

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County  
Maité Murphy, Circuit Court Judge S.C. SUPREME COURT

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Appellate Case No. 2017-002055  
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CORNELL DEVON TYLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
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## **RESPONDENT'S ISSUE PRESENTED**

- I. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to develop an alibi defense at trial.
  
- II. Whether probative evidence supports the PCR court's finding that the recanted testimony of James Gleaton does not constitute newly discovered evidence which entitles Petitioner to a new trial.
  
- III. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the trial court's omission of the permissive inference malice jury instruction where there was overwhelming evidence of Petitioner's malice apart from the use of a deadly weapon, and therefore there is no resulting prejudice.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner 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 weapon during the commission of a violent crime (2006-GS-02-550). The charges arose from an incident in the early morning hours of August 27, 2005, when a newspaper delivery truck slowly pulled to a stop outside Petitioner's home to deliver the Aiken Standard Newspaper around 4:00 A.M. The driver of the truck was Debra Dorch, a newly hired employee, and her supervisor, Joseph Brewer, sat in the passenger seat while he trained her on her paper route. App. 92. As she approached the house, Petitioner walked up to the driver's side of the truck and tried to get into the vehicle. App. 94. Dorch became frightened and sped away quickly, but about 200 or 300 feet down the road, they heard gunshots and realized they were being followed and shot at by a car behind them. App. 95-96. The people in the car continued to shoot at the vehicle as they chased them at a very high speed down the road, until Dorch was hit and killed by a bullet. App. 96-99. The truck ran off the road, flipped, and landed in a field, and the shooters drove away. App. 96-99. Brewer survived and ran for help. App. 100-102.

Byron Gipson, Esquire, represented Petitioner on the charges. Deputy Solicitor John William Weeks, Jr., prosecuted the case. Petitioner originally proceeded to a jury trial which ended in a mistrial after the jury was hung. Subsequently, Petitioner proceeded to his second jury trial before the Honorable Clifton Newman and was convicted as indicted. On January 10, 2008 Judge Newman sentenced Petitioner to thirty year term of imprisonment for murder, twenty year term of imprisonment for assault and battery with intent to kill, and five year term of

imprisonment for possession of a weapon during the commission of violent crime, with all sentences to run consecutively.

Petitioner filed a timely Notice of Appeal. Joseph L. Savitz, III, filed an Anders<sup>1</sup> brief on Petitioner's behalf. 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.

Petitioner filed a timely application for post-conviction relief on December 17, 2013, alleging that he is being held in custody unlawfully for the following reasons:

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

Respondent submitted its Return on July 29, 2014. 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.

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

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.

An evidentiary hearing was convened on January 24, 2017, at the Bamberg County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing and was represented by Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner 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.

Judge Murphy denied and dismissed the application in an Order signed May 2, 2017, and filed May 19, 2017. Petitioner filed a motion pursuant to Rule 59(a) and (e), SCRCP, which Judge Murphy denied in an Order filed September 12, 2017. Petitioner filed a timely Notice of Appeal on October 4, 2017. Petitioner's Petition for Writ of Certiorari and Appendix were filed on February 14, 2018. This Return to Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s 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." Cherry,  
300 S.C. at 117-18, 386 S.E.2d at 625.

## ARGUMENT

### **I. The PCR court properly ruled that Trial Counsel was not ineffective for failing to develop an alibi defense at trial, and fully addressed and made proper factual findings for all issues raised.**

Petitioner argues the PCR court erred in failing to find Trial Counsel ineffective for failing to call witnesses at trial, fully develop an alibi defense, and failing to request an alibi charge. However, this issue is meritless, as probative evidence supports the PCR court's ruling that Trial Counsel was not deficient and there was no prejudice. Accordingly, this Court should affirm the PCR court's denial of post-conviction relief.

