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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Certiorari to Calhoun County
Court of Common Pleas
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

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Appellate Case No. 2019-000528

DAVID J. BENJAMIN, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

BRIEF OF RESPONDENT

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STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issues of Certiorari

Whether the lower court erred in failing to find that the proper utilization of a lay witness and an expert was absent from trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense.

Respondent's Counterstatement of Issues of Certiorari

The post-conviction relief court correctly found Petitioner failed to establish trial counsel was constitutionally ineffective for failing to effectively utilize lay witness, Antonio Gidron, and expert witness, Kelly Fite, at trial where Petitioner cannot establish he suffered any prejudice and where trial counsel was not deficient in the preparation and presentation of either witness because he made reasonable and adequate efforts to prepare and discuss the case with both witnesses prior to trial and because trial counsel made adequate efforts to utilize both witnesses' testimony at trial.

a. Trial counsel properly prepared and utilized Kelly Fite as an expert witness at trial.

b. Trial counsel properly prepared and utilized witness Antonio Gidron at trial.

STATEMENT OF THE CASE

Petitioner David Jamar Benjamin is confined in the South Carolina Department of Corrections. During its February 2013 term, the Calhoun County Grand Jury indicted Petitioner for murder (2013-GS-09-00051) and two counts of attempted murder (2013-GS-09-00052 & 2013-GS-09-00053). Petitioner was represented by Nicholas Gray Thomas (Counsel). Donald N. Sorenson and Theodore N. Lupton of the First Circuit Solicitor's Office prosecuted the case. On March 4-7, 2013, Petitioner proceeded to a jury trial before the Honorable Diane Schafer Goodstein. At the conclusion of trial, the jury found Petitioner guilty as indicted. Judge Goodstein sentenced Petitioner to concurrent sentences of forty years for murder and thirty years for each of the attempted murder convictions. On March 15, 2013, Petitioner filed a motion for a new trial and a motion to reconsider the sentence. By separate Orders, both filed July 9, 2013, Judge Goodstein denied Petitioner's motion for a new trial and motion to reconsider the sentence.

Petitioner filed a notice of appeal and was represented by Wendy Keefer (Appellate Counsel). During the appeal process, Petitioner was also represented by James Lee Goldsmith, Jr., Esquire, and Robert L. Sirianni, Jr., Esquire. Applicant perfected his appeal alleging:

1) The trial court erred in not granting defendant's motion for directed verdict where the state failed to produce any direct or substantial circumstantial evidence reasonably tending to prove defendant Benjamin's guilt and
2) The trial court abused its discretion in denying defendant's motion for new trial where there was insufficient evidence to support the jury's finding and where, as a matter of law, the state failed to produce substantial circumstantial evidence to support its accomplice liability theory to convict defendant.

On December 16, 2015, the South Carolina Court of Appeals affirmed Petitioner's convictions, finding the court properly submitted the case to the jury because the State met its burden of producing any direct or substantial circumstantial evidence that reasonably tended to prove Benjamin was guilty of the murder and attempted murder charges and that the court did not

abuse its discretion in denying Benjamin's motion for a new trial because competent evidence supported the jury's verdict on the murder and attempted murder charges. State v. Benjamin, 2015-UP-554 (S.C. Ct. App. Filed December 16, 2015). Petitioner filed a petition for rehearing on December 21, 2015. On January 20, 2016, the Court denied the petition. The remittitur was issued on May 27, 2016.

On April 20, 2016, Petitioner filed an application for post-conviction relief (PCR). Respondent made its return on January 18, 2017. On July 12, 2018, the PCR court convened an evidentiary hearing at the Dorchester County Courthouse before the Honorable Robin B. Stilwell. Assistant Attorney General Christian Saville appeared on behalf of the State. Tricia A. Blanchette, Esquire, represented Petitioner. By order dated February 1, 2019, Judge Stilwell denied Petitioner relief and dismissed the PCR application with prejudice. Petitioner filed a motion pursuant to Rule 59, SCRCP, on April 14, 2019. On February 26, 2019, Judge Stilwell issued an order denying Petitioner's motion.

Petitioner filed a notice of appeal from the PCR court's dismissal on April 1, 2019. On June 29, 2019, Petitioner filed a petition for writ of certiorari requesting review of two issues including the issue addressed in this Brief:

1) The lower court erred in failing to find that the proper utilization of a lay witness and an expert was absent from trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense; and
2) The lower court erred in failing to find ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction.

On December 3, 2019, Respondent filed the Return to Petition for Writ of Certiorari. On January 5, 2022, this Court issued an Order denying certiorari on the second issue above and granted review of the first issue, addressed within. Petitioner filed his Brief of Petitioner on March 8, 2022. This Brief follows.

