an attempt to introduce inadmissible evidence, tamper with the jury, or some other inappropriate action. E.g., United States v. Alderdyce, 787 F.2d 1365, 1370 (9th Cir. 1986) (finding no evidence of prosecutorial misconduct giving rise to a Brady violation); Buffington v. Copeland, 687 F. Supp. 1089, 1095-96 (W.D. Tex. 1988) (distinguishing Brady violations from other types of prosecutorial misconduct in which, for example, a prosecutor tries to inject prejudice into a trial by introducing inadmissible evidence or making inappropriate opening statements or closing arguments). We affirm the PCR judge's decision to set aside Gibson's guilty plea and grant him a new trial based on the Brady violation.

Id. at 528-9, 514 S.E.2d at 327.

Here, Petitioner concedes that a Brady claim is not complete since the information that was not disclosed by Mr. Gleaton or the State was available, and per Mr. Gleaton disclosed, to the defense. [3] It is interesting that trial counsel claimed the testimony offered by Mr. Gleaton was

[3] A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of, or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1565-69, 131 L. Ed. 2d 490, 505-10 (1995); Brady, 373 U.S. at 87, 83 S. Ct.

not known to him prior to the evidentiary hearing, yet it appears his lack of knowledge was due to an incomplete investigation and his testimony contradicts the testimony of both Mr. Gleaton and Petitioner. Nevertheless, the information was known to the State. Petitioner asks this Court to consider Mr. Gleaton's testimony that he was threatened by the Solicitor and reach the logical conclusion that the Solicitor knew his testimony was not complete, which Petitioner submits supports a finding of prosecutorial misconduct.[4]

Turing to the allegation of newly discovered evidence, to prevail on this claim a defendant "must show that the after-discovered evidence: 1) is such that it would probably change the result if a new trial were granted; 2) has been discovered since the trial; 3) could not in the exercise of due diligence been discovered prior to trial; 4) is material; and 5) is not merely cumulative or impeaching." State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999) (citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); See Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983)). Here, it appears based upon Mr. Gleaton's testimony that there is evidence in the record to support the lower court's finding that the evidence does not meet the requirements of newly discovered evidence since Mr. Gleaton testified that he would have disclosed the information if further questioned by defense counsel and Petitioner and Mr. Gleaton testified that it was known to the defense at the time of trial. It appears that the record establishes that in the exercise of due diligence it could have been discovered and utilized by counsel at trial. Alternatively, if this Court accepts Attorney Gipson's testimony as credible, the lower court erred because he made it clear that Mr. Gleaton's testimony met the elements of newly discovered evidence.

---

at 1196, 10 L. Ed. 2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985).

[4] Mr. Gleaton was not cross-examined by the State at trial. App. p. 495.

Turning finally to the matter of ineffective assistance of trial counsel, Petitioner submits that the lower court erred pursuant to Marlar for failing to address the allegation properly. The court's failure to properly address the issue is a matter of great importance since the record demonstrates that the outcome of the trial would have been different but for counsel's failure to exercise due diligence in preparing to question Mr. Gleaton and in his deficient questioning of Mr. Gleaton. At the evidentiary hearing, Mr. Gleaton made it clear that if counsel had asked him he would have testified at trial that he felt threatened by the Solicitor and that he had additional eyewitness testimony implicating Mr. Walker. Why does this matter? The answer is found in defense counsel's mantra that the witnesses were not being truthful and Mr. Walker was the guilty party. As was explained by trial counsel at the evidentiary hearing, he would have loved to have offered Mr. Gleaton's full testimony to the jury since "that's evidence that the person you're saying did this didn't do it." App. p. 928, lns. 6-8.

During the course of trial, counsel pointed out numerous inconsistencies in the stories of Kendall Seawright, Edward Walker and Willie Ware and exposed their joint meetings in the Solicitor's office in preparation for trial. In closing, counsel argued that the witnesses had new stories, implicating Petitioner, after a powwow in the Solicitor's office. App. p. 647, lns. 7-21. He further argued: "Edward Walker is the logical person that who did all of these things, who has covered, who has lied, who has weaved this web of lies." App. p. 662, lns. 22-24.

During closing, he further argued that the only footprints by where Walker said Petitioner came to the car where Walker's, the testimony established that Walker and Ware were in the car when the shooting occurred, and there simply was no evidence Petitioner was involved. App. pp. 627, 628, 631. In sum, he argued: "The only thing that exists is three people lying and covering for one another." App. p. 653, lns. 6-7.

Clearly, counsel's failure to elicit the additional testimony from Mr. Gleaton had a direct impact on the outcome of Petitioner's trial. Therefore, Petitioner urges this Court to find that the lower court erred for failing to properly address the allegation and for failing to grant a new trial, whereby a jury could hear the testimony of Mr. Gleaton and the result could be considered fair and reliable.

III. The lower court erred in failing to find resulting prejudice from trial counsel's failure to object to the trial court's omission of the permissive inference malice instruction.