#### *Trial*

Petitioner was convicted of murder, assault and battery with intent to kill, and possession of a weapon during a crime after his participation in a high-speed chase following a newspaper delivery truck where he shot at the truck, killing the driver and injuring the passenger. At trial, Trial Counsel presented four witnesses in his defense, including Petitioner. Petitioner testified at trial that at close to four o'clock that morning, his friend Edward Walker knocked on his door and asked him for money. App. 558. He stated he was not expecting him there, but he gave him money and told Walker to leave, then he went to lay back down in his bedroom. App. 559-560. Petitioner testified that he heard gunshots, and a few minutes later, Walker knocked on his door again and told Petitioner he needed to leave his house because something happened. App. 560-561. He testified that he was at the house with his roommate Johnny Miles and brother Tremain during the shooting, and he did not know what was happening. Petitioner testified that he was picked up after the shooting by his friend Misty, who gave him, Miles, and Tremain a ride to Miles' niece's house to get away from the trouble. App. 563-565.

In his closing argument to the jury, Trial Counsel pointed out inconsistencies in the State's witnesses' testimony. He argued that the un-contradicted testimony showed Edward Walker and Wallow Ware were in the car that was chasing the victim, and there is a dispute about whether there were additional people in the car. App. 628. He argued to the jury that the co-defendants who testified for the State—Seawright, Wallow, and Ware—all sat down together and talked about their testimony and decided on a story to point the blame to Petitioner instead of to each other. App. 637-638.

#### *Evidentiary hearing*

Petitioner now argues Trial Counsel should have investigated and called as a witness Johnny Miles, Tremain Tyler, Misty, and Kaliah Felder. However, Trial Counsel cannot be ineffective because he offered valid strategic reasons for choosing not to present testimony from Johnny Miles and Tremain Tyler. Furthermore, Trial Counsel credibly testified that he attempted to investigate but was never able to get in contact with Misty, so he was not able to use her as a witness. App. 922.

Trial Counsel testified at the evidentiary hearing that his argument to the jury that Petitioner was not present at the crime scene alluded to an alibi, but he did not consider his defense to be an alibi defense. App. 945. He testified his strategies at trial included showing inconsistencies with the prior statements of the State's witnesses and to show large lapses in the way the investigation was conducted. App. 947-948. He stated he wanted to show issues with the evidence presented and show that their investigation did not point to Petitioner as being the guilty party, but the guilty party was somebody who was a witness for the State. App. 948.

Trial Counsel testified that he strategically chose not to call Tremain Tyler as an alibi witness for several reasons. Tremain Tyler is Petitioner's brother who possessed some learning

disabilities. Trial Counsel stated he made the decision not to use Tremain based on his conversations with Petitioner and his family. App. 918. He testified that the Tyler family did not want Tremain to be called as a witness. App. 919. He was also concerned that calling Tremain as a witness would put him in a situation where he could say something that would damage his own case, which was at issue because he was facing the same criminal charges as Petitioner, and Tremain's attorney did not want him to incriminate himself. App. 919-920. Trial Counsel testified that he did not believe putting Tremain up as a witness would be a wise strategic decision based on the charges he was facing and the fact that he was a co-defendant in the case. App. 920.

Trial Counsel testified he chose not to call Johnny Miles as an alibi witness because "you don't know what Johnny Miles is going to say." App. 946, line 16-17. He explained that Miles had said he saw a rifle in the house and Petitioner ran out of the house with a rifle, and when they came back they took a four-wheeler and hid the rifle, so calling him as a witness would not have been very smart. App. 946. Trial Counsel testified that during the trial, Miles was sitting downstairs waiting to be called as a witness, even though he was sick with the flu, but he decided not to call Miles as a witness because "he was going to say some extremely prejudicial things about [Petitioner]." App. 947, line 3-8.

Trial Counsel testified that he was never able to get in contact with Misty. App. 922, line 19-20. He explained, "I had heard the name Misty, but I was never able to get in contact with Misty...And I think it went a little bit deeper than that in a sense, but I'll just say I was never able to get in contact with Misty. But I think it was a little bit deeper than that." App. 922, line 19-25. Importantly, Misty did not testify at the PCR evidentiary hearing.

