No. 15-8114

IN THE SUPREME COURT OF THE UNITED STATES

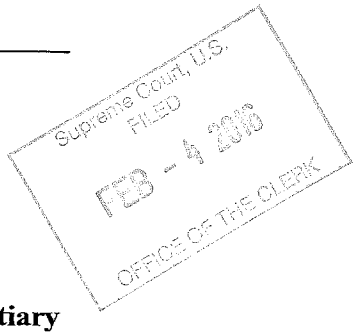
JAMES TYLER, III,

Petitioner,

vs.

DARREL VANNOY, Acting Warden, Louisiana State Penitentiary

Respondent.



ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

In July 1995, James Tyler was appointed counsel for his upcoming capital murder trial. From the start, Mr. Tyler and his counsel fervently disagreed about counsel's proposed idea to fully concede Mr. Tyler's guilt during the guilt/innocence phase of trial. Defense counsel ignored Mr. Tyler and kept insisting that he would concede Mr. Tyler's guilt to the jury despite the defendant's strenuous and continuous objections.

Mr. Tyler told the trial court of his objections to counsel's proposed concession of guilt and requested new counsel. The trial court denied this request. Mr. Tyler took the extraordinary measure of filing a lawsuit against his lawyers and attempting to take a writ to the appellate court to reverse the trial court's order refusing to appoint him new counsel, who would contest his guilt. Despite Mr. Tyler's best efforts to stop counsel, his attorney conceded Mr. Tyler's guilt to first degree murder in his opening statement.

The Louisiana District Court's consideration of Mr. Tyler's ineffective assistance of counsel claim presents questions left open by this Court in *Florida v. Nixon*, 453 U.S. 175 (2004):

I. **When counsel fully concedes the client's guilt to all charges over the client's express objection, does counsel's performance amount to a complete failure to subject the prosecution's case to meaningful adversarial testing so that the *United States v. Cronic*, 466 U.S. 648 (1984), prejudice standard applies (as every other state and federal court to consider the question has held), or does the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice standard apply (as the lower court in this case held)?**

II. **Whether Petitioner's Fourteenth Amendment rights under *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Brookhart v. Janis*, 384 U.S. 1 (1966),were violated when his counsel entered the "functional equivalent of a guilty plea" to first-degree murder over his objections; and his Sixth Amendment right to self-representation under *Faretta v. California*, 422 U.S. 806**

(1975) was violated when the trial court did not explain that he had the right to represent himself when Petitioner tried unsuccessfully to fire his attorneys?

III. **In a capital case does a defense counsel who concedes guilt after failing to investigate and present a readily available innocence defense against his clients express wishes render ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984)?**

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. James Tyler III, Plaintiff/ Appellant.

2. Darrel Vannoy, Interim Warden Louisiana State Penitentiary

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Tyler respectfully requests that this Court issue a *writ of certiorari* to review the judgment of the Louisiana District Court and address the important questions of federal constitutional law presented.

OPINIONS DELIVERED IN THE COURT BELOW

The judgment of the 1st Judicial District Court, Caddo Parish, Louisiana, denying the first supplemental post-conviction relief is not reported and is attached as Appendix A. The unpublished opinion of the Louisiana Supreme Court affirming the denial of the first supplemental post-conviction relief is reported at *State v. Tyler*, 2006-2339 (La. 06/22/07); 959 So.2d 487 and is attached as Appendix B. The judgment of the 1st Judicial District Court, Caddo Parish, Louisiana denying the second supplemental post-conviction is not reported and is attached as Appendix C. The opinion of the

Louisiana Supreme Court affirming the denial of the second supplemental post-conviction relief is reported as *State v. Tyler*, 2013-0913 (La. 11/06/15); 2015 La. LEXIS 2613, and is attached as Appendix D.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Sixth and Fourteenth Amendments, reading in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (U.S. CONST. amend. VI.)

> "No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . ." (U.S. CONST. amend. XIV, § 1.)

STATEMENT OF THE CASE

Proceedings Below

Petitioner James S. Tyler, III, was convicted of first-degree murder at a jury trial in the 1st Judicial Court, sitting at Shreveport, Parish of Caddo, on August 28, 1996, with the Honorable Eugene W. Bryson, Jr. presiding. The same jury returned a sentence of death on August 31, 1996. The death sentence was formally imposed by the court on October 4, 1996.

Petitioner pled not guilty to the first-degree murder charge. He was indigent and was represented by Public Defenders Alan Golden and Kurt Goins at trial. Despite Petitioner's oral and written objections to both his counsel and the court, defense counsel conceded his guilt. Jerome M. Winsberg was retained to represent Petitioner on direct appeal. On September 9, 1998, the Louisiana Supreme Court affirmed Petitioner's conviction and death sentence. Petitioner filed for *certiorari* from the United States Supreme Court and was denied review. *Louisiana v. Tyler*, 119 S.Ct. 1472 (1999).

On January 30, 2002, Petitioner timely filed his First Supplemental Application for Post-Conviction Relief alleging that he was constructively denied counsel under *United States v. Cronic*, 466 U.S. 648 (1984), when his attorneys, against his express wishes, conceded his guilt to first-degree murder during the guilt/innocence phase of the trial.

On August 11, 2006, the state district court denied the single-issue petition and ordered the Applicant to file all supplemental post-conviction claims within 60 days.[1] Applicant filed *Notice of Intent to Take Writ* on August 14, 2006, and the court set a return date of September 22, 2006, and stayed all further post-conviction proceedings pending appellate review of its decision. Petitioner timely filed a writ with the Louisiana Supreme Court on September 22, 2006. The writ was denied on June 22, 2007.

Petitioner filed a Second Amended Application for Post-Conviction Relief on May 8, 2009. Petitioner raised claims including that his Fourteenth Amendment rights under *Boykin v. Alabama,*, 395 U.S. 238 (1969), and *Brookhart v. Janis*, 384 U.S. 1 (1966), violated when his counsel entered the "functional equivalent of a guilty plea" to first-degree murder without his consent; and that his Sixth Amendment right to self- representation under *Faretta v. California,* 422 U.S. 806 (1975) was violated when the trial court did not explain that he had the right to represent himself when Petitioner tried unsuccessfully to fire his attorneys. Petitioner also argued that his trial attorneys were ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for conceding his guilt during the guilt phase of trial. The district court denied hearings and summarily dismissed several of the Petitioner's claims on August 1, 2011. The district court reserved a final ruling on the post-conviction petition and granted the Petitioner further argument and hearings on most of the Petitioner's ineffective assistance of counsel

[1] The district court decided only the *Cronic* claim, refusing to decide the *Boykin*, *Brookhart* and *Faretta* issues as being outside the scope of the single-issue petition. These claims are tied to the same factual scenario of an attorney conceding guilt against his client's express wishes and were raised and denied in his second supplemental petition.

claims as well as his *Faretta* and *Boykin* claims. The evidentiary hearing ordered by the district court was held December 27, 28, 29, and 30, 2011. Petitioner called five witnesses: defense trial counsel Kurt Goins, Dr. Tony Strickland, Carla Boose, Steve Lemoine and Dr. Margaret Stuber. The State called defense trial counsel Alan Golden. The district court denied these remaining claims on December 28, 2012. The writ application with the Louisiana Supreme Court was timely filed on April 25, 2013. The Louisiana Supreme Court granted the writ application in part on November 22, 2013, remanding the case to the district court for further hearings. See *State v. Tyler*, 129 So.3d 1230 (La. 2013). On November 6, 2015, the Louisiana Supreme Court denied post-conviction relief on all of the remaining claims. *State v. Tyler*, 2013-0913 (La. 11/06/15); 2015 La. LEXIS 2613.

Statement of Relevant Facts

On June 20, 1995, a Caddo Parish Grand Jury indicted James Tyler for the first-degree murder of Jock Efferson. R. 13. The indictment alleged that the killing occurred: 1) when the defendant had the specific intent to kill during the course of an armed robbery; and 2) when the defendant had the specific intent to kill and inflict great bodily harm upon more than one person. Alan Golden of the Indigent Defender Office was appointed to represent Mr. Tyler, and he was arraigned on July 21, 1995. Mr. Tyler pled not guilty to all charges. R. Vol. 1, 1.

