

STATE OF SOUTH CAROLINA  
In the South Carolina Supreme Court

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Appeal from Dorchester County  
The Honorable Diane S. Goodstein

JUN 30 2021

S.C. SUPREME COURT

Appellate Case No. 2020-1390

The State of South Carolina, ....., Respondent,

v.

Tiffany Ann Sanders, ....., Petitioner.

**PETITIONER'S BRIEF**

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## TABLE OF AUTHORITES

### State Cases

<i>Clark v. State</i> , 315 S.C. 385, 434 S.E.2d 266 (1993).....	19
<i>Edwards v. State</i> , 392 S.C. 449, 710 S.E.2d 60 (2011) .....	7
<i>Floyd v. State</i> , 303 S.C. 298, 400 S.E.2d 145 (1991).....	21
<i>McCoy v. State</i> , 401 S.C. 363, 737 S.E.2d 623 (2013).....	19
<i>Smith v. State</i> , 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012) .....	9
<i>State v. Hughes</i> , 328 S.C. 146, 493 S.E.2d 821 (1997) .....	10
<i>State v. Tiffany Ann Sanders</i> , Unpublished Op. No. 2020-UP-237 ( <i>filed</i> August 12, 2020) .....	3-4
<i>Tiffany Sanders v. State</i> , Op. No. 2014-MO-049. ....	3,8
<i>State v. Watkins</i> , 406 S.C. 360, 752 S.E.2d 261 (2013) .....	21
<i>White v. State</i> , 263 S.C. 110, 208 S.E.2d 35 (1974) .....	3, 8, 20

### State Statutes

Rule 29(b), SCRCrimP.....	2, 4
Rule 804, SCRE .....	5
<i>South Carolina Code Ann.</i> §17-27-20 <i>et seq.</i> .....	6,19

**INDEX**

Questions Presented ..... 2

Statement of the Case ..... 3

Argument I:

Whether the trial court erred by denying Petitioner’s motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer’s testimony-- that Petitioner was not aware of, nor did she participate in the murder of the victim-- was not available until this proceeding, and could not have been obtained at any earlier point?  
..... 4

Argument II:

Whether the trial court should have found that Sean Kammerer’s affidavit constituted after-discovered evidence, and granted Petitioner a new trial?  
..... 10

Conclusion ..... 21

## QUESTIONS PRESENTED

- I. Whether the trial court erred by denying Petitioner's motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony-- that Petitioner was not aware of, nor did she participate in the murder of the victim-- was not available until the proceeding in which it was raised, and could not have been obtained at any earlier point?
  
- II. Whether the trial court should have found that Sean Kammerer's affidavit constituted after-discovered evidence, and granted Petitioner a new trial?

## STATEMENT OF THE CASE

Tiffany Sanders was tried before the Honorable Diane S. Goodstein and a jury between August 3-5, 2010<sup>th</sup> in Dorchester County, South Carolina. She was represented by Michael O'Neal, Esquire. The State was represented by Harrison Bell and Mandy Kimmons. She was convicted of murder and sentenced to 30 years in prison. She did not initially appeal her conviction and sentence. She then filed an application for post-conviction relief on August 3, 2011<sup>th</sup> and an Amended application on August 24, 2011. After an evidentiary hearing on May 24, 2012<sup>th</sup> at the Orangeburg County courthouse, the Honorable Deandrea G. Benjamin granted her a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but dismissed her other claims. That order was filed on August 3, 2012. Sanders was represented by Dale T. Cobb and Thomas R. Goldstein for the hearing and subsequent appeal.

Petitioner then filed a petition for writ of certiorari from the denial of her PCR. On December 17, 2014, the South Carolina Supreme Court issued its memorandum opinion in *Tiffany Sanders v. State*, Op. No. 2014-MO-049. Petitioner then filed a petition for rehearing that was then denied on January 22, 2015<sup>th</sup>.

Petitioner then filed a Motion for a New Trial Based on After-Discovered Evidence on March 21, 2017. After a hearing on May 30, 2017<sup>th</sup> during which Judge Goodstein did not hear any testimony, she denied the motion on February 5, 2018<sup>th</sup>.