Finally, Trial Counsel testified he was never told about Kaliah Felder and was not aware of her to investigate her. “I’m not aware of the other young lady who testified. I think her testimony was that she had moved to New York at some point in time. I never had any contact with her, don’t know her, never seen her, I’m not aware of her.” App. 922, line 13-17. Trial Counsel also agreed that Kaliah Felder’s testimony would not have matched the timeline of Petitioner’s version of events for purposes of an alibi, anyway, because Felder testified that she and Misty picked up Petitioner and gave him a ride away from his home around 3:15 A.M., but the shooting did not occur until around 4:00 A.M., and he claimed he left his house after the shooting. App. 959; App. 873, line 25 – 874, line 5 (“Q: And after you left the club, did you return to Mr. Tyler’s residence? Kaliah Felder: Yes, ma’am. Q: Okay. Do you have any idea approximately when that would have been? Kaliah Felder: Probably 3:00, 3:15, 3:30.”).

Trial Counsel testified that, based on his experience as a criminal trial attorney, because he only called Petitioner as a witness at trial and did not call any other witnesses to establish an alibi, he did not think that he would have had a viable request for an alibi charge. App. 947, line 9-15. He further explained that Petitioner’s version of the events did not qualify as an alibi, stating “I didn’t really view that as an alibi just based on other information that we were receiving. I just didn’t feel that was the prudent course to take.” App. 957, line 25 – 958, line 3. Trial Counsel did not feel Petitioner’s story made it physically impossible for him to be at the scene of the crime, as is required for a complete alibi defense. App. 958, line 4-12.

Trial Counsel also opined it would be “dangerous” to mention the actual word “alibi.” He explained, “But I do remember a conversation with my colleagues about the danger of going down that alibi – mentioning the word alibi. It was alluded to throughout, but mentioning that actual word was dangerous because – just based on the way that I perceived that Mr. Weeks was

putting that case together, it was dangerous for us to get there, for us to put that in there.” App. 944, line 1-10.

### *Discussion*

The PCR court relied heavily on Trial Counsel’s testimony in finding offered a valid strategy reason for choosing not to use Tremain or Miles as alibi witnesses. First, it is important to note the PCR court found Trial Counsel’s testimony on this issue to be credible. This Court gives great deference to a PCR judge’s findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). Because Trial Counsel’s credible, detailed testimony supports the PCR court’s finding of a valid strategic reason in choosing not to call these witnesses, this finding should be upheld.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Furthermore, Trial Counsel's failure to call Misty or Kaliah Felder as an alibi witness cannot be deficient, as he conducted a reasonable investigation but was never able to contact Misty, and he was never told about the existence of Kaliah, so he did not know to investigate her. "[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." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). 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).

The record clearly shows Trial Counsel investigated and prepared this case for trial very thoroughly and spent countless hours working on Petitioner's defense. Because he attempted to find Misty and was unable to, and because he was never told about the existence of Kaliah Felder, who had moved to New York, it is reasonable that he did not get in touch with these potential witnesses. Accordingly, he cannot be deficient for failing to investigate or call them.

Secondly, there can be no resulting prejudice from Trial Counsel's failure to call Misty or Johnny Miles as a witness because they did not testify at the PCR hearing. 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. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). 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.

Kaliah Felder's testimony would not have constituted as an alibi or changed the outcome of the trial, as her testimony only suggested that she picked Applicant up from his house after she returned from a nightclub, which was between 3:00 and 3:30 A.M. App. 873-4. This timeline did not match up with Petitioner's alleged alibi, in which he claimed he was at his house during the shooting, which occurred around 4:00 A.M., and Misty and Kaliah picked him up from his house afterwards. Kaliah also was not present and was unable to testify about Applicant's specific whereabouts at the time of the shooting at 4:00 A.M. Additionally, Kaliah testified that she was intoxicated when she and Misty picked Petitioner up. App. 875, line 9-10. This fact could call her credibility into question and make a jury believe her story is inaccurate.

The PCR court made the following findings in holding Petitioner was not prejudiced by the failure to develop an alibi defense:

Secondly, [Petitioner] 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.

[Petitioner’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, [Petitioner] 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 [Petitioner’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 [Petitioner] 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.

App. 1236-1237.

The PCR court’s findings on prejudice are clearly supported by probative evidence in the record and are proper given the specific facts and circumstances of this case. Petitioner’s version of events does not meet the requirements of a complete alibi defense, because it is possible that he could have participated in the shooting, which occurred outside and near his house, even if he was at home. Accordingly, because probative evidence supports the PCR court’s findings, and because Trial Counsel was not deficient and there was no resulting prejudice, this Court should deny certiorari.