STATEMENT OF FACTS

Summary of Evidence Presented at Trial

In the early morning of September 18, 2011, Petitioner and co-defendants Joshua Haggood and Kevin Frazier were involved in an exchange of gunfire with the murder victim, Dominique Lawton, at a Calhoun County nightclub. The men were mutual combatants and the shooting stemmed from Dominique bumping into Petitioner on the dance floor earlier that morning. Dominique was killed by a gunshot wound to the head and two innocent bystanders, James Hampton and Shawn DeFreitas, were shot in the elbow and in the leg, respectively.

Calhoun County Sheriff's Deputy Terry Snead testified that he received a dispatch regarding a shooting shortly before 4:00 a.m. on September 18, 2011. He then responded to an Elloree, South Carolina, nightclub known as the Pine Terrace Club or Piggy Park. Sgts. Phil Rice and Earl Kinley also responded, but Sgt. Rice was delayed in going to the scene because he responded to a tip that one of the shooting victims had unsuccessfully tried to drive to the hospital and was at a convenience store in Cameron, South Carolina. (App'x pp. 108-12; 123).

When Deputy Snead arrived at Piggy Park roughly thirty minutes later, the scene was "kind of chaotic," and some people were leaving as he arrived. Deputy Snead saw one person, Dominique Lawton, lying on the ground between some trees and a parked Cadillac, with a group of people huddled around him. Another wounded person was seated in a small gray car. This person had an arm or shoulder wound. EMS was already on standby and was called in for the victims. (App'x pp 112-21; 123; 125; State's Exhibit 3).

Twenty-five year old Andrew Haynes, who goes by the nickname "Bubba," testified that he is a DJ working under the name "DJ Stroke." He had previously worked at the Piggy Park approximately thirty times without a homicide, and he was working there on September 17-18,

2011. Mr. Haynes arrived between 11:00 and 1:30 p.m. Mike Bullock, "DJ Mike," also worked Piggy Park that night and was there before Mr. Haynes. Bullock had backed his van up to a door on the right-hand side of the nightclub, when viewed from the road (State's Exhibits 4-5), and it remained there the entire night. (App'x pp. 126-29; 148-49).

Dominique and Petitioner, as well as Petitioner's co-defendants, were on the dance floor. "[A]bout thirty minutes" after Mr. Haynes arrived, he witnessed an altercation between Petitioner when the victim bumped into Petitioner on the dance floor. There were "some words and a little shoving" but no punches were thrown. As soon as that occurred, Mr. Haynes stepped in between them and stopped it. The club was serving free liquor, everyone appeared to be drinking and the victim was intoxicated before this incident occurred. (App'x pp. 129-33).

After Mr. Haynes talked to the men, they both seemed to calm down. However, Petitioner, Haggood and Frazier went outside sometime later.[1] Because Mr. Haynes is respected at the club, he followed them outside shortly afterwards, in an effort to further calm them down. By the time he got outside, it looked like the three men were returning to the club from their car. Mr. Haynes spoke with Petitioner. "Well, Dominique's nickname is Killa, so [I told him] 'don't follow around with Killa because he's young, drunk, you know how they get.'"[2] Petitioner's response was, "'I'm a killer,' and then they walked in and that was all." (App'x pp. 133-35; 149; 151-52).

Because Mr. Haynes knew Dominique and because violence is bad for a DJ's business, he also spoke with Dominique and told him "go ahead and calm down because it's not called for." (He explained that Dominique was given the nickname of Killa in childhood). Mr. Haynes did not notice any other altercations inside the club that morning, but the decision was made to close the

[1] Mr. Haynes knew Frazier because they played basketball against each other in high school.
[2] By this he meant that where there is a crowd of people who are drinking and they bump into one another, shoving can occur. (App'x p. 149).

club, since the crowd was "iffy." After the crowd had started leaving, someone ran back inside and told Mr. Haynes there was another confrontation outside of the club. By the time he got outside, he did not see the murder victim, and he thought that Dominique and Dominique's friends had walked towards the road. However, he saw Kevin Frazier holding a silver revolver and aiming it in the air. (App'x pp. 135-38; 140; 152; 155).

Mr. Haynes knew Frazier. So, in another effort to avoid trouble, he went up to Frazier and talked to Frazier. Frazier said, "'I just want to get out the country. I want to get home.'" Haynes told Frazier that he was respected and he promised to escort him to the car. He also got between the two sides. However, both parties continued their "chatter" and Frazier continued to hold his gun in the air. (App'x pp. 138-41).

According to Mr. Haynes, the black car that the defendants had arrived in was parked on the side of the building and backed in, one car away from the white van. A car owned by Shawn DeFreitas was parked in front of and facing it. By the time that Mr. Haynes and Frazier reached the trunk of the defendants' car, Frazier began firing his revolver into the air. At this point, Petitioner was by the driver's door, Haggood was standing on the passenger side of the car, and roughly twenty-five or thirty men and women were in the area. Mr. Haynes ran back into the club and heard a lot of gunshots. (App'x pp. 138-45; 153).