Petitioner filed a timely notice of appeal on February 9, 2018. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v.*

*Tiffany Ann Sanders*, Unpublished Op. No. 2020-UP-237 (*filed* August 12, 2020). The South Carolina Court of Appeals then denied Petitioner's timely filed petition for rehearing on September 22, 2020.

This Court granted Petitioner's petition for a writ of certiorari on May 28, 2021.

This petitioner's brief timely follows.

## ARGUMENTS

- I. **The trial court erred by denying Petitioner's motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony-- that Petitioner was not aware of, nor did she participate in the murder of the victim-- was not available until this proceeding and could not have been obtained at any earlier point.**

The critical issue in this petitioner's brief is whether Sean Kammerer, an exonerating witness, was available to testify at any earlier point prior to Petitioner's motion for a new trial filed in March of 2017. The Court of Appeals held that since Petitioner could have discovered Kammerer's potential testimony by exercising due diligence prior to trial, she is not entitled to relief. *State v. Sanders*, Op. No. 2020-UP-237 (*filed* August 12, 2020). Kammerer's testimony is the sole piece of evidence upon which Petitioner relies in her motion for a new trial based on after-discovered evidence. Judge Goodstein found, in her order, that Petitioner had access to Kammerer's testimony since the time of her and Kammerer's arrests. Judge Goodstein found, in pertinent part:

Mr. Kammerer's testimony is not necessary to decide this issue because it does not fit within the definition of newly-discovered evidence. Kammerer was known to the Defendant at least since their arrest in

2007. While the Defendant may be correct in her assertion that Kammerer would not have wanted to testify at her PCR hearing while he was pursuing his own legal remedies through the PCR process, that fact does not mean that Kammerer was unavailable at the time. The Defendant had the means to subpoena Mr. Kammerer's testimony pursuant to Rule 45 of the SC Rules of Civil Procedure.

ROA 61-62.

This ruling is inaccurate, and this Court should grant Petitioner a new trial.

A definition of "unavailability as a witness" is provided in Rule 804, SCRE:

- (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—
- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
  - (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
  - (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
  - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
  - (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Kammerer was unavailable to Petitioner under (a)(1) or (a)(5) of this statute. But additionally, this list is not exhaustive, and this Court should find that witnesses

pursuing their own statutory legal remedies cannot be compelled to testify in post-conviction relief proceedings.

The procedure for post-conviction relief is provided by the Uniform Post-Conviction Procedure Act (Act), *S.C. Code Ann.* §§ 17-27-10 to -120 (1985). The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.

*South Carolina Code Ann.* §17-27-150, Discovery in post-conviction relief proceeding, provides: (a) A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

The trial court was inaccurate when it found that PCR counsel could have subpoenaed a co-defendant to testify at a PCR hearing without a judge's express permission to do so because the rules do not allow it. It would have been improper for PCR counsel to subpoena Kammerer without the court's permission. But also, it is highly unlikely that a judge would have given permission to do so since Kammerer, at the time of Sanders' PCR hearing, was pursuing his own statutory legal remedies and thus could not have been forced to testify at his co-defendant's PCR hearing by way of a subpoena. The South Carolina Court of Appeals erred when it dismissively found that "Sanders could have discovered Kammerer's potential testimony by exercising due diligence prior to her trial."

Additionally, the Court of Appeals' opinion states that trial counsel made a "strategic" decision not to call Kammerer at trial. This assertion is belied by the record. Here is the testimony from the PCR hearing:

Q: And what did you do to investigate the charges and any defenses?

A: Well, I went and looked at all the discovery materials. I looked at all the statements. I spoke with my client. **What I did not do, which I should have done, was I should have gone up and talked to Sean Kaminer (sp) in prison.**

Q: And why did you not do that?

A: The trial came up. I figured the government, the state was going to bring him to trial. I kind of was counting on that. I told my client that. We showed up for the trial, he wasn't there, **and I can just tell you right now that after the trial was over I realized that I should have gone to see him in jail. I should have found out what he was going to say and I should have brought him down there.**

App. 93-94 (emphasis added).

Q: What reason—why did you not speak to him in advance of trial?