On July 12, 1996, James Tyler filed a 42 U.S.C. §1983 action against his attorneys in the United States District Court, Western District of Louisiana claiming his attorneys were violating his civil rights by refusing to agree to contest his guilt in his upcoming capital trial.

In his §1983 complaint, Mr. Tyler alleged that after Mr. Golden was appointed, they had an initial interview. (42 U.S.C. §1983 complaint filed by James Tyler, Post-Conviction Petition Ex. 1, at 5). During that interview, Mr. Tyler informed Mr. Golden that he had no knowledge of or involvement in the crime. Nevertheless, Mr. Tyler claimed that Mr. Golden immediately advised him to concede his guilt to the charges. Post-Conviction Ex. 1, at 6. Mr. Tyler claimed that he had given Mr. Golden

information to investigate so that he might better prepare for his defense, but that Mr. Golden continuously refused to investigate or prepare a defense for his case. Post-Conviction Ex. 1, at 6-7. Mr. Tyler stated that over a twelve-month period each time that Mr. Golden met with him, he advised Mr. Tyler to plead guilty in the hopes that the trial judge would take pity on Mr. Tyler and give him a life sentence.

Mr. Tyler refused to do so and stated that Mr. Golden repeatedly threatened him for refusing to comply with his wishes. Mr. Golden also told Mr. Tyler that he disliked him because Mr. Tyler refused to accept his advice and plead guilty.[2] Mr. Golden told Mr. Tyler that if he were on Mr. Tyler's jury, he would convict him of first-degree murder and sentence him to die by lethal injection and that he was sure any other human being would do the same. Mr. Golden also told Mr. Tyler that he felt that he had no chance of winning Mr. Tyler's case in trial and therefore Mr. Golden felt there was no need for him to waste his time preparing for trial by interviewing witnesses or preparing cross-examination questions for the State witnesses. Post-Conviction Ex. 1, at 6. Mr. Tyler stated that throughout his representation, Mr. Golden refused to assist him in preparing a defense and had constantly threatened not to help Mr. Tyler if he continued to refuse this imaginary plea bargain. For those reasons, Mr. Tyler alleged a conflict of interest between himself and counsel. Post-Conviction Ex. 1, at 7. The trial court was given notice and a copy of Applicant's §1983 lawsuit.

On August 12, 1996, James Tyler filed a written motion seeking to have Mr. Golden and Mr. Goins removed from his case and to have new counsel appointed. R. 1354. In his motion, Mr. Tyler alleged that Mr. Golden had failed in every respect to represent Mr. Tyler's interests. Mr. Tyler claimed that during the hearing on the Motion to Suppress, Mr. Golden failed to advise Mr. Tyler that he had the right to testify at those hearings and that later, when Mr. Tyler asked Mr. Golden why he had failed to so advise him, Mr. Golden responded that he assumed Mr. Tyler was "unintelligent" and that Mr. Golden

[2] No plea offer had been presented by the State.

expected Mr. Tyler "to agree to a plea bargain," despite the fact that the State had never offered a plea agreement. Furthermore, Mr. Tyler alleged that he and Mr. Golden could not agree on a defense and that this led to heated discussions between them. In his motion, Mr. Tyler informed the court that he had filed a 42 U.S.C. §1983 action against his attorneys which caused a complete breakdown in the relationship between himself and his counsel. R. 1355-1356. (Post-Conviction Ex. 2.)

On August 14th, 1996, the trial court heard oral argument on Mr. Tyler's motion. The trial court advised Mr. Tyler that it had read his motion and asked Mr. Tyler if he wished to say anything else regarding it. Mr. Tyler addressed the court:

> Alan Golden has been completely ineffective as my counsel. He failed to notify me of my right to testify for the motion to suppress that I had and was denied by the Court; and also we have a conflict of interest. So I filed a 42 U.S.C. §1983 complaint to the United States Clerk of the District Court and that was filed in the civil action number on the 25th of July.

R. 1923.

The district court continued:

Court: All right. Is that all you have to say?

Tyler: Yes, sir.

Court: In reading your petition, I find that you filed the civil rights lawsuit first?

Tyler: Yes, sir.

Court: Then you filed a petition for change of counsel, which is sort of interesting, and used the filing of the lawsuit as a basis for changing counsel. I think the Court can look to see if there is truly a conflict here or whether or not this tactic is being used basically as dilatory. In your allegations, I don't see that there is a legal conflict about things . . .

Court: ...I'm looking at both the civil rights action—which I'm going to file in this, a copy of it, file in this proceeding so that it's clear—and the motion to appoint counsel, I don't see a conflict of interest, per se, other than a dispute between a defendant and his counsel in connection with their representation or his representation of the defendant.

T.R 1925-26. (emphasis supplied.)

The Court denied Mr. Tyler's motion on the grounds that it believed it was a "personality" conflict between the defendant and counsel rather than a dispute about legal matters. *Id.* Mr. Tyler objected to the Court's ruling:

> Tyler: Okay, your Honor. For the record, I would like to object to the Court's decision.
>
> Court: You've learned well, counsel. Your objection is noted and overruled. And I will grant, if any writs are to be filed, they are to be filed tomorrow afternoon at 5:00.
>
> Tyler: Okay. Thank you.
>
> Court: I will file this.

R. 1927-28.

On August 16, 1996, the Court held another motion hearing to dispose of any unfinished business. At that time, Mr. Tyler informed the Court that on the previous day, he had tried unsuccessfully to get his trial counsel to assist him in filing a writ with the Court of Appeal as to the denial of his *pro-se* motion to appoint new counsel. Mr. Golden and co-counsel both informed the Court they were not going to help Mr. Tyler with any such writ since the motion in their opinion was adverse to ***Mr. Golden's*** interests. R. Sup. Vol. I, 59. (emphasis supplied). The Court then extended Mr. Tyler's time to take writs until noon on August 19, 1996, (the day on which trial began) and told Mr. Tyler the Court would furnish him with certified copies of the minutes and the transcript. Mr. Tyler informed the Court he did not know how to take a writ and needed legal assistance to do so.

R. Sup. Vol. I, 62-63.

Mr. Tyler filed his writ with the Second Circuit Court of Appeal on August 19, 1996, among other things, alleging that:

> The defendant alleges that he did not commit any crimes in the State of Louisiana and has pleaded not guilty. Mr. Golden and his co-counsel has [sic] stated that the defendant has an open and shut case so their [sic] not going to attempt to get the defendant acquitted, but seek to say the defendant did commit a robbery/homicide as a result of intoxication or because the defendant had some sort of mental defect. The defense claims their [sic] trying to get the defendant a life sentence instead of the death penalty. If the defendant

did not believe he would be acquitted and wanted a life sentence then the defendant would have pleaded guilty instead of not guilty...

Post-Conviction Ex. 3. [3]

During opening statements at trial, defense counsel conceded that Mr. Tyler was guilty of killing the victim during the course of an armed robbery and that he also shot and wounded the two surviving victims: "[T]hat is not in dispute in this case." The defense then told the jury that it would begin to learn "that there are serious questions about Tyler's state of mind at the time he committed the crime." R. 1024.

After the State rested its case-in chief, the defense rested without calling any witnesses. The following exchanged occurred:

Defense Our client has declined his right to testify and wishes to address the court.

* * *

Tyler: I wish to put on the record that my attorneys are using a defense that I don't agree with. I never agreed with it. That's why I filed a motion to appoint new counsel. My attorney who is supposed to represent me is not saying nothing in my favor. I understand they may be trying to get me a life sentence, but if I wanted a life sentence, I would have pleaded guilty. I pleaded not guilty and I don't think my attorneys should have done that without my permission. I didn't want to take no plea bargain, you know and they still went against my wishes.

Court: I understand what you are saying, and I believe your attorneys have chosen a strategy, I will ask them to state for the record but it appears that they feel like the weight against you is so overwhelming that they would stand a chance of alienating the jury in the penalty phase if they contested every matter and that they are taking the position to move through the guilt stage as quickly as possible, put all the evidence that would be damaging to the defense in early so that the jury already has dealt with that and will not deal with it in a surprise situation in the penalty phase. Is that correct?