*Rulings on allegations as required by Marlar v. State*

Petitioner asserts the PCR court committed an error of law by failing to properly rule on the issues raised as required by Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) and S.C. Code Ann section 17-27-80. Respondent asserts the PCR court fully addressed all allegations and

findings of fact, and the court's findings are supported by evidence in the record and presented at the evidentiary hearing. All issues raised were thoroughly discussed at the hearing and addressed in the order of dismissal, and any potential minor errors or omissions do not affect the findings to the extent that a remand for further findings to be made is necessary. Accordingly, this assertion should be denied and relief should not be granted as such.

**II. The PCR court properly held that the recanted testimony of James Gleaton does not constitute newly discovered evidence which entitles Petitioner to a new trial, and the State did not commit prosecutorial misconduct or withhold information about Gleaton.**

Petitioner first asserts the PCR court erred in failing to find prosecutorial misconduct for threatening witness James Gleaton and failing to disclose his changed testimony to Trial Counsel. However, probative evidence supports the PCR court's finding that Petitioner failed to prove prosecutorial misconduct, so its ruling should be upheld.

James Gleaton testified for the State at Petitioner's first trial, which ended in a mistrial. At the second trial, Gleaton testified for the defense, because, as Trial Counsel explained at the evidentiary hearing, the State did not call him as a witness, and Gleaton had some helpful testimony for Petitioner, so he wanted to get his testimony in. App. 926, line 23 – 927, line 9. Solicitor Weeks testified at the evidentiary hearing that, although he could not remember specifically, he knew for some reason he decided not to call Gleaton as a witness at the second trial. App. 1004. He stated he would much rather cross-examine a witness than direct-examine, so he probably thought it was best to let the defense call him. App. 1004.

Gleaton's testimony at the first and second trial was essentially the same, and he expressed to the jury that he saw a car speeding down the road firing shots during the crime, but he could not see who was in the vehicle. App. 1018-1020; App. 485-487. He testified at both trials that he did not see Petitioner in the car. App. 1025; App. 495. However, at the evidentiary

hearing, Gleaton testified this story was not the truth, and the truth was that he saw Edward Walker hanging out of the vehicle shooting a firearm as the car drove by. App. 894-895. He testified that he went to Solicitor Weeks before the second trial and told him the truth, but the Solicitor threatened him and told him he could not change his story, and he was so scared that he did not tell the truth at the second trial. App. 893-894. Gleaton testified that he told Trial Counsel about the meeting with the Solicitor, and Petitioner testified that they were aware of the “true” story before the second trial. App. 894; App. 971-973. In contrast, Trial Counsel testified at the evidentiary hearing that he had never heard of the new testimony from Gleaton. App. 925.

#### *Prosecutorial Misconduct*

Petitioner concedes this cannot be a Brady<sup>2</sup> violation by the State, but seems to assert that Trial Counsel should have discovered this information before the trial, and his lack of knowledge was due to an incomplete investigation.<sup>3</sup> Regardless, Petitioner still asserts prosecutorial misconduct based on Gleaton’s testimony that Solicitor Weeks threatened him out of changing his story to the “truth.” Petitioner further accuses the Solicitor of knowing Gleaton’s testimony was not complete, which resulted in prosecutorial misconduct.

Solicitor Weeks testified he had heard “a bunch of versions of the stories in this case,” and he recalled Gleaton’s statement and interview with the Sheriff’s Department. He could not specifically recall meeting with Gleaton before the second trial, and did not have a recollection of Gleaton changing his story before the new trial. Weeks explained:

I just know that any time a witness’ testimony changed to my knowledge, the first person that got told about it was Byron Gipson (Trial Counsel) because, you

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<sup>2</sup> Brady v. Maryland, 373 U.S. 83 (1963). “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.” PWC at 19.

<sup>3</sup> Any allegation of Trial Counsel’s failure to investigate this new information from James Gleaton was never raised or ruled upon by the lower court, and is not properly raised now, and is accordingly not preserved for appellate review.

know, we're always preparing all the way up to the ball being tossed in the air. And lots of times witnesses do have changes in their testimony, and as soon as they become available to me, I tell the defense lawyer. I was a defense lawyer for 15 years. I appreciate that responsibility.