A: Like I said, I assumed, which is always a mistake, that the state was going to bring him to trial, and I would get a chance some way to talk to him prior to trial, and if he's be helpful in my case, I'd put him up as a witness. **In retrospect, I should have gone to speak to him. I should have gone to the jail to talk to him. I should have put him up in my case.**

App. 95-96 (emphasis added).

Trial counsel clearly did not offer a "strategic" reason for not calling Kammerer to testify at trial. *Cf. Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011) (noting that counsel provided strategic reasons for not calling codefendant as witness at trial when counsel observed the codefendant's plea hearing and had concerns that codefendant could not withstand cross-examination due to prior vacillation and the

cumulative nature of the testimony). Even the Respondent's Return to Petition for a Writ of Certiorari acknowledges that trial counsel indicated it was a mistake to not speak with Kammerer prior to Petitioner's trial. Respondent's Return, p. 5 ("[T]rial counsel Michael O'Neal testified that he believed in retrospect that it was a mistake not to go and speak with him and bring him to trial").

### **Relevant Dates**

The following are dates relevant to consideration of this issue.

- Sean Kammerer pleaded guilty to murder on March 24, 2008<sup>th</sup> and was sentenced to 34 years in prison.
- Kammerer filed a post-conviction relief application on January 26, 2009<sup>th</sup>.
- Petitioner was tried before Judge Goodstein and a jury between August 3-5, 2010<sup>th</sup> in Dorchester County, South Carolina.
- Petitioner's PCR hearing was held on May 24, 2012<sup>th</sup> (she was granted a belated appeal pursuant to *White v. State*)
- Kammerer's PCR application was dismissed on June 14, 2013. He did not appeal.
- The South Carolina Supreme Court issues an unpublished opinion in *Tiffany Sanders v. State of South Carolina*, Opinion No. 2014-MO-049 on December 17, 2014<sup>th</sup> denying relief.
- Kammerer executes declaration on January 7, 2017.

The trial court's order finds that PCR counsel could have properly subpoenaed Kammerer to Petitioner's PCR hearing and forced him to testify on Petitioner's behalf while he was pursuing his statutory right to challenge his own conviction. The court did not address the fact that contacting a witness who is represented by counsel would have been improper. *See* Rule 4.2 of the Rules of Professional Conduct,

Communication with Person Represented by Counsel. *And see Smith v. State*, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012) (acknowledging that Rule 4.2 imposed an impediment on trial counsel contacting a witness represented by counsel).

But also, the court found that, since Kammerer pleaded guilty, he could have been compelled to testify at Petitioner's trial, even though he had already filed a PCR application and was represented by counsel:

As is the case for all guilty pleas, Mr. Kammerer was advised that he was surrendering his right to remain silent and his right against self-incrimination. Thus, he no longer enjoyed the privilege of refusing to testify upon the Court's acceptance of his plea. Therefore, at the time of her trial, Kammerer was available for Defendant to subpoena and attempt to interview... Due to Defendant's knowledge of Mr. Kammerer and the available legal means for obtaining his testimony at the time of trial, the testimony cannot be newly discovered evidence under the relevant definition.

ROA 62 (emphasis in original).

This finding ignores the fact that Kammerer, at the time of Petitioner's trial, had already filed an application for post-conviction relief and was challenging his guilty plea. If the court's reasoning is allowed to stand, and the Court of Appeals' opinion approving of it, it will mean that criminal defendants, who plead guilty, effectively waive their rights to avail themselves of post-conviction relief remedies because they can be compelled (by virtue of their guilty pleas) to testify at a co-defendant's PCR hearing. Kammerer exercised his legal statutory rights to collaterally challenge his conviction. Given that he was pursuing these remedies, there is no reason to think he would have willingly implicated himself in the murder that he was challenging and seeking to overturn. It would have been improper to then

subpoena him at Petitioner's trial, or the PCR hearing, to have him invoke his Fifth Amendment right not to incriminate himself. *See State v. Hughes*, 328 S.C. 146, 153, 493 S.E.2d 821, 824 (1997) (witness may not be called solely for the sake of having witness invoke privilege against self-incrimination, for the purpose of permitting the jury to infer wrongdoing from that assertion). The trial court's ruling would effectively gut post-conviction relief for defendants who plead guilty, an action that would not be proper unless undertaken by the legislative branch. It would also provide a disincentive for criminal defendants to plead guilty if, by doing so, they will be presumed to have waived their rights to challenge their convictions by way of an application for post-conviction relief.