---

[3] The Second Circuit Court of Appeals subsequently denied Mr. Tyler's writ on September 19, 1996, some three weeks after Mr. Tyler was convicted, because "Petitioner has failed to prove that there has been a filing of the motion to appoint new counsel with the district court and petitioner fails to provide this court with a copy of the ruling or decision which he complains of as required by UCRA 4-5." (Post-Conviction Ex. 4.)

Defense: More or less, your Honor. That is correct. Our primary objective is to save his life, to do whatever we can to increase his chances of getting a life sentence. We decided to contest the act would fly in the face of overwhelming and obvious evidence and destroy our credibility in the penalty phase.

Court: Before trial there was a consideration certainly by counsel of the possibility of pleading the defendant guilty and going right to the penalty phase to do the same thing you have done here, that is move through the evidence against him quickly?

Defense: That's correct. We offered that opportunity to Tyler.

Court: He declined that opportunity?

Defense: That is correct.

Court: So you are consistent in your strategy in this matter from the very beginning?

Defense: Yes.

Court: Mr. Tyler, all I can tell you is that your attorneys feel that it is in your best interests to do it this way.

State: Can we make clear that a life sentence has never been on the table here?

Tyler: I want to make an objection to that defense.

Court: I understand you are objecting to your defense counsel using the defense they have been doing to the Court?

Tyler: Yes, Sir.

Court: I see no incompetence of counsel in what they are doing. I see that this is a calculated strategic procedure that **all your counsel have agreed to.**

R. 3622-3630. (emphasis supplied).

In closing arguments, the defense once again fully conceded Mr. Tyler's guilt to all charges: "[w]e began by telling you that Tyler shot and killed Jock. ***You now know that.***" … "We told you you would learn he shot and wounded Denise and Rashaan. ***You now know that.***" R. 3638. "You have learned thus far what James has done. You've begun to learn a little about why he did it. Soon you will

learn more." R. 3641. (emphasis supplied). In rebuttal, the State acknowledged that the defense argument was a foregone conclusion that Mr. Tyler would be found guilty:

"I assume from [defense counsel's] comment ... means that he assumes you are going to find Tyler guilty of first-degree murder." R. 3641.

On August 28, 1996, the Applicant was found guilty of first-degree murder and sentenced to death on August 31, 1996.

The State District Court Opinion

In deciding the Petitioner's one-issue petition, the Louisiana state district court cited this Court's decisions in *Bell v.* Cone, 535 U.S. 685 (2002), and *Florida v. Nixon*, 543 U.S. 175 (2004), as controlling authority and that a full concession of guilt over the express objections of the client should be analyzed as *Strickland,* rather than *Cronic,* error.

Although *Nixon's* holding was narrowly drawn,[4] the district court broadly interpreted the decision to mean the client's consent was irrelevant.

In denying the Second Supplemental Petition claims under *Faretta* the district court denied the claim on the grounds Mr. Tyler never asked to represent himself. The district court held that *Nixon* foreclosed that the concession violated *Boykin* and *Brookhart* even when a client objects to a concession strategy. The district court further held that the defense's decision to concede guilt was reasonable and did not violate *Strickland* despite the lack of investigation and availability of a misidentification defense.

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[4] "... when a defendant, informed by counsel, ***neither consents nor objects*** to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." *Id.* at 555. (emphasis added).

REASONS FOR GRANTING THE WRIT

This writ raises two issues of first impression: 1) In a capital trial, can a defense attorney fully concede a client's guilt against the client's express objection without violating the constitution; and 2) Which standard of review applies to the violation: a) *United States v. Cronic*, 466 U.S. 648 (1984), not requiring a showing of prejudice; or b) *Strickland v. Washington*, 466 U.S. 668 (1984), requiring a showing of prejudice?

Before *Florida v. Nixon*, 543 U.S. 175 (2004), lower courts had uniformly agreed that a full concession of guilt against the express wishes of a client is presumptively prejudicial. *See e.g., United States v. Swanson,* 943 F.2d 1070 (9th Cir. 1991); *Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983); *State v. Harbison,* 337 S.E.2d 504 (N.C. 1985).

In contrast, the Louisiana state district court denied Mr. Tyler relief by applying the inapposite *Strickland* standard. The district court wrongly held that this Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004), is controlling, even when a client **expressly objects** to his attorney's concession of guilt. In *Nixon,* this Court expressly reserved this question, holding only that *Strickland* rather than *Cronic* applies when counsel fully concedes guilt and the client does not expressly object to that strategy.

Even so, the district court denied relief on the erroneous ground that Mr. Tyler's consent to his lawyer's decision to concede his guilt was irrelevant, finding that *Nixon* requires application of *Strickland* to full concessions of guilt over the express wishes of the client. In doing so, the district court ignored well-established constitutional principles that this critical decision was the defendant's to make, ***not*** the attorney's.

James Tyler pled not guilty to first-degree murder, thereby invoking numerous constitutional rights that belonged to him personally and that historically and indisputably only he could waive. James Tyler never waived those rights. To the contrary, he repeatedly attempted to assert these rights in the

strongest possible terms. In spite of Tyler's objections, these constitutional rights – that belonged solely to him – were stripped from him by his defense counsel, with full complicity of the trial court. That same court in post-conviction once again held that Mr. Tyler's objections were irrelevant.

Nixon never addressed this factual scenario and left unanswered the question of "when does the lawyer's decision to concede his client's guilt violate the client's right to his day in court?" This question is in urgent need of resolution by this Court. The sheer number of these cases in lower courts highlights the confusion on this issue. Some courts think it acceptable to partially concede the client's guilt against his objection, while others disagree. Some think the dividing line depends on where in the trial the lawyer concedes guilt. Others disagree. Before *Nixon,* all lower federal and state courts agreed that *fully* conceding guilt in opening statements against the client's express objections was *Cronic* error. Since *Nixon,* Louisiana alone has interpreted this Court's decision to mean that all concession of guilt cases should be governed by *Strickland.*

This issue will continue to arise in federal and state courts across the country, and the Louisiana court's misinterpretation of *Nixon* threatens to plunge a previously-confused area of the law into further confusion and uncertainty based on its clear misreading of this Court's opinion in *Nixon.*

The Florida Supreme Court in *Nixon* went further than any previous court when it held that *Cronic* would apply in any concession case where trial counsel did not obtain affirmative express consent from the client. This Court's reversal in *Nixon* did not clarify other lower court cases involving a client's express objections to a concession.

This case presents an ideal vehicle to resolve the question. There is no doubt that James Tyler clearly and expressly stated his wishes both to counsel and to the court throughout the proceedings. Moreover, the State does not argue that Mr. Tyler failed to preserve his claim in any respect, and the court issued a decision on the merits.

If the lower court's decision is allowed to stand, it will encourage more capital defense attorneys to ignore the client's wishes regarding fundamental rights that belong exclusively to them. It will leave a capital defendant with no alternative but to represent himself or herself to prevent this type of attorney overreaching. In light of *Nixon,* the lower courts need guidance from this Court to clearly delineate the boundaries of decision-making in capital representation. Petitioner respectfully requests that this Court hold that such conduct by defense counsel is both unconstitutional and presumptively prejudicial. Alternatively, Petitioner requests that this court reverse his conviction as his counsel unreasonably conceded his guilt after failing to investigate and present a readily available innocence defense against his client's express wishes and rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984).

I. WHEN COUNSEL FULLY CONCEDES A CLIENT'S GUILT TO ALL CHARGES, OVER THE CLIENT'S EXPRESS OBJECTION, COUNSEL'S PERFORMANCE AMOUNTS TO A COMPLETE FAILURE TO SUBJECT THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING, SO THAT THE *CRONIC* STANDARD APPLIES

A. Introduction

This Court has held that certain omissions or commissions by trial counsel are sufficiently egregious that they amount to a constructive denial of counsel. Such deficiencies so fundamentally impact the defendant's Sixth Amendment rights that prejudice is presumed. U.S. CONST. amend. VI; *Cronic*, 466 U.S. 648, 656-657 (1984) (footnotes omitted).