App. 1005, line 10-18. When asked if he threatened Gleaton in any way, he explained:

I don't know. I don't think I would, I don't think I did. He never really said how I threatened him or I never really understood how I threatened him.

I have discussed with witnesses about perjury, I've discussed with witnesses about contacting witnesses in the duration in between trials or before trials, I've discussed with witnesses a lot of things that they might perceive – people think I threaten them just because I'm six-foot-eight and weigh entirely too much.

But as far as physically threatening or legally threatening, I'm pretty sure he had a lawyer with him and if his rights would have been offended or if I would have done anything out of the way with Mr. Gleaton, they would have been all over me. But honestly, I don't remember threatening him. I've raised my voice with witnesses, I've, you know, told them what I was going to do when I went to trial, but I don't remember threatening Mr. Gleaton.

App. 1005, line 20 – 1006, line 14. He stated that, to his knowledge, he did not tell Gleaton he would stay in jail longer if he did not testify one way or another. App. 1006, line 15-18. Weeks testified he did not withhold anything from the defense in this case. App. 1006, line 19-21. Finally, Weeks insisted that he did not commit prosecutorial misconduct as alleged, and explained that Trial Counsel had total access to his file and his witnesses. App. 1008. He felt like they had a “clean” trial, and he did not know of anything that he did differently than he usually does. App. 1008-1009.

This testimony in the record is clearly probative evidence supporting the PCR court's finding that Weeks did not commit prosecutorial misconduct. The PCR court held:

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 [Petitioner] 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.

App. 1234.

Respondent concedes the PCR court's ruling that prosecutorial misconduct is not an issue for post-conviction relief is improper under the facts and circumstances of this case, because the issue as presented is not a direct appeal issue. However, the PCR court's ruling should not be dismissed, as this error of law was a harmless error. After this erroneous finding, the PCR court went on to address the merits of the issues and denied the allegation based on the testimony presented at trial. Because the finding is supported by probative evidence, it should be upheld.

*Newly discovered evidence*

Secondly, Petitioner's assertion that he is entitled to a new trial on the basis that Gleaton's recanted testimony constitutes newly discovered evidence 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).

Here, the PCR court found Gleaton's testimony did not satisfy all five of these requirements. The PCR court explained:

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. [Petitioner] must also prove that the new testimony could not have been discovered before the trial with due diligence, yet [Petitioner] 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 [Petitioner] 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 "(Recantation 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. Mavfield, 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 [Petitioner] 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.

App. 1232-1233. The PCR court correctly pointed out that the alleged new testimony failed to satisfy the first, third,<sup>4</sup> and fourth factors of the test for newly discovered evidence. The PCR court further found Gleaton's testimony to be not credible and unreliable in light of his prior testimony under oath. This Court gives great deference to credibility findings made by the PCR court. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). Accordingly, this "new" testimony cannot qualify as newly discovered evidence which would entitle Petitioner to a new trial.

#### *Ineffective Assistance of Counsel*

Finally, Petitioner's assertions of ineffective assistance of Trial Counsel for failure to elicit or utilize the additional testimony from Gleaton are all meritless, as the PCR court found Gleaton's recanted testimony was not credible, and Trial Counsel credibly testified he was not

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<sup>4</sup> Although Trial Counsel credibly testified he was never told about the new testimony, this does not affect the analysis of the third factor of the newly discovered evidence test. If Gleaton did, in fact, have a true version of events to share, they could have been discovered before the trial by the exercise of due diligence.

told about the new version of events from Gleaton. Trial Counsel cannot be deficient for failing to use information that he has no reason to believe exists. Additionally, there can be no resulting prejudice from the failure to use testimony which was found incredible and would not have changed the outcome of the trial. The PCR court found Gleaton's testimony made no difference to the outcome of the trial because, even if he had seen Edward Walker in the vehicle shooting, there was testimony presented that there were multiple shooters in the car, so it cannot discount the possibility that Petitioner was also in the car, shooting, as found by the jury. Accordingly, because Trial Counsel was not deficient and there was no resulting prejudice, this Court should deny certiorari on all issues relating to Gleaton's testimony.