Respondent's brief notes that Judge Goodstein requested additional briefing after the hearing on May 30, 2017. Undersigned counsel provided additional briefing to the court and Mr. Sorenson on June 16, 2017. Counsel then contacted the court again on November 3, 2017<sup>th</sup> to inquire whether the court wanted any additional briefing. The court never responded.

**II. The trial court should have found that Sean Kammerer's affidavit constitutes after-discovered evidence and granted Petitioner a new trial.**

**Relevant Facts**

The essential facts of this case are not complex. Petitioner encountered Jesse Ham (the decedent), Brandon Frye, David Hughey, and Kevin King on June 8, 2007<sup>th</sup> in a neighborhood near where she lived as she was out driving with her disabled sister. While she was with these young men, she spoke to Kammerer, a friend of hers, on the phone. Shortly afterwards, she drove Jesse Ham, the victim, to a shopping

center area near a Tire Kingdom in North Charleston, SC. After they arrived, Kammerer shot and killed the victim.

The State's theory of the case, as Solicitor Bell outlined in his opening argument, was that Petitioner lured the victim, Jesse Ham, to the area so that Kammerer could kill him. The State prosecuted the case under the theory of "the hand of one is the hand of all." ROA 329. As the State argued to the jury:

The difference between accessory before the fact of murder and murder is that you have to determine whether she was present or not. She was in her car when the murder happened outside the car. At some point she left the scene. It's up to you to decide if she was present or not.

If she was not present at the scene, you can find her guilty of accessory before the fact. If she was present at the scene, you can't find her guilty of accessory before the fact, but you can find her guilty of murder, because she aided and abetted and helped and joined in with this crime.

ROA 329-30.

At the conclusion of the opening argument, the State asked the jury to find her guilty "of either murder or accessory before the fact of murder." ROA 330.

But what the jury did not hear because it was only revealed when Kammerer signed his declaration, is that Petitioner had absolutely no knowledge that Kammerer had a gun that night, or that he intended to shoot and kill Jesse Ham. Indeed, Kammerer's affidavit is wholly consistent the version of events that Petitioner immediately provided to law enforcement at the time of these events as discussed below.

At trial, the State elicited the following pertinent testimony from its witnesses:

David Watson, a special investigator with the Ninth Circuit Solicitor's Office, was a detective with the North Charleston Police Department when Ham was killed. He was dispatched to an area near a Tire Kingdom in North Charleston at approximately 11:15- 11:20pm on June 8, 2008. This area was on the corner of Ashley Phosphate and Dorchester Road. There is an "infamous" Rock-n-Roll McDonald's restaurant on the corner. When he arrived, he saw the victim on the ground. ROA 345. This witness identified several photographs that were admitted into evidence.

Kevin King also testified for the State. He was a friend of Ham's from the neighborhood. ROA 350. They lived in the Forest Hills neighborhood off Dorchester Road. ROA 351. On the night of the shooting Ham came by King's house with another friend, and they decided to hang out. ROA 352. Ham's friend was "Brandon." ROA 353. They went back to a house right behind the Rock-n-Roll McDonald's. They hung out and "had a beer or two." ROA 353. Present were Ham, King, and another male.

Bored, they decided to walk around the neighborhood. ROA 353. While they were walking, a female drove into the neighborhood. The young men waved her down and she pulled up to them. They asked her what she was doing, and she said "Nothing with ya'll" and drove away. ROA 354. They walked back to the house. King testified this happened around 7:30 or 8:00pm. Back at the house, they sat in the backyard. They heard a loud horn. Brandon and the "other guy" went to the front of the house. King and Ham stayed in the backyard. ROA 355. Brandon then came to the back yard and said "Hey, this girl wants to talk to you" referring to Ham. ROA 355. According to King, the girl asked them their names and they lied to her about them. ROA 355.

He said they stood there talking for at least 30 to 45 minutes. ROA 355. King testified that she said she had a friend from the neighborhood who knew Ham and wanted to meet him at the Rock-n-Roll McDonald's. While they were talking, she spoke on the cell phone. King testified he put his ear to the phone and heard a guy's voice. ROA 356.