At every opportunity in the instant case, James Tyler objected to his attorneys' decision to concede his guilt at trial and instead demanded that his attorneys contest the State's case. Their decision to ignore James Tyler's wishes and concede his guilt is *Cronic* error. By conceding his guilt against his wishes, Mr. Tyler's attorneys failed to subject the State's case to any "meaningful adversarial testing."

Instead of representing Mr. Tyler's interests, defense counsel joined the State in ensuring that their own client would be convicted of first-degree murder, against his express wishes. From opening statements to closing arguments, defense counsel told the jury there was no issue for it to decide as far as

James Tyler's guilt or innocence of first-degree murder, that it was not in dispute. James Tyler was "constructively denied counsel" by his attorneys' actions. *See e.g. United States v. Swanson*, 943 F.2d 1070 (9th Cir.) *see also Rickman v. Bell*, 131 F.3d 1150, 1157 (6th Cir. 1997) (presumption of prejudice because counsel did not serve as advocate such that he was a "second prosecutor" and defendant would have been "better off to have been merely denied counsel."); *see also Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988) (holding):

> [A]n attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

see also, Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (an indispensable element of the effective performance of defense counsel's responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation).

The purpose of the guilt/innocence phase of a trial is to determine a defendant's guilt or innocence of a crime. Here, there was no guilt/innocence determination by the jury. Defense counsel called no witnesses and contested none of the State's evidence. Rather, they told the jury that Mr. Tyler was not only guilty beyond a reasonable doubt but beyond any doubt. This cannot be considered "meaningful adversarial testing." That trial counsel's reason for conceding guilt was to save their client's life is irrelevant and does not justify their actions. *See, e.g., Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983); *United States v. Morris*, 568 F.2d 396, 401-02 (5th Cir. 1978) (even a prosecutor may not properly express such a personal opinion on the defendant's guilt). *See also*, *Cronic, supra*, at 656, n. 16:

> Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude with any satisfactory degree of certainty, that the defendant's case was adequately presented.

Id. (Citations omitted)

Here, the district court found that counsel provided meaningful adversarial testing by filing a few pretrial motions and arguing that Mr. Tyler had mental health issues that the jury would hear about in the penalty phase. However, the district court incorrectly asserted that defense counsel used mental health evidence to contest the element of specific intent necessary for a first-degree murder conviction.[5]

Just because defense counsel may have opened their mouth at some point during trial to offer some non-substantive or innocuous expression does not mean they have meaningfully tested the prosecution's case. Conceding the defendant's guilt to all charges against his express wishes is just such a "structural flaw" that requires reversal. *See Nance v. Ozmint,* 367 S.C. 547, 626 S.E.2d 878 (S.C. 2006) (remanded by this Court in light of *Florida v. Nixon*), which then held that *Cronic,* not *Strickland* still applies to certain ineffective counsel claims:

> We hold that this case represents a very rare situation where counsel failed to provide an adversarial challenge to the prosecution. We find it most compelling that in the present case counsel abandoned his role as defense counsel and in fact helped to bolster the case against his client.
>
> As a result, we hold that counsel was ineffective under *Cronic* and failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client.

Id., 367 S.C. at 557-558.

Mr. Tyler's attorney conceded guilt to all first-degree charges in the indictment despite Mr. Tyler's repeated objections. Under every court's authority besides Louisiana that has addressed this same factual scenario, Mr. Tyler is entitled to relief under *Cronic*.

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[5] In Louisiana, defense counsel may not introduce mental health evidence to negate specific intent in first-degree murder without asserting an insanity defense. La.C.Cr.P. Art. 651. The trial court granted a state motion in limine to bar defense from introducing any mental illness evidence during the guilt phase. R. 1305. Defense counsel fully conceded all elements of first-degree murder in opening statement and closing arguments.

B. *Nixon* Does Not Apply to Cases Where the Client *Expressly Objects* to His Attorney's Concession of Guilt During the Guilt/Innocence Phase of a Capital Trial.

The lower court held that *Florida v. Nixon*, 543 U.S. 175 (2004), foreclosed *Cronic* relief even when a client **objects** to his attorney's concession of guilt. The lower court correctly noted that *Nixon* rejected the argument that admitting guilt, via concession in the opening and closing arguments, functionally equals changing the plea to guilty and thus requires ***express consent*** on the record. *Nixon*, 543 U.S. at 189 (emphasis added). However, the lower court failed to recognize that *Nixon* only applied when the lawyer told the client of the possible concession and got no reaction. *Id.* at 189, 191-192.[6]

This Court never reached the question of whether counsel would be ineffective, under *Cronic* or *Strickland*, if a defendant objected to the concession. *Nixon* also does not decide the applicable standard when counsel fails to consult with the client before conceding guilt. *Nixon* noted the defense's attempts in this area, when it found that counsel, generally, "has a duty to discuss potential strategies with the defendant."

Nixon added, "when a defendant, informed by counsel, ***neither consents nor objects*** to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." *Id.* at 555. (emphasis added). Thus, *Nixon* applies only in capital cases where defense counsel tells a defendant it plans to concede guilt and the defendant fails to reply. After *Nixon,* other lower courts have still applied *Cronic* to concessions over a client's objections. *See United States v. Dago*, 441 F.3d 1238, 1250 (10th Cir. 2006) (citing *States v. Swanson,* 943 F.2d 1070 (9th Cir. 1991); *Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983); *State v.*

[6] In *Nixon,* this Court adopted the findings of the lower court that Mr. Nixon silently acquiesced by his failure to object. Significantly, Nixon's trial counsel stated that he would not have conceded guilt if Nixon had raised an objection, but that Nixon gave no such indication.

Harbison, 337 S.E.2d 504 (N.C. 1985), for authority that complete concessions of guilt over client objection is *Cronic* error); *Poindexter v. Mitchell*, 454 F. 3d 564 (6th Cir. 2006) (citing *Swanson*).

The Florida Supreme Court in *Nixon* went further than any previous court when it held that *Cronic* applied in any concession case where trial counsel did not obtain affirmative express consent from the client. By contrast, all previous courts had granted *Cronic* relief when the client had objected at the time of the trial. This Court in *Nixon* reversed the Florida Court's application of *Cronic* when the client neither consented or objected to his lawyer's proposed strategy. This Court did not reverse lower court opinions granting *Cronic* relief when the client objected.

In sum, only the Louisiana courts have held that a ***complete concession of a client's guilt in the guilt/innocence phase of a trial when the client objects*** is anything but *Cronic* error which would require reversal and a new trial.

The *Nixon* decision and statements made in oral argument show that *Nixon* applies only in capital cases where defense counsel has told a defendant that counsel plans to concede guilt *but the defendant fails to respond. Nixon* is inapposite to Petitioner's case. Mr. Tyler respectfully submits that *certiorari* should be granted to correct the Louisiana courts misguided application of *Florida v. Nixon*, 453 U.S. 175 (2004).

II. PETITIONER'S FOURTEENTH AMENDMENT RIGHTS UNDER *BOYKIN V. ALABAMA*, 395 U.S. 238 (1969), AND *BROOKHART V. JANIS*, 384 U.S. 1 (1966), WERE VIOLATED WHEN HIS COUNSEL ENTERED THE "FUNCTIONAL EQUIVALENT OF A GUILTY PLEA" TO FIRST-DEGREE MURDER OVER HIS OBJECTIONS; AND HIS SIXTH AMENDMENT RIGHT TO SELF REPRESENTATION UNDER *FARETTA V. CALIFORNIA*, 422 U.S. 806 (1975) WAS VIOLATED WHEN THE TRIAL COURT DID NOT EXPLAIN THAT HE HAD THE RIGHT TO REPRESENT HIMSELF WHEN PETITIONER TRIED UNSUCCESSFULLY TO FIRE HIS ATTORNEYS

In *Faretta v. California*, this Court affirmatively recognized a defendant's right to self-representation as a constitutional right. The Supreme Court stated that autonomy is the "lifeblood of the law." *Faretta v. California,* 422 U.S. 806, 834 (1975). *Faretta's* underlying premise is that a

defendant's autonomy is a constitutional value, espoused throughout our nation's jurisprudence and society. Defendant autonomy consists of the ability to waive rights, the power to control one's destiny, and the right to privacy. Even the three dissenting justices in *Faretta* cautioned:

> This is not a case where defense counsel, **against the wishes of the defendant** or with inadequate consultation, has adopted a trial strategy that significantly affects one of the accused's constitutional rights. For such overbearing conduct by counsel, there is a remedy.

