

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

App. Case No.: 2017-002055

RECEIVED

DEC 19 2019

SC Court of Appeals

Cornell Devon Tyler, 326023,

Petitioner,

vs.

State of South Carolina

Respondent.

PETITION FOR REHEARING
AND FOR REHEARING
EN BANC

Tricia A. Blanchette
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Attorney for Petitioner

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STATEMENT OF THE CASE

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, 2008, 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), SCRCF, 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, SCRCF, 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.

On February 14, 2018, a Petition for Writ of Certiorari and Appendix were filed. On July 16, 2018, the State submitted a Return to Petition for Writ of Certiorari. Thereafter, the appeal was transferred to the South Carolina Court of Appeals. On December 10, 2019, this Court denied the Petition for Writ of Certiorari via written Order, from which this Petition for Rehearing and Petition for Rehearing *En Banc* follows.

ARGUMENT

Pursuant to Rule 221, SCACR, Petitioner respectfully petitions this Court for rehearing and for rehearing *en banc*. In doing so, Petitioner would respectfully request that the panel and entire Court review the Petition for Writ of Certiorari and the entirety of the arguments contained therein. Petitioner would further request that the panel and the entire Court review the lengthy record contained in the previously filed Appendices.

By way of the Petition, the following arguments were raised:

- 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.

As to argument one, Petitioner submits that this Court must not overlook that the standing Order of Dismissal fails to properly address the issues raised at the evidentiary hearing and in Petitioner's Rule 59, SCRCR, Motion, as argued in the Petition. See Fishburne v. State, Op. No. 27911 (S.C. Sup. Ct. filed July 31, 2019) (Remanding for the lower court to properly address issues raised at the evidentiary hearing despite post conviction relief counsel failing to file a Rule 59, SCRCR, Motion.). Furthermore, the Order errantly addresses appellate counsel's testimony and further errantly justifies counsel's failure to properly present an alibi defense and request an alibi charge. Petition

pp. 5-6, 10-13. Petitioner submits that a finding of ineffective assistance of counsel for the handling of the alibi defense is supported by Martin v. State, Op. No. 27900 (S.C. Sup. Ct. filed July 17, 2019), which was filed following the submission of the Petition for Writ of Certiorari. Here, counsel's failure directly affected the outcome of Petitioner's trial and requires that a new trial be granted.

Regarding argument two, Petitioner submits that simply ignoring the lower court's failure to properly address this issue as it relates to ineffective assistance of counsel, despite counsel's arguments via Rule 59, SCRCP, Motion, further encourages the long standing epidemic of incomplete and inaccurate orders on post conviction relief. Petition pp. 13, 21-22; See Fishburne v. State, Op. No. 27911 (S.C. Sup. Ct. filed July 31, 2019). Alternatively, Petitioner urges this Court to find that the lower court erred in finding that the testimony of James Gleaton did not amount to newly discovered evidence since the elements of newly discovered evidence were satisfied by trial counsel's testimony, which was deemed credible by the lower court. Petition pp. 14-18, 20.

Turning to argument three, Petitioner asks this to review the argument in its entirety, but Petitioner would emphasize that the standing finding of no prejudice should not be upheld. As was argued in the Petition:

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.

Petition p. 23. Yet, here:

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.

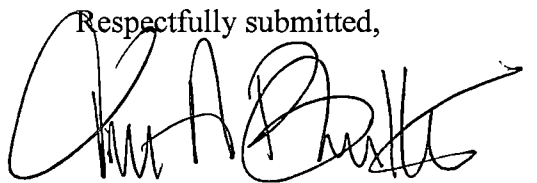
Petition p. 24 (emphasis added).

Therefore, Petitioner would urge this Court to not only rehear and/or reconsider the arguments made as to issue three, but to also do so on each argument raised in the Petition. Petitioner submits the lower court erred in failing to properly address the issues raised via the pleadings and at the evidentiary hearing and in failing to grant relief. Therefore, Petitioner would respectfully ask this Court to allow the issues to be further addressed by granting certiorari or whatever step the Court deems proper.

CONCLUSION

In consideration of the arguments contained in the Petition and the above stated points of emphasis, Petitioner respectfully requests that the Court conduct a full review of the previously submitted Petition for Writ of Certiorari and Appendix. Petitioner would further urge this Court to reverse the Order filed on December 10, 2019 and allow Petitioner to brief the arguments or remand to the lower court for proper findings and/or a new trial.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 19 day of December 2019.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

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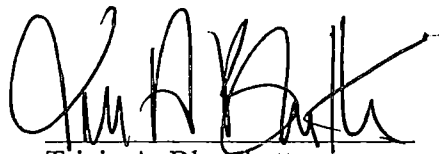
State of South Carolina

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that a copy of a Petition for Rehearing and for Rehearing *En Banc* was hand delivered to Megan Harrigan Jameson, this 19th day of December 2019 at the following address:

Office of the Attorney General
ATT: Megan Harrigan Jameson, Esquire
1000 Assembly Street, 5th Floor
Columbia, SC 29201



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December 19, 2019

LAW OFFICE OF
TRICIA A. BLANCHETTE

December 19, 2019

South Carolina Court of Appeals
ATT: Honorable Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

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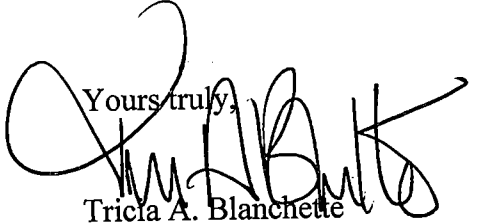
SC Court of Appeals

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

Dear Madam Clerk:

For filing, attached please find an original and six copies of a Petition for Rehearing and a Certificate of Service. I appreciate your assistance, and please contact me if any additional information is needed.

Yours truly,


Tricia A. Blanchette
Attorney at Law

cc: Office of the Attorney General
Cornell Tyler