King testified that Ham was hesitant to go, but that eventually he went. King got into the backseat. He said he got into the car because Ham was "his friend." ROA 357. Petitioner drove to the McDonald's, drove around it one time, and then pulled into a Publix parking lot. There was a delivery truck between the buildings, so she drove up to the wood line and backed in. ROA 357. There were four of them in the car—Petitioner, Ham in the passenger seat, King, and then Petitioner's older, disabled sister next to King. ROA 358.

King testified that something did not seem right to him, and he wanted to get out of the car. As he was doing so, Kammerer came running up to the car with a gun and put it into King's stomach. King pushed him down and then ran. ROA 359. He ran between the buildings where the delivery truck was parked.

King testified that he knew Kammerer; that they grew up together and attended school together. ROA 360. As King ran, he continued to hear shots. ROA 360. He then took off through the woods behind the Publix because he knew the area. He called his dad to come and pick him up. ROA 361.

Later that morning, detectives got in touch with King and they told him that he needed to speak to them. ROA 362.

King described that Kammerer and Ham used to be friends but that they had a fight over shoes. ROA 363. This argument happened two or three years before the shooting, but apparently the two held grudges. The two of them “fought a lot.” ROA 364. Ham got tired of it and hit Kammerer with a bat. ROA 364. King’s testimony was conflicting as to the seriousness of their problems. He testified that Kammerer had screamed, in connection with the bat incident, that he would kill Ham. But then he stated there were other incidents, but they were not “too serious.” ROA 364.

King admitted that he did not run into Publix to seek help for his friend. He testified, implausibly, that he tried to call 911 on his phone while he was in the woods, but that because he had a long-distance phone, it would not call 911.

David Hughey also testified for the state. At the time of his testimony, he was employed by the U.S. Army. He lived down the street from Brandon and was friends with Ham. That night they were hanging out at Brandon’s house. They were drinking and talking. ROA 377. While they were hanging out, Petitioner pulled up in her car. Hughey knew her before that night because they attended middle school together. ROA 378. They asked her what she was doing, and she said “nothing.” Then she pulled off. ROA 379. After that, they returned to Brandon’s house, and drank some more. According to Hughey, Petitioner then returned to the house. Hughey said Petitioner was “trying to find out who Jessie was.” ROA 381. She talked on her cell phone. Hughey testified that he thought she already knew who Ham and Kevin were. ROA 382. Hughey testified that Petitioner said that a girl wanted to meet Ham. ROA 383. Ham, King and Petitioner, along with her sister, drove away. ROA 383. After

they left, Hughey stayed at the house with Brandon for another 10 or 15 minutes, and then left. ROA 384.

Later that night, Brandon called Hughey and told him they needed to go to McDonald's to look for Ham. They rode their bikes there. They observed police on the scene, so they went back home. Brandon spoke to the police. ROA 385.

Hughey admitted on cross-examination that he knew "a little bit" about the history between Kammerer and Ham. ROA 387. He never saw them fight. ROA 388. When he and Brandon went back up to the Publix area, Hughey took his gun. ROA 389. After encountering the police and not being searched for weapon, he rode his bike and then threw the gun into a ditch to get rid of it. ROA 390.

Brandon testified for the State. ROA 391. He lived in the area behind the Rock-n-Roll McDonald's. Generally, Brandon corroborated King and Hughey's accounts. He stated that Kevin and Ham were "hollering" at Petitioner and that she drove off. ROA 393. They asked her if she wanted to hang out with them, and she said no. ROA 395. After she, her sister, King, and Ham went to Publix, Petitioner returned about 15 minutes and said that "something happened." They drove back up there together. They did not see anything. They drove to the McDonald's and Publix parking lots. ROA 397. Brandon testified that she was acting like she was scared but that "you could tell it was an act." ROA 398. Brandon testified that Petitioner brought him back to his house and then left. He then called Hughey and they biked up there to check on Ham. ROA 399. They saw the police there. Brandon tried to leave, but he was

chased down by a police officer who found marijuana on him. ROA 399-400. The next day he found out that Ham had been killed. ROA 400.