As found by the lower court, the record establishes that the trial court's charge lacks the general permissive inference instruction that is required when a judge charges the jury on implied malice. 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) (Setting forth the standard implied malice charge and finding that "hereafter only slight deviations from this charge will be tolerated."). The omitted instruction reads as follows: "If facts, 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." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, this Court has stated that all inferences should be accompanied by the general permissive inference instruction. See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher.

More recently, in Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), this Court found a trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. Here, Attorney Gipson testified that he did not identify an issue with the malice instruction, but he agreed "there's an objection that can be made in those situations." App. pp. 953-54. The lower court properly found counsel was deficient for failing to object since the general permissive inference instruction should have been given when the trial court instructed the jury that "Malice may be inferred from conduct showing a total disregard for human life." App. pp. 717, lines 20-21, 1238.

Turning to the question of prejudice, the Court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." Id. at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." Id.

As noted in Belcher, additional context for an inference charge is required because an inferred malice instruction can lead a jury to disregard defenses raised by a criminal defendant:

> Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because if one intentionally kills another with a deadly weapon, the implication of malice may arise. ... That highlights the "half-truth" of the charge.

386 S.C. at 610, 685 S.E.2d at 809 (internal quotation marks omitted). Here, the jury was instructed in this case that they could infer malice from conduct showing a total disregard for human life. That charge is just as much as a "half-truth" as the deadly weapon charge because killing another in self-defense is unmistakably an activity that shows total disregard for human life. The jury needs context in which to evaluate an inferred malice charge and the general permissive inference

instruction provides that context. Since the jury did not receive that context due to defense counsel's deficient performance, it is highly likely that the jury followed the trial judge's instructions and inferred malice, which amounts to a showing of prejudice.

Furthermore, the lower court cites to evidence from the record in support of her finding that the jury could have determined that malice could be inferred "aside from the fact that a deadly weapon was used." App. p. 1239. This reasoning amounts to an error of law because the question before the court should have been whether there was evidence of expressed malice that negated the effect of the erroneous inferred malice instruction. The court's reasoning that points out all of the evidence that supports an inference of malice demonstrates how prejudicial the failure to give the permissive inference malice instruction was in the instant case.

As was charged by the trial court:

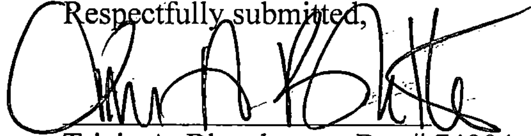
> Expressed malice is shown when a person speaks words or expresses hatred or ill will for another person or when the person prepared beforehand to do an act that was later accomplished. For example, lying in wait for a person or other acts of preparation going to show that the deed was done within the defendant's mind would be expressed malice.

App. p. 717, lns. 12-19. None of the evidence cited by the lower court in her ruling amounts to expressed malice. Therefore, the lower court's reasoning actually demonstrates the prejudicial effect of trial counsel's deficient representation in regards to the malice instruction. As a result, Petitioner urges this Court to find that a new trial must be granted.

CONCLUSION

As is argued in detail above, Petitioner would respectfully request that this Court grant certiorari and allow Petitioner to further address the above arguments via brief and/or oral argument. Ultimately, Petitioner would respectfully request that this Court reverse the denial of relief by the lower court and find that a new trial must be granted.

Respectfully submitted,



Tricia A. Blanchette – Bar # 74904
Post Office Box 2147
Leesville, South Carolina 29070
(803) 908-3266
Attorney for Petitioner

This 14 day of February 2018.

LAW OFFICE OF

TRICIA A. BLANCHETTE

February 14, 2018

RECEIVED

FEB 14 2018

S.C. SUPREME COURT

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

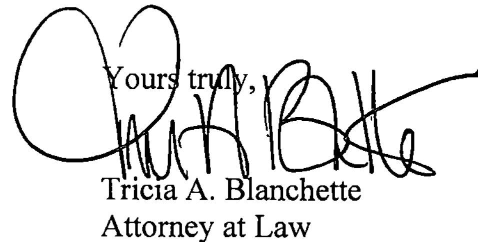
RE: Cornell Devon Tyler v. State; Appellate Case No. 2017-002055

Dear Sir:

For filing, please find an original and six copies of a Petition for Writ of Certiorari, a Certificate of Service, and an unbound original and one bound copy of the Appendices in the above referenced PCR appeal.

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

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: 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
FEB 14 2018
S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

App. Case No.: 2017-002055

Cornell Devon Tyler, 326023, Petitioner,

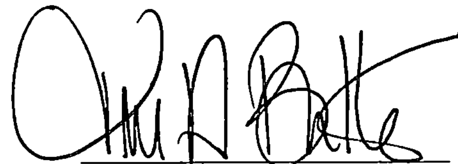
vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that a copy of the Petition for Writ of Certiorari, Appendices (Vol. 1-3) were hand delivered to Julie A. Coleman, Assistant Attorney General, this 14th day of February 2018 at the following address:

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



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

February 14, 2018