After the shooting ended, Mr. Haynes went back out and saw that his friend, James "Pee Wee" Hampton, had been shot. Mr. Haynes started to drive Hampton to the hospital but the deputies arrived and would not let him leave because his car was part of the crime scene. (App'x pp. 145-46). Mr. Haynes had not seen anyone with a gun when Frazier fired the shots into the air and he did not see Petitioner with a gun. (App'x p. 147; 153).

Natasha "Tasha" Sumpter testified that she is twenty-four years old. She and her friend, Tanesha, were at Nevadria "Momma" Miller's birthday party at Piggy Park, on September 17-18, 2011. She had witnessed a "little small argument inside the club." When she and her friend were leaving "there was a lot of argument and then I saw one of the guys with the gun." This man was in front of the women. The description that she gave was of a brown-skinned man, who was slightly taller than her and had a "little haircut." She is 5'4" tall and, as will soon be clear, this description was consistent with Haggood. (App'x p. 226-31).

Dominique Lawton was one of the people arguing and the argument was close to the club's front door. Natasha immediately grabbed Tanesha and tried to convince her friend to leave, but Tanesha wanted to talk. Tanesha had parked next to a ditch that ran alongside the roadway with the passenger side away from the road. The shooting began by the time they reached their vehicle. Natasha did not see the shooting, and their vehicle did not get hit by gunfire. (App'x pp. 230-34).

After the shooting stopped, Natasha got out of the car and heard a girl screaming that "'they shot him. They killed him.'" She subsequently saw Dominique lying on the ground close to the road and called his sister. Other than the man whom she described, she had not seen anyone else with a gun. (App'x pp. 234-37).

James "Pee Wee" Hampton testified that he is from Elloree, South Carolina. He and Dominique Lawton were good friends. Mr. Hampton did not know either Petitioner or Haggood, prior to the night of the shooting, but he played basketball against Frazier in high school. [3] Mr. Hampton and his friend, Charles Goodwin, arrived at Piggy Park between 12:30 and 1:00 on September 18th. They parked along the side of the road. (App'x pp. 202-05; 221).

[3] Frazier went to Calhoun County High School. (App'x p. 204).

At some point while Mr. Hampton was in the club, he became aware that Dominique Lawton had been involved in an altercation in the club and the other person involved in the incident was pointed out to him. He then spoke to the victim, telling Dominique "to chill out and calm down." Dominique was calm after this conversation. However, "[a]bout an hour or two" later, there was a commotion outside the club and Mr. Hampton went outside and "tried to keep it calm." (App'x pp. 205-06).

As soon as Mr. Hampton got outside, he saw Frazier standing on his right. Frazier had a revolver in his hand and was waiving it in the air. Frazier said "[A]ll we want to do is go home." Petitioner and Haggood[4] had guns as well and were also standing by the door. Dominique and some of his friends were in this same area and "[t]here was a lot of chatter." Hampton walked over to where the defendants were parked, backed in at the corner of the building and next to the DJ's van. (App'x pp. 206-11; State's Exhibit 3).

Shawn Cooper's vehicle was parked in front of the defendants' car. Although Dominique was walking to his car, he and his friends were still exchanging words with Petitioner and his co-defendants. Petitioner, Haggood, and Frazier all had their guns out, and by the time that Mr. Hampton reached their vehicle, Frazier fired one or two shots into the air. As Hampton started to walk away from their vehicle and toward the road, several more shots were fired from behind him and in the area of the defendants' vehicle. When Hampton felt a bullet go past his head, he immediately ducked behind the van. Hampton later told police that he saw Haggood shooting but he did not see Petitioner shooting and, at trial, he testified that he had inferred that Haggood was shooting. (App'x pp. 211-14; 223-24).

[4] Mr. Hampton described Haggood as being of "[a]bout medium height." (App'x p. 208).

After these shots, he heard someone say, "'Killa, get up.'"[5] Hampton ran over to where his friend was lying on the ground, by a tree, with a gunshot wound to the head. (State's Exhibit 2). In a reaction to seeing his friend in this condition, Mr. Hampton ran up toward the club, pulled a green pole "out of the ground and threw it at the [defendants'] car." Mr. Hampton also saw Shawn Cooper on the ground behind his car, which was still facing the defendants' car. (App'x pp. 214-17).[6]

Next, Mr. Hampton walked started to walk back up behind the DJ's van, on the far side of the defendants' vehicle. However, several more shots were fired and a bullet struck him in the left elbow. He alerted others present that he had been hit and he was placed in Mr. Haynes' car. (State's Exhibit 3). Eventually, an ambulance transported him to the hospital. (App'x pp. 218-20).