422 U.S. at 848 (Blackmun, J., with Burger, C.J., and Rehnquist, J., dissenting) (emphasis added) (*citing Brookhart*).

The district court wrongly asserts that there is no authority to suggest that a trial court has a duty to inform a defendant of his *Faretta* right to represent himself without an unequivocal request by the defendant that he wishes to do so. Nor does the court address the fact that *Faretta* guarantees that certain fundamental rights belong to the defendant and cannot be abrogated by trial counsel without requiring the client demand to represent himself. The court's opinion that Petitioner's *Faretta* and *Boykin* claims are meritless is legally incorrect. No less than five justices of the Fifth Circuit Court of Appeals disagree. In *Haynes v. Cain*, 272 F.3d 757 (5th Cir. 2001), the defendant only raised his counsel's concession of guilt to the underlying felony against his wishes as a *Cronic* error. Therefore, the appellate court was limited to analyzing the claim on that basis.

However, the original majority panel (comprised of Circuit Judges Politz and Kazen) addressed the fact that even a partial concession of guilt against a client's wishes also raised serious constitutional questions regarding voluntary guilty pleas and *Faretta* rights: *See Haynes*, 272 F.3d at 764:

> Haynes defines his claim primarily in terms of ineffective assistance of counsel. Our analysis, in turn focuses on that issue and we do not herein address the broader and equally serious sixth amendment concerns that the facts of this case raise, *e.g.,* whether, by conceding partial guilt over Haynes direct objection, counsel usurped the fundamental right of how to plead that is reserved for the accused; or whether the trial judge, by not informing Haynes of his right to self-representation, violated his fundamental rights as enumerated in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1972).

Three more justices dissented in the en banc opinion in *Haynes,* not on the basis that it disagreed

with the majority that *Haynes* should prevail on the *Cronic* claim, but on the grounds that the defendant's *Boykin* and *Faretta* rights were violated even though the defendant never raised claims on these grounds. Robert M. Parker, Circuit Judge, joined by Judges Jacques L. Weiner, and Harold R. DeMoss, Jr., dissented from the en banc opinion on this ground. *Haynes v, Cain,* 298 F.3d 375, 384 (5th Cir. 2002) (en banc) (Parker, J., Weiner, J., and DeMoss, Jr., J., dissenting)

In addition, Judge Dennis issued the following concurring opinion in the *Haynes* en banc decision:

> After objecting to his defense counsel's strategy at the early stage of the trial, Haynes did not assert his right to self-representation or **clearly call for the discharge of his attorneys.** Consequently, the trial judge did not inquire into the voluntariness or intelligence of such a nonexistent claim. Subsequently, Haynes continued to allow the defense counsel to represent him, and he elected not to testify at trial or to further protest the trial strategy pursued. Under these circumstances, Haynes either waived his self-representation claim or failed to properly raise and preserve it for our review. In either case, a reversal of his conviction on the theory that he has suffered a violation of his Sixth Amendment right to self-representation is unwarranted based on the record designated for our review.

Haynes, 298 F.3d at 384 (Dennis, J., concurring) (en banc) (*emphasis* added).

Here, Petitioner did try to discharge his attorneys and has raised the claims that his *Boykin* and *Faretta* rights were violated when his trial counsel conceded his guilt against his wishes. Unlike the defendant in *Haynes,* Petitioner has preserved these issues for appellate review.

State and federal courts after *Florida v.* Nixon, 453 U.S. 175 (2004), have held that conceding guilt against the client's express objections still violates his constitutional rights as established in *Faretta* and *Boykin See Cooke v. Delaware,* 977 A. 2d 803 (Del. 2009):

> This case is not like *Nixon*, where the defendant did not respond to counsel's proposed strategy, and neither consented nor objected when his counsel pursued that strategy at trial. In stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty. The Court's holding in *Nixon* that counsel was not required to acquire the defendant's "affirmative, explicit acceptance" to a tactical decision to concede guilt, was expressly qualified as applying only to the factual scenario in which the defendant is unresponsive to counsel's proposed strategy.[65] However, where, as here, the defendant *adamantly objects* to counsel's proposed

> objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury.[66] The right to make these decisions is nullified if counsel can override them against the defendant's wishes. In this case, the trial court's failure to address the breakdown in the attorney-client relationship allowed defense counsel to proceed with a trial objective that Cooke expressly opposed. This deprived Cooke of his Sixth Amendment right to make fundamental decisions concerning his case.

Id at 847 (footnotes omitted); see also footnote 67 at 847 citing *Faretta.*

Cooke also held that concessions of guilt over the express wishes of the defendant violate *Boykin v. Alabama,* 395 U.S. 238 (1969), and *BROOKHART V. JANIS*, 384 U.S. 1 (1966); *Id.* at 842 (footnotes omitted).

Cooke cited numerous fundamental constitutional violations that occur when defense counsel concedes guilt over a client's express objections. *See* note 40 at 842, citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (right to plead not guilty); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (right to trial by jury); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (right to confront witnesses); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (right to not testify). *See* omitted note 41 at 842 citing *Faretta*, 422 U.S. at 819-20; and *Brookhart*, 384 U.S. at 7-8. *See also People v. Bergerud,* 223 P.3d 686, 693 (Colo. 2010):

> The right to enter a plea is one of those fundamental choices that must be decided by the defendant alone. *See [Jones v.] Barnes*, 463 U.S. [745] at 751 [1983]. Counsel cannot concede the defendant's guilt to a crime over his express objection, thereby waiving his privilege against compulsory self-incrimination.[11] *See Boykin v. Alabama*, 395 U.S. 238, 243 ... (1969); *see also Brookhart v. Janis*, 384 U.S. 1, 4-7 ... (1966) (holding defense counsel's agreement to a truncated trial was the "equivalent of a guilty plea" and so required the defendant's consent).

Id. at 699-700 (footnote omitted). *See also, id.* at 699, footnote 11:

> The People's reliance on ... *Nixon*, ... to assert the contrary is misplaced. There, the Supreme Court considered whether defense counsel's concession of guilt without the defendant's express consent constituted ineffective assistance of counsel. The Court's holding was very narrow:
>
> > [I]n a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest

> and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent.

Id., citing Nixon at 192.

> As illustrated by the holding, both the fact that capital cases present defense attorneys with different strategic decisions than do other cases and the defendant's silence were critical to the Court's conclusion. *See id.* at 191-92. Neither consideration applies here where the death penalty has been abandoned by the prosecution and the defendant *explicitly* objected to counsel's actions on his behalf.

Id. (*emphasis* in original).

Bergerud did not approve of the constitutionality of conceding a client's guilt against his wishes. However, the court determined that the trial counsel in *Bergerud*, unlike counsel in Mr. Tyler's case, did not in fact concede guilt in opening statements.

In contrast, Mr. Tyler's lawyers fully conceded his guilt to first degree murder. Also, *Bergerud* remanded the case to lower court to see if defense counsel's actions impermissibly deprived the defendant of his right to testify and whether trial counsel properly investigated any self-defense before refusing to present it as a viable defense.

Here, Petitioner is entitled to a new trial on the basis of well-established United States Supreme Court precedent established in *Faretta* and *Boykin.* No matter how overwhelming the evidence, a criminal defendant is entitled to an innocence defense. As Justice Byron White explained, "absent a voluntary plea of guilty, we also insist that [defense counsel] defend his client whether he is innocent or guilty." *United States v. Wade*, 388 U.S. 218, 257 (1967) (White, J., joined by Harlan and Stewart, JJ., dissenting in part and concurring in part). Defense counsel thus is required "to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." *Id.* at 258. Mr. Tyler was entitled to present an innocence defense and was deprived of numerous fundamental rights by overbearing counsel.