Brandon had prior convictions of assault and battery of a high and aggravated nature. He also suffers from an anoxic brain injury that causes memory loss and makes him "slower." ROA 401.

Brandon testified he knew both Kammerer and Ham and knew that they did not like one another. He never saw them fight in public. He testified that he heard Kammerer talk about killing Ham. ROA 403.

Jessica Hans, another State's witness, worked for Publix Supermarkets. She testified that as she and another co-worker were standing outside, they heard several loud pops. She looked over to the Papa John's/ Tire Kingdom area and saw a person firing a gun. After the shot was fired, the person with the gun ran to the other side of Tire Kingdom and then disappeared behind a building. She estimated that about 30 seconds later, she saw a Jeep Cherokee speed off in another direction. ROA 416. She and her co-worker then drove over to that area and found the victim on the ground. They called 911.

DeJuan Jenkins then testified for the State. He testified that he had been with Kammerer since 3 o'clock or 4 o'clock on the day that Ham was killed. They had been at the mall; Jenkins had driven Kammerer's mother's car. Around 9 o'clock that evening, they returned to Kammerer's house. He testified that around 10 o'clock, he and Kammerer went to the McDonald's. They parked in the Tire Kingdom parking lot. According to Jenkins, they were going to meet Kammerer's "girlfriend" there.

Jenkins testified that once the “girlfriend” arrived, he observed Kammerer walk over to the car and open the passenger door. As he did so, someone exited the car. Kammerer then pulled out a gun. The victim then exited the car and tried running away. Kammerer started shooting at him. After he shot him, Kammerer got back into the car and told Jenkins to take him to his brother’s house. Instead, he took him home.

Jenkins testified that he did not see Kammerer with a gun prior to being in the Tire Kingdom parking lot. Kammerer disputes this and claims that Jenkins gave him the gun that night. At trial, Jenkins denied he gave the gun to Kammerer. Jenkins acknowledged that he did not call the police. Later, he pleaded guilty to accessory after the fact of murder and received a youthful offender sentence. Jenkins testified that Petitioner had not been present at the scene when the murder occurred— “She been left since—since he first started shooting and she leave.” Jenkins testified that he did not know of any problems between Kammerer and Ham. ROA 426.

Detective James Sturkie was employed with the City of North Charleston Police Department. He spoke to Petitioner at the police station, and he recounted their interview during the trial. Her statement was admitted into evidence without objection. ROA 443. Her statement said, which Kammerer’s affidavit corroborates:

Riding around with my sister, my parents called and said they was almost home. Rode to my neighborhood. Was riding through; seen Brandon, David, Jessie, and Kevin. I knew David and Brandon before.

Sean calls and asks who I’m with, then asked me to bring Jessie up to Publix. Kevin, Jessie, my sister and I ride to Publix.

Kevin and Jessie wanted to get out of the car, and as soon as they did Sean ran up to Kevin, pushed him and Jessie screamed "drive." And I took off and went to Brandon's house.

Went to Brandon's house, got Brandon, went back up there to see if any—if they ducked in the woods. I had no knowledge of a gun until I heard the shot.

After me and Brandon didn't see anyone, Brandon said, "All right you can take me home." I dropped Brandon off and went home. Tried to call Sean, no answer.

I had no knowledge of a gun being present to take a life. The only knowledge that I had was Sean wanting to fight Jessie because of Jessie beating Sean in the head with a baseball bat. I had—if I had known guns would have been involved, I would have kept Jessie and Kevin at Brandon's house.

ROA 443-44.

The after-discovered information presented in Kammerer's affidavit is so critical to this case because the State conceded how weak its case was during the trial. The State clearly indicated they did not have any proof that Petitioner possessed any malice on the night this happened.

MR. BELL: Well, Your Honor, I think that malice exists from the fact that the principle in this case has admitted and pled guilty to murder. So, malice does exist. She is here as a person that aided, abetted under the "hand of one, the hand of all." I don't know that we have to assume that she had malice, but that malice existed in the commission of the crime...It's up to the jury to decide whether that the murder was the probable or natural consequence of this fight that she—that she gave in her, you know, self-serving statement....

And her part is either she was present or not present, thus accessory before the fact of murder or murder. The malice is certainly there. It's not necessarily her malice, but all it says is "malice." It doesn't say it has to be that person's malice, but that malice existed before somebody was killed.