Dr. Jerrold Buckaloo, an orthopedic at Orangeburg Regional Medical Center, and personnel at that hospital treated Hampton's gunshot wound to his left elbow, on the morning of September 18th. However, the bullet (State's Exhibit 33) was not removed until a later surgery on February 8, 2012. The bullet was turned over to the Calhoun County Sheriff's Office. (App'x pp. 220-21; 238-43; 245-49; 430). Dr. Buckaloo testified that a gunshot wound, generally, is the type of injury that would be likely to cause a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment in the function of a bodily part or organ. (App'x p. 249).

Capt. Kirk Corley, of the Calhoun County Sheriff's Office, went to Fayetteville, North Carolina to interview Joshua Haggood sometime after the murder. On a second trip to Fayetteville, he picked up a Springfield .40 caliber handgun (State's Exhibit 34) that had been loaned to Joshua Haggood on the night of the shooting by a Mr. McGarrah and which the Fayetteville authorities

[5] He corroborated that "Killa" was a nickname that Dominique had since childhood.
[6] The pole was introduced as State's Exhibit 32.

had collected. Haggood had apparently returned the weapon to McGarrah and McGarrah had pawned it. Capt. Corley also interviewed McGarrah, who provided him with the rest of the ammunition that was in the weapon when it was returned by Haggood (State's Exhibit 35). (App'x pp. 252-57).

Joshua Haggood testified that he was twenty-six years old. At the time of the murder, he was a Sergeant in the United States Army and was stationed at Fort Bragg, in Fayetteville. After his return from deployment to Afghanistan in December 2010, he would come to Orangeburg and visit once or twice a month. He had known Benjamin, a/k/a "Killa Season,"[7] and Frazier for a long time and they were two of his closest friends. He was testifying as the result of a plea bargain.[8] (App'x pp. 259-64; 308-09).

At some point, he began bringing a .40 caliber semi-automatic pistol with him that he borrowed from fellow soldier Georgio McGarrah. (State's Exhibit 34). On Friday, September 16, 2011, he came to Orangeburg with the .40 caliber pistol "to visit." On Saturday night, the 17th, Haggood went and picked up Petitioner at his Orangeburg County residence. Petitioner placed his silver, .45 caliber semi-automatic pistol in the trunk of the car.[9] They picked up Frazier at a trailer in Calhoun County and then went to the Piggy Park, for Nevadria Miller's birthday party. Petitioner drove Haggood's 2009, black, Toyota Camry to Piggy Park because he knew how to get there. (App'x pp. 264-70).

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[7] Petitioner got this nickname because he did not lose fights in high school and finished a victor when confronted. (App'x pp. 309-09; 314).

[8] Originally, he was indicted on the same charges as Petitioner for his role in the shootings, but he was allowed to plead guilty to one count of assault and battery of a high and aggravated nature for shooting Hampton and the State recommended a ten-year cap on that sentence, whereas he could have received twenty years. Also, this sentence was concurrent to an unrelated Lexington County sentence for aggravated assault. (App'x pp. 262-63). He later received a seven-year sentence on the Calhoun County conviction. *See* http://public.doc.state.sc.us/scdc-public/.

[9] Haggood had previously seen Petitioner with the .45 "a few times. (App'x p. 267).

Haggood's brother, William Pinckney, followed them to Piggy Park in a tan car. (State's Exhibit 12). When they arrived at Piggy Park, Petitioner backed the car up "to the edge of the club." Pinckney likewise backed in and he parked his tan car between them and the van. When they initially entered the club, Haggood's pistol was in the console of his car and both Petitioner's and Frazier's silver, .32 caliber revolver were in the trunk. (App'x pp. 270-72; 301-02; 390).

Inside the club, "plenty of people were dancing." Haggood only drank beer[10] while in the club, but both Petitioner and Frazier drank beer and free liquor. The entire time Haggood was at the club, he only drank four or five beers. Sometime later, Petitioner told Haggood that there had been an incident and he pointed out two individuals that he thought Haggood needed to look out for because one person had a book bag and the other one was reaching inside the bag. Petitioner thought that one of these men had a gun. (App'x pp. 273-75; 278).

Petitioner "was kind of agitated," and Haggood asked him what he wanted to do. Petitioner said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun. So, the three defendants went to the car and each man armed himself. Petitioner and Haggood stuck their weapons in their waistbands, but Frazier put his .32 in his pocket. This was an hour and a half to two hours after they first got to the club, and they went back inside after they had armed themselves. (App'x pp. 275-78).

There was "a normal club environment" when they re-entered the club and they continued to drink. Eventually, the music stopped and the lights came on, signaling that the club was closing. Haggood went outside and talked to a woman while waiting on his friends. As soon as Petitioner and Frazier came outside, Dominique "charged" his weapon, or pulled the slide back, and the gun

[10] The liquor was free, but patrons had to pay for beer. (App'x p. 273).

ejected a live bullet. This happened near the front door." [E]verything became chaotic" after that occurred.[11] (App'x pp. 278-82; 304-05).