III. IN A CAPITAL CASE, DEFENSE COUNSEL WHO CONCEDE GUILT AFTER FAILING TO INVESTIGATE AND PRESENT A READILY AVAILABLE INNOCENCE DEFENSE AGAINST HIS CLIENTS EXPRESS WISHES RENDER INEFFECTIVE ASSISTANCE UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

Despite the Petitioner's plea of not guilty to the indictment, counsel conceded his guilt during opening statements, at the close of the state's evidence, and during closing arguments. In doing so, counsel violated Mr. Tyler's Sixth Amendment Right to Counsel pursuant to *Strickland*, v. *Washington*, 466 U.S. 668 (1984). "[I]n some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense ... in order to persuade the jury to focus on an affirmative defense ...." *United States v. Swanson,* 943 F.2d 1070, 1075-76 (9th Cir. 1991). Concessions are appropriate when the evidence against the defendant is overwhelming, *Haynes v. Cain,* 272 F.3d 757, 767-68 (5th Cir. 2001); *United States v. Arnold,* 126 F.3d 82, 89 (2d Cir. 1997), or when "conceding guilt to one count of a multi-count indictment ... bolster[s] the case for innocence on the remaining counts," *United States v. Holman,* 314 F.3d 837, 840 (7th Cir. 2002).

Here, though, conceding the issue of eyewitness identifications was unreasonable. Counsels' failure to investigate and present available evidence multiply prejudiced Mr. Tyler: not the least of which was counsels' uninformed concession of guilt fully to the one charge of first-degree murder. The case evidence was not overwhelming and counsel had a readily available misidentification defense it could have presented to the jury.

Rashaad Roberson and Denise Washington were the only people or evidence which placed Tyler at the crime scene. The importance of the eyewitness testimony was heightened by the lack of physical evidence linking Mr. Tyler to the crime. No latent prints, DNA evidence or any other evidence linked to Mr. Tyler was found at the Pizza Hut. Police obtained a search warrant and seized the clothing Mr. Tyler was wearing. No blood or trace evidence was on the clothing. The police could not locate the alleged murder weapon in Mr. Tyler's hotel room. The impeachment of Roberson and Washington's testimony would have removed a vital link in the State's chain of evidence. Given the circumstances, a

competent lawyer would have done all possible to contest that evidence. Other than move to suppress the testimony, and conduct a superficial and ineffective cross-examination of the witnesses at the suppression hearing, defense counsel did nothing. Instead, counsel fully conceded that Mr. Tyler was the perpetrator.

At the post-conviction evidentiary hearing, trial counsel Kurt Goins agreed that eyewitness testimony was essential to the State's case against Mr. Tyler:

> Q. Would you agree that the strength of the case came - was in large part on the credibility of the three witnesses; Roberson, Denise Washington, and Sharlot Tedder?
>
> A. Plus Mr. James Douglas. Yes.

P.C. Hearing Tr. 12/27/11, at 21.[7]

Presented with much discovery to impeach eyewitness identifications, trial counsel considered a misidentification defense. When asked if the team "consider[ed] using the variances for impeachment of Roberson and Washington's IDs at trial," Mr. Goins stated, "I'm sure we did. But we did not." P.C. Hearing Tr. 12/27/11, at 34. *See* P.C. Hearing Tr. 12/27/11, at 38, 63 (co-counsel confirming team consideration of misidentification). Later, Mr. Goins testified that the defense interviewed no witnesses before rejecting that defense:

> Q: Now, going back to the trial. At the trial you never examined - never asked on cross-examination for Rashaan and Roberson (sic) - anything about their eyewitness descriptions of the perpetrator that differed from James Tyler?
>
> A: No, I did not.
>
> Q: Did you explore or speak to the officers who had interviewed Roberson and Washington about what they were told about physical discrepancies?
>
> A: No.

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[7] Lead Counsel Mr. Golden likewise testified that eyewitness identification testimony is "extremely important" in a case, such as Mr. Tyler's, with no physical forensics evidence linking the defendant to the crime. P.C. Hearing Tr. 12/28/11, at 256.

Q: Can you explain how, if you had, how you would have used this to present a misidentification claim?

A: Well, if you were using that information, you use it to try to create reasonable doubt through the issue of misidentification or faulty identification.

P.C. Hearing Tr. 12/27/11, at 59-60.

Q: And as far as Sharlot Tedder, you never questioned Sharlot Tedder about the clothes she described Mr. Tyler wearing both before and after the crime were completely different than the descriptions by the eyewitnesses?

A: No.

Q; Are those types of distinctions important to creating reasonable doubt?

A: They could be, yes.

P.C. Hearing Tr. 12/27/11, at 61.

The jury heard none of this information, which would have contradicted the eyewitness testimony as counsel, against Mr. Tyler's objections, unreasonably chose a concession strategy in a bid to maintain credibility with the jury in the penalty phase.

A. In The Instant Case, The Concession of Guilt Was Not Reasonable When Counsel Failed to Do a Full Investigation Into The Guilt Phase of The Case, Despite The Readily Available Evidence That The Eyewitnesses' Descriptions Of The Perpetrator Did Not Match Mr. Tyler's Physical Characteristics and Their Description of The Clothing The Perpetrator Was Wearing Did Not Match The Clothing Mr. Tyler Was Allegedly Wearing.

The police reports indicate that the Ms. Tedder told police that Mr. Tyler wore black tennis shoes, blue jean knee length shorts and a white tee shirt. Post-Conviction Ex. 7, at 7. Another police report indicates a consistent description of Mr. Tyler's clothing by Ms. Tedder, *albeit* with a slight variation in shoe color—"navy blue tennis shoes with jade colored shoestrings." Post-Conviction Ex. 7, at 25. Tedder also told the police that the knee-length faded-blue denim pants that Mr. Tyler had on at the time of his arrest were the same ones he was wearing on the Memorial Day evening. Post-Conviction Ex. 7, at 39. Notably, Ms. Tedder told police that she was "wearing the actual t-shirt that Tomlin had been wearing on the night of this offense." Post-Conviction Ex. 7, at 27-28. Later, Ms.

Tedder transferred the shirt to the police in the parking lot of the JoDan Motel. Post-Conviction Ex. 7, at 64-A.

At the Preliminary Hearing, Ms. Tedder testified that before and after the time of the shooting, Mr. Tyler wore a white t-shirt and light blue jean shorts. R. 1440, 1468-69. Thereafter, Ms. Tedder added to the description about what Mr. Tyler was wearing when she next saw him:

Q. Now, when you saw him in the bedroom, what was he doing?

A. Wiping off the sweat.

Q. Was he standing or sitting?

A. He was standing.

Q. Was he fully clothed?

A. Yes.

Q. Was he in the same clothes he was wearing when he left?

A. Yes, he was.

Q. Did you notice anything unusual about the clothing?

A. No.

Q. Did you see any blood on his clothing?

A. No, I did not.

R. 1473.

Her description of Mr. Tyler's clothing completely differed from that given by Ms. Washington and Mr. Roberson, who were direct eyewitnesses to the gunman's appearance at the crime scene. However, at trial, defense counsel never asked Ms. Tedder about the clothing Mr. Tyler was wearing that day, despite the descriptions by both Washington and Roberson that the gunman was wearing dark clothing.

Roberson and Washington's previous eyewitness statements to police could have been used to

discredit their identifications of Mr. Tyler regarding additional physical discrepancies. In a police report, Foster wrote that Washington described the assailant as:

> short, 4'10, brown skin, fade hair cut with a curl on the top. He was wearing Khaki shorts with a dark shirt. Ex. 7 at 52.

Also, in her May 30, 1995 statement, Ms. Washington described the perpetrator as being "about 4'10." *See* Post-Conviction Ex. 8, at 3. Ms. Washington at that time said he was "real short" and that "he was so short that it stood out to [her]." *Id.* at 3, 15. Yet defense counsel did nothing to elicit that Washington described the gunman to Foster as being almost a foot shorter than James Tyler.