**III. The PCR court properly ruled that Trial Counsel was not ineffective for failing to object to the trial court's omission of the permissive inference malice jury instruction where there was overwhelming evidence of Petitioner's malice apart from the use of a deadly weapon, and therefore there is no resulting prejudice.**

Petitioner asserts the PCR court erred in failing to find prejudice from Trial Counsel's failure to object to the trial court's omission of the permissive inference jury instruction during the malice charge at trial. Petitioner argues that, regardless of the strong evidence of inferred malice in this case, because there was no express malice in the specific facts of this case, the jury must have been prejudiced by the lack of a permissive inference jury instruction. This cannot be true, because a finding of *express* malice is not required for a murder conviction, and overwhelming evidence of Petitioner's inferred malice prevents a prejudicial effect from the omission of the permissive inference language, as the jury would have found Petitioner acted with malice even if they had been instructed that the inference of malice is simply an evidentiary fact to consider.

“Murder” is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10 (1976). “‘Malice’ is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.” State v. Stuckey, 347 S.C. 484, 502, 556 S.E.2d 403, 412 (Ct. App. 2001). “Malice is defined as a ‘formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it.’” Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002) (citing State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000)). Although implied malice can be inferred from the use of a deadly weapon, and from conduct showing a total disregard for human life, the inference is simply an evidentiary factor to be taken into account by the jury in making its determination of the existence of malice. See State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

This explanation to the jury that the inference of malice is only a factor to consider is referred to as the “permissive inference instruction” and is required by this Court in a valid jury instruction. Elmore warned the bench that “only slight deviations from this charge will be tolerated.” 279 S.C. at 421, 308 S.C. at 784. This Court has held that a defense attorney can be deficient for failing to object to the trial court’s omission or deviation from the required permissive inference instruction. See Gibson v. State, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016), reh'g denied (June 15, 2016). In the present case, the trial court did not include a permissive inference instruction, and Trial Counsel did not object. App. 717. Accordingly, the PCR court found Trial Counsel was deficient in his failure to object. App. 1238.

However, the PCR court properly found there was no resulting prejudice from Trial Counsel’s failure to object. “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.” Gibson, 416 S.C. at 265, 786 S.E.2d at 124. “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. (citing Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008)). Based on the evidence presented at trial of Petitioner’s malice, the PCR court found the following:

The evidence presented at trial showed the jury that [Petitioner] 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. [Petitioner’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. [Petitioner] 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. [Petitioner] 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 [Petitioner] 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, [Petitioner] 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 [Petitioner] in this case. This allegation is denied and dismissed with prejudice.

App. 1239-1240.

The PCR court’s findings are clearly based on probative evidence in the record, as it used the facts of the case to show overwhelming evidence of Petitioner’s malice toward both victims. The overwhelming evidence of malice is enough to contradict the presumption of malice from Petitioner’s use of a deadly weapon as well as from Petitioner’s conduct showing a total disregard for human life. This case is extremely different from Gibson, where this Court found prejudice because “there was little evidence of malice aside from the use of a gun.” 416 S.C. at

266, 786 S.E.2d at 124. Petitioner's conduct, where he actively pursued a high speed chase of the victims while shooting at them out repeatedly out the window of the car, clearly shows malicious intent.

Accordingly, because overwhelming evidence of Petitioner's malice prevents any prejudice from the omission of the permissive inference instruction, Trial Counsel was not ineffective in his failure to object, and this Court should deny certiorari.

### CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By:   
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July 16, 2018

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO AIKEN COUNTY  
Court of Common Pleas

The Honorable Maite Murphy, Circuit Court Judge

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Appellate Case No. 2017-002055

CORNELL D. TYLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Tricia A. Blanchette, Esquire**  
**Law Office of Tricia A. Blanchette, LLC.**  
**Post Office Box 2147**  
**Leesville, South Carolina 29070**

This 16th day of July, 2018

  
KAITLYN S. SLICE  
LEGAL ASSISTANT



RECEIVED

JUL 16 2018

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

July 16, 2018

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

**Re: Cornell D. Tyler, #326023 v. State of South Carolina**  
**Appellate Case No. 2017-002055**  
**Lower Court Case No. 2013-CP-02-2859**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman  
Assistant Attorney General  
SC Bar No. 102214

JAC/ks  
Enclosures

cc: Tricia A. Blanchette, Esquire (2 copies)