Frazier pulled out his gun and waived it in the air, saying, "I'm just trying to get home. I don't want any trouble." As Haggood and Petitioner headed for the car, he also reached for his gun. However, Petitioner pressed his shoulder, as if to tell him to "fall back. Chill out." A lot of people attempted to intervene and Frazer was ushered to the car. Dominique and his crowd went towards the road. (App'x pp. 282-83).

"By the time I got in front of my brother's William's car, … the first shots came out. They started shooting. And then it was like everybody was scattering." Haggood did not know who fired these shots but testified that they came from "towards the road." He did not hear these shots hit anything; neither he nor his friends were shot; and his car, his brother's car, and the are of the club near him were not hit. However, Petitioner pulled out his .45, "outstretched [his] arm like downward … from the waist" and began shooting in the direction of the car in front of Haggood's car (which was Shawn DeFreitas' car). Petitioner was at the passenger side corner when he began but continued moving as he shot. (App'x pp. 284-86; 303; 310-12).[12]

Someone then threw a post, which hit the passenger side mirror of Haggood's car and knocked out the mirror, itself. Haggood heard shots coming from "behind the van." So, he moved to the back of his car and he fired "three or four" shots from his .40 caliber pistol in that direction. Then, Petitioner got behind the wheel and Haggood got into the front passenger seat. Frazier fired "two or three" shots in the air before getting into the back seat. (App'x pp. 286-88; 312).

[11] Dominique seemed to be the aggressor and Haggood said that this was like an "ambush." (App'x p. 304).
[12] Frazier was near the rear driver's side.

Initially, Shawn DeFreitas' car was blocking them in, but that car backed up and they left the parking lot. As Petitioner was driving them away, Frazier said that he had fired in the air and he asked his friends if either of them had to shoot. Haggood was on his cell phone with his brother and did not respond. However, Petitioner's response was to the effect that he had not shot into the air because he was not going to waste bullets. Also, Frazier rolled down his window as they rode. Haggood later learned that he had thrown out shell casings from his .32. (App'x pp. 289-92).

Petitioner drove Frazier to another club and Haggood dropped off Benjamin at his residence. Haggood was thereafter told that DeFreitas and two other people had been shot, and he told Petitioner the news. Yet, Haggood drove back to Fayetteville, leaving around 6:00 a.m. He returned the .40 caliber pistol to McGarrah and was subsequently informed that McGarrah had pawned it. Haggood confirmed that there was no damage to his car (State's Exhibits 6-10) from the shooting, and that the only damage was caused by the pole hitting the mirror of his car. (App'x pp. 292-97).

Haggood was contacted by the Calhoun County Sheriff's office that day, but he lied to them about what had occurred at Piggy Park. He also gave a number of statements before and after his arrest in this case but continued to lie about his involvement, as well as that of Petitioner and Frazier, until he gave his fourth statement. He only gave that statement because, based upon what he heard from others, "I wasn't under the impression that I shot anybody." He later discovered that he had shot someone. (App'x pp. 297-301).

At thirty-one, Shawn DeFreitas is a little older than many of the other witnesses. He had attended both Calhoun County and Elloree High Schools. He has a younger sister named Latisha Cooper and he is sometimes called Shawn Cooper. He arrived at Piggy Park, alone, around 3:00

a.m. on September 18th and he parked his Chevy Impala facing two vehicles, with another car on his side. (App'x pp. 315-17).

Mr. DeFreitas went into the club and talked to people. He did not witness any trouble while there. When he left an hour or so later, he saw "an altercation" between Dominique and Frazier in front of the door to the club. Because Mr. DeFreitas knew both of them, he "went to go break it up." (*sic*). Eleven or twelve other people were also standing around in the area.[13] (App'x pp. 318-19; 330).

> Well, I got in the middle of both sides, kind of, and I was telling Dominique, you know, just leave it alone.
>
> And … I turned to Kevin and told Kevin … to go to his car.
>
> The altercation was still going. They were yelling at each other and then Kevin pulled out a gun. When he pulled out the gun, that's when I grabbed him and I walked him over to the car.

(App'x p. 319, lines 13-20). Mr. DeFreitas did not see anyone else with a gun at that time. (App'x pp. 319-20).

Although DeFreitas's car was parked in front of Haggood's car, there was almost a car length between the two cars. Even after Mr. DeFreitas and Frazier reached the driver's side of Haggood's car, Frazier and Dominique were "still going at it. And basically, Dominique was heated because Kevin pulled out the gun." DeFreitas told Dominique to "'just leave it alone'" and "'y'all, just go to your car.'" (App'x pp. 320-21).

Someone came up and pulled Dominique away. Frazier was screaming that he wanted to go home, and Mr. DeFreitas told him that he was going to get home. "'Just get in the car.'"

[13] He had seen Petitioner "a couple of times, but I didn't know him personally." He also did not know Haggood. (App'x pp. 318-19).