Officer J.C. Williams, who interviewed Roberson and Washington at the Pizza Hut shortly after the robbery, testified at the motion to suppress hearing that Roberson described that suspect as a black male, light complected, about five seven to five eight. Roberson stated the suspect was wearing dark clothing and had a fade hair cut with a curl on top. Williams testified that Washington gave the same description that Roberson gave except she described the gunman as medium to dark complected. R. 1827.

Roberson also stated that the perpetrator had a slim build, whereas Mr. Goins testified that Mr. Tyler was "kind of stocky" and that given his height and weight at the time of the crime Mr. Tyler would not be described as slim. P.C Hearing Tr. 12/27/11, at 29, 33. Further police records, dated December 24, 1994, describe James Tyler as being "approx[imately] 5'08' – 200 lb." and as having "tattoos and a burn," as well as "scars on [his] arms." R. 266.

Mr. Goins also admitted that while Roberson (and Denise Washington) described the perpetrator as having a fade-style haircut, Mr. Tyler had an Afro at the time of his arrest. P.C Hearing Tr. 12/27/11, at 26, 28. And while neither Roberson nor Washington described the perpetrator as having any tattoos or scars, Sharlott Tedder stated that Mr. Tyler had two prominent tattoos, and those tattoos were also documented in a police report. *Id*, 12/27/11, at 29-30, 33. In addition, counsel never asked Roberson about his initial description to police that the gunman was light skinned, and was dressed in dark

clothing. Nor did he ask about Roberson's statements to the police describing the gunman as having a slight mustache. Considering that Mr. Tyler is dark-skinned, was clean shaven, and was wearing light colored clothing at the time the crime was committed, the jury might have considered that to be relevant in determining the witnesses credibility.

Mr. Goins also described how such a theory could have been used to create reasonable doubt:

> Q: And if you had used [a misidentification theory], what kind of evidence could you have used to create a reasonable doubt about the eyewitness identification?
>
> A: If we had taken that path, we would have brought out the discrepancies in descriptions, height and weight discrepancies, perhaps clothing discrepancies, perhaps the opportunity of someone to view the perpetrator, the circumstances of the viewing, and also information about the lineups. And if any identification came later on, perhaps we could have argued identification would have become stronger over time. Those are the types of things you would challenge in a case where you're arguing misidentification.

P.C. Hearing Tr. 12/27/11, at 33-34.

Although the testimony of a victim is sufficient to sustain a conviction, the testimony must be credible. *Tucker v. Palmer,* 541 F.3d 652 (6th Cir. 2008). Demonstrating that their descriptions of the perpetrator's clothing and physical traits did not match the clothing that the other state witness, Sharlott Tedder described Mr. Tyler wearing that evening or the physical description of Mr. Tyler that she provided to the police could have led the jury to question all aspects of the prosecution's case, including Ms. Tedder's testimony. Still, despite multiple opportunities to impeach Rashaan Roberson and Denise Washington eyewitness identifications, Mr. Goins failed to do so.

B. Trial Counsel's Failure to Investigate and Present Readily Available Evidence to Impeach Roberson's in Court Identification of Mr. Tyler as Suggestive and Unreliable was Deficient

In post-conviction, trial counsel Goins testified to numerous other aspects of Roberson's identification of Mr. Tyler that could have been attacked:

> Q: Could you have used the information that Roberson initially excluded Tyler as a suspect when he was shown the photographic lineup and said he didn't look anything like that man?

A: Yes.

Q: And you could have used the fact that Mr. - even when he was shown the live lineup, that Mr. Tyler was the only person that was in both, he still couldn't make a positive ID?

A: Yes, you could have used that information.

Q: And you could consider that this was information that was pertinent to the identification of the gunman?

A: It is.

P.C. Hearing Tr. 12/27/11, at 6.

Trial counsel never asked Roberson about what occurred previous to his in-court identification; however, Mr. Goins later admitted that the procedures lent themselves to a defense-friendly argument:

Q: I'm going to ask that there's like six people shown in the photographic lineup and then there was six people shown in the live lineup.

A: Yes.

Q: And the fact that Mr. Tyler is the only one of those six people that is in both, what relevance is that to a reliable identification?

A: Arguably that's suggestive.

Q: Yes. And why would that be suggestive?

A: Because the same person is repeated in two lineups, two separate lineups.

Q: Okay. And what relevance is there that Roberson testified at the suppression hearing that he'd previously seen Mr. Tyler's photograph in both - - in the photographic lineup, the live lineup, in a newspaper article where he's identified as a suspect, and that he'd viewed the live lineup prior to the first time he identified Mr. Tyler in open court for the first time?

A: Well, arguably one could say that identification became stronger over time and ultimately resulted in a positive identification because of multiple viewings.

Q: Right. But prior to the in-court identification, he had never identified Mr. Tyler.

A: Correct.

Q: So what is the relevance that the first time Mr. Roberson identified Mr. Tyler,

he's in court and he's clearly who the police and the DA has targeted as committing the crime?

A: Well, one could argue that the identification is unreliable; it's one that got stronger over time from repeated viewings, as opposed to that's the person that the witness saw at the time of the offense.

Q: Right. Could you argue that the witness recognizes Mr. Tyler from all the previous viewings?

A: Yes.

Q: And you could have made that argument?

A: That argument could be made.

Q: Yeah. And you could have made that argument to the jury?

A: Yes.

P.C Hearing Tr. 12/27/11, at 45-46.

C. Trial Counsel Rendered Ineffective Assistance by Failing to Impeach Sharlott Tedder's Credibility

Defense counsel failed to investigate and to take advantage of a variety of opportunities to impeach the credibility of State's witness, Sharlott Tedder. They failed to ensure that the jurors knew that Ms. Tedder had been a confidential informant for the Shreveport police in the past; that she not been prosecuted for her admitted prostitution and drug dealing activities in exchange for her testimony against James Tyler; and that she was with a possible alternative suspect in the Palomar Motel immediately after the crime. Through these omissions, Petitioner was prejudiced because the jury was deprived of vital information that would have affected their evaluation of Ms. Tedder's credibility.

Despite multiple opportunities to impeach Sharlott Tedder, trial counsel failed to do so, despite understanding the importance of impeachment evidence on a jury's determination of a witness's credibility. See P.C. Hearing Tr. 12/27//11, at 39-40:

Q. Did you do any investigation to determine if there were - Ms. Tedder was paid any money or had any type of benefit in turn for her testimony against Mr. Tyler?

A. Not that I recall.

Q Were you aware that Ms. Tedder testified at the preliminary hearing and Mr. Holland asked her that the charges against her for prostitution and drug dealing, that he would not pursue those charge against her for her testimony?

A. No. I'm only familiar with her trial testimony. And there's some allusion to that in the record, as far as her trial testimony.

Q. Okay. Do you recall her testifying at the trial that she was receiving no benefit for her testimony?

A. Yes.

Q. Do you consider charges not being filed against someone to be a benefit?

A. I would say so.

Q. But you didn't ask Ms. Tedder about that when you cross-examined her?

A. No.

Id. See also at 46-47:

Q. Now, turning to Sharlot Tedder, can you explain the significance of her reliability and her credibility to the case?

A. Well, her credibility is important because she witnesses James' detailed confessions of what he did, what happened, et cetera.

Q. And would it be relevant to her credibility the fact that she was a confidential informant to the police?

A Yes, that could be of relevance. Yes.

Q And how as a defense lawyer – would you explain how that could have been important information for the jury to have known?

A. Well, if you're able to produce it for the jury, it would suggest that this is someone who trades literally their own hide for information the police needs. That's the best and shortest way I can put it.

Q And as far as investigating the case, did you attempt to get Ms. Tedder's criminal files or her confidential informant files to find out if there was any benefits?

A. I'm sure we checked her records. Now, as far as her confidential informant file, that's much easier said than done.

Id at 46-47.

Q. Mr. Goins, could you identify what this document is from the record?

A. It is a letter. It has the District Attorney's Office's letterhead on it dated August 26, 1995.

Q. Can you please read what the letter says?

A. Yes. It says via fax delivery to Dorothy R. of Shreveport City Jail from Hugo Holland, re: Sharlot Tedder, white female. Please be advised that the District Attorney's Office is rejecting all charge against the individual aforementioned. She was arrested last night for unauthorized use of a movable and simple battery. As these charges have been rejected, please consider this your authority to release her.