The information contained in Kammerer's affidavit is after-discovered evidence that proves that Petitioner is not guilty of murder.

In *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993), this Court held that to obtain a new trial based on after discovered evidence, the party must show that the evidence:

- (1) would probably change the result if a new trial is had;
- (2) has been discovered since the trial;
- (3) could not have been discovered before trial;
- (4) is material to the issue of guilt or innocence; and
- (5) is not merely cumulative or impeaching.

*See also McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013); *Clark, supra*.

Additionally, the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. *S.C. Code Ann. § 17-27-20(A)(4)* (2014).

The information contained in Kammerer's affidavit is after-discovered evidence that entitles Petitioner to a new trial. This information—that Petitioner was unaware of the existence of a gun, or that Kammerer had any intention of killing Jesse Ham prior to his actually doing so—would have changed the outcome of the trial since the State's entire theory of the case was that she *did* know about Kammerer's plans that night. But as Kammerer admits, not only was Petitioner

unaware of his plans, but the gun was not even present at the scene until after Kammerer and Petitioner spoke that night. DeJuan Jenkins pulled out the gun and handed it to Kammerer once they arrived at the scene of the shooting. This information was discovered after trial and could not have been discovered before trial by counsel because Kammerer was pursuing his own legal remedies. This information is material to the issue of guilt or innocence because Petitioner's knowledge of the existence of the gun constitutes an element of the offense.<sup>1</sup> Additionally, this information is not merely cumulative or impeaching since it is information that has not been revealed, in any manner, until now. Judge Goodstein erred when she found that this evidence did not constitute after-discovered evidence, and she should have granted Petitioner a new trial. The South Carolina Court of Appeals' opinion upholding the trial court decision denying Petitioner a new trial is erroneous (and at least partially based on an inaccurate review of the lower court record). This Court should grant Petitioner relief and grant a new trial.

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<sup>1</sup> In its brief, Respondent argues that Petitioner waited three and a half years to pursue this after-discovered evidence claim and therefore cannot show "due diligence." Petitioner's *White* appeal was denied on December 17, 2014. Kammerer executed his affidavit on January 7, 2017, reflecting a period of roughly 2 years. In addressing this issue, the Court should look at the totality of Petitioner's efforts and note that Petitioner 1) exercised her right to a jury trial, 2) sought to have the appellate courts address both a direct appeal of her conviction and her post-conviction claims, 3) filed a petition for rehearing when the Court of Appeals denied after-discovered evidence claim, and 4) sought review of the denial of her *White* appeal and first PCR claim. At every step, Petitioner has availed herself of the state remedies that exist.

## CONCLUSION

This Court should grant Petitioner relief and grant her a new trial.<sup>2</sup>

Respectfully submitted,

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<sup>2</sup> In doing so, this Court should consider whether to appoint another judge to hear the matter. During the course of these proceedings, the trial court made some specific findings of fact that, as a matter of policy may suggest that another judge hearing the matter would be appropriate. Throughout the 29(b) hearing, the trial judge appeared very concerned that Kammerer was going to perjure himself. In addressing that issue, she repeatedly specifically indicated she was not categorizing his statement as an “affidavit” (because it was not notarized), and she appointed counsel to speak to him about his intentions to testify on Petitioner’s behalf so he would not be charged with perjury. The court also made the affirmative finding Kammerer was available at an earlier time to testify on Petitioner’s behalf. That conclusion suggests that his failure to have done so may be construed adversely against him in a subsequent hearing. *See Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991); *State v. Watkins*, 406 S.C. 360, 752 S.E.2d 261 (2013).

STATE OF SOUTH CAROLINA  
In the South Carolina Supreme Court

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Appeal from Dorchester County  
The Honorable Diane S. Goodstein

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The State of South Carolina, ....., Respondent,

v.

Tiffany Ann Sanders, ....., Petitioner.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Petitioner's Brief complies with Rule 211(b), SCACR.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of this Petitioner's Brief and Appendix on William Joseph Maye of the South Carolina Attorney General's Office by sending it to him at [JMaye@scag.gov](mailto:JMaye@scag.gov) on this date, June 30, 2021.

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