Benjamin then walks up and to the passenger side of the car and someone told DeFreitas to move his car because it was blocking in Haggood's car. As he turned to go move his car, there were several gunshots and he was struck by one. The bullet entered his right side and exited his inner leg. He immediately dropped to the ground and crawled behind his car. (App'x pp. 321-24).

Mr. DeFreitas did not see who shot him. When looked up again, he saw Frazier shooting into the air[14] and "Benjamin shooting towards the opposite side of the club." Mr. DeFreitas told another man who had also ducked behind his car that he had been hit, and someone else screamed, "'Dominique hit.'" Shawn looked over and saw Dominique lying on the ground. (App'x pp. 324-25; 331-33). Although most people had been ducking, screaming and running when the shooting began, Petitioner, Haggood and Frazier did not do any of those things. (App'x p. 334).

Mr. DeFreitas gave the keys to his car to a woman who was present, and she tried to drive him to the hospital. However, the car had a blowout along the way, and the woman flagged down a passing officer. Later an ambulance took him to the hospital where his gunshot wound was treated. His vehicle had not been shot at Piggy Park. (App'x pp. 325-29).

Danny Saxon testified that he was thirty-four years old. He had known Dominique Lawton for roughly fifteen years. He also knew Petitioner from school but he did not know Haggood or Frazier. (App'x pp. 339-40). Mr. Saxon and a friend, Sammy Brigman, arrived at Piggy Park around 3:15 a.m., on the morning of September 18, 2011. They were in Mr. Saxon's Cadillac Seville and Brigman was driving. They "pulled in in the driveway on the far side of the club," and they parked between ten and fifteen feet off of the side of the road. Brigman headed for the club as soon as they arrived, but Saxon stayed at the car. (App'x pp. 340-43).

[14] Frazier may have been shooting in the air before then, but that was the first time that Shawn saw him shoot. Also, Shawn did not know who initially shot. (App'x p. 333).

Mr. Saxon did not know what happened before he got out of his car because he had the music on, but he saw people "running around" outside of the club. Dominique walked around the front of the Cadillac and to the passenger side. Dominique "was obviously agitated," and Mr. Saxon told him to "calm down" or "take it easy." Dominique did not have anything in his hands. **(**App'x pp. 343-44).

Mr. Saxon then heard gunshots and took cover behind his car. Before he ducked, he saw a tall man, whom he did not recognize, shooting into the air. By the time Mr. Saxon turned back around, he saw Dominique lying on the ground, on the rear passenger side of the Cadillac. Dominique had a wound to the head. He was. Once the shooting stopped, Mr. Saxon immediately found one of Dominique's cousins and told her what had occurred. When police arrived, Saxon was asked to move his up a short distance and he moved it about a car length, to the position that it is marked on the crime scene diagram. (App'x pp. 344-47; State's Exhibit 1). Later, an officer from the Calhoun County Sheriff's Office photographed a bullet hole in his car that had not been there before the shooting. Neither Mr. Saxon nor law enforcement found that bullet in his vehicle. (App'x p. 348-45; State's Exhibit 27).

Michael Bullock testified that he was working as a DJ at Piggy Park on September 17-18, 2011. He arrived around 9:00 p.m. He knows Benjamin, Frazier, and Haggood from school, and he met Dominique after he began DJ'ing at Piggy Park. (App'x pp. 352-54).[15]

For the most part, Haggood, Benjamin, and Frazier hung out together while at the club. When asked whether he became aware of an altercation inside the club while he was there, Mr. Bullock testified, "A little. They had bumped into each other in the club and Dominique kept watching him the whole time in the club." As a result, Mr. Bullock had DJ Stroke (Andrew Haynes)

[15] He knows Petitioner "a lot better than [he] knew Mr. Lawton." (App'x p. 363, ll. 1-3).

go talk to Dominique. Despite this intervention by Mr. Haynes, Petitioner and Dominique "were just looking back and forth at each other" for the rest of the evening. (App'x pp. 354-55; 361-62).

Mr. Bullock went outside to unlock his van (State's Exhibit 5) after Piggy Park closed. All of the people who had been in club were outside and "[i]t was just a big commotion outside. … I turned around to go back in, [and] all I heard was Kevin Frazier said all he wanted to do was go home." Frazier and his friends were standing near their car, which was to the left – or driver's side – of Mr. Bullock's van. Bullock did not see anyone with a weapon. (App'x pp. 355-58).

Mr. Bullock went back into the club to unplug his equipment and soon heard a lot of gunshots. Haynes ran back in the club as soon as the shooting started. After the shooting stopped, Mr. Bullock went out to load his equipment in his van but law enforcement would not let him leave. He did not notice any damage to the van, until a deputy alerted him to the presence of three "bullet holes through the window of the van in the back side" and corresponding holes on the other side. The bullet holes are depicted in State's Exhibits 17-21, and they were not present before the shooting on September 18th. (App'x pp. 358-61).