Q. Were you aware of this?

A. No. It's not familiar.

Id. at 48.

Q. Mr. Goins, were you aware of Sharlot Tedder being paid any money as a result of her setting up the drug buy against Mr. Tyler?

A No, I was not.

Q. If you had that information, would that have been something you could have used to impeach Sharlot Tedder?

A. It would be.

Q. And you did not – did you do any type of investigation to try to determine if Tedder had been paid benefits or compensation or had charges dropped?

A. Not that I'm aware of or recall.

Q. And if you'd had these, how does defense counsel utilize this type of information to attack the credibility and the reliability of a State's witness?

A . Well, that's the point. They are tools to attack a witness' credibility.

Q. Can you explain your understanding of Sharlot Tedder's lifestyle at the time of James' arrest?

A. My understanding was she was a prostitute and James was one of her customers.

Q. And at the time were you aware of these other charges referenced in the letter by Hugo Holland on property crimes?

A. Not those particular ones. Only her priors and what was said at trial that was pending or what was alluded to.

Q. And do you recall during the trial that the trial court asked after Ms. Tedder's testimony that he wanted it clear that there had been no deals made with the State's attorney for her testimony?

A. Yes, I recall that from reading the record.

Q. If you'd had this information and the letter, would you have been able to impeach her testimony on that fact?

A. Yes.

Id. at 51-52

In addition, readily available police reports reveal that at least two possible suspects to the Pizza Hut shooting were around the scene at the time of the crime. Robert Anderson told the police that he was working at the Pizza Hut on the night of the crime and that when he left, only Mr. Efferson, Ms. Washington and Mr. Roberson were at the establishment. He also told police that he was gone for only five to ten minutes on a delivery and when he left, he did not see anyone near the restaurant, either on foot or in a car. When he returned, Ms. Washington's boyfriend told him that there had been a robbery and shooting. Mr. Anderson told police that he then drove to the back of the building and tried to enter, but the door was locked. He then told police about his encounter with a white car at the back of the building:

> Anderson states that he drove to the back and tried to get in but the door was locked from the inside. He states that he then got in his grey station wagon and started driving around the building counter clockwise trying to find an open door, but all of the doors were locked. He states that as he was driving around the building, he saw a white car that looked like a Ford LTD turn onto Esplanade from westbound on Greenwood and stop on Esplanade. He then saw a black male subject get out of that car and leave on foot headed towards the west across Esplanade. He states that as he came around the front of the building to the east side of the building in his car, he then met the white car coming from around the back of the building and headed back to Greenwood Road, where it turned back east on Greenwood and left the scene. He advised that he had given the description of the car and the subjects to a detective at the hospital, but he again described the car and driver to me at my request. He advised that the car was an older looking white car that looked like a Ford LTD. He did not recall any distinguishing features of the car. He advised that the driver was a dark complected black male wearing a white shirt and who

had a low haircut. He could not give any further description.

P.C. Hearing Ex. 1; Post-Conviction Ex. 7, at 17. Moreover, police reports indicate that Mr. Anderson saw the passenger run into the woods:

> At that time Robert states he observed a black male in a blue t-shirt and blue jeans get out of the front passenger seat and run into the woods behind the store.

Post-Conviction Ex. 7, at 49. Detective Foster also noted that this same vehicle was also reportedly seen by Robert Wilcox, the manager of the Palomar Motel. Post-Conviction Ex. 7, at 18.

Ms. Tedder testified at both the Preliminary Examination and at trial that the man who checked into room 51, identified as Howard McCoullough, also engaged her services on the night of the crime. R. 1629, 3600. Moreover, she also testified that Mr. Tyler came to Mr. McCoullough's room:

> Q. When is the next time after you went to room 51 that you saw Tyler over there?
>
> A. I seen him he came down to room 51 and knocked on the door and wanted to know could he come in. And the guy that I was with in there with said, well, no, you know. So, it wasn't long after that that I went on ahead and I came out of the room.
>
> Q. Talking about room 51?
>
> A. Yeah, room 51. . . .

R. 3601.

Defense counsel wholly failed to address this information. The jury did not know about the white car speeding through the Pizza Hut parking lot at the time of the crime; or that a person got out of the passenger seat of the car and ran into the woods; or that the passenger had on dark clothing; or that the passenger, who was later identified as McCoullough, immediately came from the Pizza Hut parking lot and rented a room at the Palomar Motel; or that McCoullough was the person in room 51, who engaged Ms. Tedder's services and wanted drugs and who refused Mr. Tyler entry into the room.

However, trial counsel seemed unaware of this information in police reports that the defense received in discovery. *See* P.C. Hearing Tr. 12/27/11, at 58:

Q. And were you aware that Sharlot Tedder was actually in the hotel room with Howard McCoullough minutes after the shooting and then again after James Tyler allegedly confessed to her?

A. *No.*

Q. Did you do any type of investigation about Howard McCoullough as a possible suspect?

A. *No, not that I recall.*

Id. at 59 (emphasis supplied).

Trial counsel had readily available evidence which they could have discovered had they investigated further to impeach Tedder's credibility, but choose not to use any of this valuable impeachment evidence. Trial counsel instead let Tedder falsely assert to the jury and the trial court that she received no benefits for her testimony.

Nor did counsel explore Tedder's relationship or involvement with McCollough. For effective defense counsel, this would have been fertile ground for impeachment. What are the odds that a car would be seen speeding in a crime scene parking lot and that another witness would see its passenger running into the woods, and who would then take a room in a motel across the street and be visited there by the State's main witness?

D. Conclusion

Counsel's decision to concede guilt without investigating the credibility of any of the State's witnesses was unreasonable. *See Strickland v. Washington*, 466 U.S. 668 (1984) (requiring investigation unless and until counsel determines that further investigation would either be fruitless or harm the client). Simply stated, attorneys have "a duty to make all reasonable efforts to learn what they [can] about the offense." *Rompilla v. Beard,* 545 U.S. 374, 385 (2005).

"In assessing the reasonableness of an attorney's investigation . . . , a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith,* 539 U.S. 510, 527 (2003). The

question is whether the undiscovered evidence, "taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability" and whether "the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached." *Rompilla,* 545 U.S. at 393 (citations, internal quotation marks omitted).

In a capital case where the key evidence against the defendant is identification and the defense lawyer failed to investigate the witness' identifications, failed to interview the witnesses who gave the identifications, failed to question an identification witness about prior failures to identify the defendant, failed to question witnesses about prior lineups and failure to identify the defendant, failed to question the identification witnesses about divergent physical descriptions of the perpetrator, failed to question the identification witnesses about divergent clothing descriptions of the perpetrator, and failed to advise the Court that the physical descriptions did not match Mr. Tyler either at a Motion to Suppress or at trial, these failures constitute deficient performance and undermine confidence in the verdict. Mr. Tyler's conviction should be reversed.

Furthermore, trial counsel failed to ensure that the jurors knew that Ms. Tedder had been a confidential informant for the Shreveport police in the past, that she not been prosecuted for her admitted prostitution and drug dealing activities in exchange for her testimony against James Tyler, and that she was with a possible alternative suspect in the Palomar Motel. Through these omissions, Petitioner was prejudiced because the jury was deprived of important information that would have affected their evaluation of Ms. Tedder's credibility.

Mr. Tyler's wishes to have his guilt contested by impeaching the state's witnesses' identifications was a viable defense that his attorney's failed to investigate and present to the jury and therefore his conviction should be reversed. For the foregoing reasons, the Court should grant Mr. Tyler's application and issue a writ of certiorari to review the decision of the Louisiana Supreme Court.

Respectfully submitted,

Dated: February 4, 2016

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES TYLER, III,

Petitioner,

vs.

DARREL VANNOY, Acting Warden, Louisiana State Penitentiary

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via regular U.S. Mail, on this 4th day of February, 2016 upon Suzanne Williams, Caddo Parish District Attorney's Office, 525 Marshall Street, Shreveport, LA 71101. All persons required to be served have been served.

Respectfully submitted,

Dated: February 4, 2016

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