Delvin Lawton testified that he is Dominique Lawton's older brother. He was not at Piggy Park on September 17-18, 2011. However, Jacob "Boomer" Warren brought him a .380 caliber pistol that had belonged to Dominique on the day after the shooting. Warren told Delvin that he had found it on the ground where Dominique had fallen. Delvin then turned over the .380 (State's Exhibit 36) to law enforcement. (App'x pp. 364-66).[16]

Det. Matthew Trentham collected gunshot residue kits from the surviving victims, James Hampton and Shawn DeFreitas (State's Exhibits 63-64) at the hospital before 7:00 a.m. on September 18th. Based upon information provided by eyewitnesses whom Det. Trentham

[16] Delvin had seen his brother with a gun before. (App'x p. 367).

interviewed at the hospital, Petitioner, Haggood and Frazier were developed as possible suspects. (App'x pp. 427-30).

Lt. Henry Dukes, Jr., is employed by the Calhoun County Sheriff's Office as the lieutenant over the investigation division. (App'x p. 369). When he arrived at Piggy Park on the morning of September 18th, he was informed that there were three gunshot victims. By that time, the scene was secure; the victims had been transported to the hospital by EMS; and other officers were taking statements from witnesses. One of Lt. Dukes' responsibilities that morning was to process the crime scene. (App'x p. 370).

Lt. Dukes found a live round or bullet (State's Exhibit 40) close to the front door of the club.[17] In the area behind the van, he found a spent shell casing (State's Exhibit 41).[18] In the grass and gravel on the corner area of the club, which is on the right side as one faces the club, Lt. Dukes found five .45 caliber shell casings (State's Exhibits 42-46) and three .40 caliber shell casings (State's Exhibits 47-49). All of those casings were found in the same general area. (App'x pp. 371-76).

Dominique's body was found where there is blood stain on the ground near a large oak tree shown in State's Exhibit 2. Lt. Dukes found five 9 mm. shell casings (State's Exhibits 51-55), scattered in the grass, roughly fifteen feet behind where Dominique's body was located. (App'x pp. 376-78; 409-10). He found State's Exhibit 32, the green wooden post that Mr. Hampton threw at Haggood's car, in front of the club. (App'x pp. 378-79).

He also photographed the damage to Mr. Bullock's van, which consisted of three bullet holes that entered on the driver's side of the van, which was the side closest to where Haggood

[17] This area was depicted in State's Exhibit 4.
[18] A marker depicted in State's Exhibit 17 designates the location of this casing, as well.

had parked (State's Exhibits 17-20),[19] and three corresponding holes on the opposite side of the van. (State's Exhibits 22-24). He managed to retrieve the projectile (State's Exhibit 50) from one of the shots that did not go all the way through the van. (App'x pp. 379-83). He then examined the building to see if he could find areas that appeared to have been struck by bullets. He did not see any defects on the right front of the building or behind the building in the area where Haggood and Haggood's brother were parked. (App'x p. 383).

On the left side of the front of the building, however, he located and photographed (State's Exhibits 25-26) an area where a bullet had chipped a piece of concrete off of the building, and the concrete was on the ground. Although he saw a similar defect a short distance away from this that also may have been caused by a bullet, it did not have a piece of concrete on the ground near it and he was unable to determine whether a bullet had cased that damage. Lt. Dukes did not finish processing the scene until after daylight. (App'x pp. 384-86).

Kevin Frazier's name had been mentioned in the original 911 call. So, Lt. Dukes went to the residence of Frazier's mother in an effort to locate him. Lt. Dukes thereafter spoke to Frazier, who made arrangements to come speak with Lt. Dukes. Frazier did not show when promised and did not arrive until the afternoon of the 18th, and he was then arrested. A gunshot residue kit was performed at that time as well. **(**App'x pp. 386-89).

Initially, Frazier denied firing or having the gun with him at the Piggy Park, but he changed his story the following day and admitted he did have a gun. Lt. Dukes got the consent of Frazier and Frazier's girlfriend to search their residence and he recovered a .32 caliber revolver (State's

[19] One went through the glass on the rear side of the van. The second is into the metal on the rear side and the third bullet hole is closer to the taillight.

Exhibit 37) that had been hidden in a couch, as the result of the search executed on September 19th. It had two spent cartridge casings (State's Exhibits 38-39) in it. (App'x pp. 396-99).

Lt. Dukes testified that Benjamin and Haggood were also developed as possible suspects and he contacted Haggood in North Carolina on the 18th. Based on that conversation, he was able to locate the vehicle belonging to Haggood's brother, William Pinckney. When Lt. Dukes examined that car (State's Exhibits 12-14), he discovered that there was a bullet hole in the "right back by the tail light." When the tail light was disassembled, he found and seized the bullet (State's Exhibit 56). (App'x pp. 389-92).

Lt. Dukes likewise examined Mr. Saxon's Cadillac (State's Exhibits 27-30) and saw where a projectile had entered the door of the car and struck the door post, without penetrating the door post. Because Lt. Dukes did not find any bullet, he came to the conclusion that the bullet may have ended up between the door and the post. (State's Exhibits 29-30). If this was correct, it could have simply fallen to the ground when the door was opened. In light of this and information that Mr. Saxon's car had been moved, Lt. Dukes went back to the crime scene several days later and looked for more evidence in the area near where the victim had fallen. This time, he used a metal detector. (App'x pp. 392-95; 416; 420).

This decision proved beneficial because he found three bullets (State's Exhibits 57-59) approximately 7' - 8,' or roughly a car length, in front of where the victim had been.[20] (App'x pp. 395-96). After Dominque died on September 19th, Lt. Dukes went to the hospital and obtained a gunshot residue kit of his hands. (App'x pp. 399-400). Also, Petitioner turned himself in on the 19th and all three defendants were charged. (App'x pp. 400-01; 409).

[20] Again, the victim was found lying over to the right as one faces the club and near a large oak tree depicted in State's Exhibit 2. (App'x p. 395). Also, Mr. Saxon moved his car forward roughly a car length at the request of law enforcement. (App'x pp. 346-47).

On September 2nd, Lt. Dukes and Lt. Corley went to Fort Bragg and interviewed Haggood. Although he was still lying about his involvement in the shootings, the officers were able to photograph his car. (State's Exhibits 7-10). The only damage present was that the reflective portion of the passenger side side-view mirror was broken (see State's Exhibit 9), and there was some green paint on the mirror. This paint mark was consistent with the green post recovered at the crime scene. (App'x pp. 401-03).

Lt. Dukes also performed gunshot residue testing (State's Exhibit 60) on the car. He swabbed interior areas around the windows on the driver's door; the driver's side rear door; the passenger's door; and the passenger's side rear door. (App'x pp. 403-05). Benjamin's residence was searched several days later but officers were unable to locate his .45 caliber pistol or any other gun. Officers have likewise not been able to locate a 9 mm. consistent with the shell casings that were recovered near the victim's body at the crime scene and they have been unable to identify who fired this weapon. (App'x pp. 405-06; 410-11; 414; 419-22; 431-33).

Agent John Roberts was employed in SLED's trace evidence department until 2012 and analyzed the gunshot residue kits that were submitted in this case. Agent Roberts explained that the palms and the back of the hand of both hands are tested for the presence of the three metals present in gunshot primer: lead, barium and antimony. These three metals must be "in quantities that we associate with firing a gun, handling a gun, or being near a gun when it goes off," since those are the three main ways that people get gunshot residue on their hands. (App'x pp. 448-52).

"Gunshot residue is fairly easy to remove off your hands." Any number of activities will remove it, and within six hours a living person's body will absorb enough of the metals "to a point that we can't find it in quantities that we associate with firearm." So, no analysis is performed on tests administered over six hours after the alleged discharge of the weapon. However, the body of

a deceased individual does not absorb the metals and testing may be performed even if the sample was taken beyond the six-hour window. Further, clothing is often tested for gunshot residue. (App'x pp. 453-55).

Agent Roberts tested several of the samples received in this case. The samples taken from Shawn Defreitas and James Hampton (State's Exhibits 63 and 64, respectively) were negative for gunshot residue.[21] (App'x pp. 455-57). Agent Roberts did not perform any analysis of the kits taken from Frazier or Nayrone Shivers[22] because the samples were taken outside of the six-hour time frame. (App'x pp. 457-58). Agent Roberts opined that the kit taken from victim came back negative. However, he would not have run the test if he had known that the victim had been on life support for hours after the shooting and that the kit was not collected until after the victim's death on the 19th, since all of the markers had dissipated. (App'x pp. 458-60).

The next kit that Agent Roberts tested was the one performed on Haggood's vehicle. He testified that "[v]ehicles work a lot like clothing. If a gun is fired in the vehicle, or near the vehicle, sometimes you can take samples and you can find gunshot residue kit on those samples from that vehicle." (App'x pp. 460-61). Agent Roberts opined that his testing of the sample from the front driver's side of the car showed the presence of metals that were "associated with or consistent with gunshot residue."[23] (App'x pp. 461-64).

Of the remaining particle lifts, the only one that was positive "was the driver's side back. And on that particle lift I did find a round gunshot residue particle, the particle that's unique to gunshot residue and doesn't come from anywhere else. And I found a non-round particle that has

[21] Both samples were taken roughly four hours after the shooting. (App'x p. 456-57).
[22] He did find gunshot residue on a black shirt belonging to Shivers. (App'x p. 465-66).
[23] Agent Roberts explained that he found a round lead particle on this lift and that "[r]ound lead particles are associated with gunshot residue. There [are] a couple other places that they come from, but not very many. They are not unique, but they are close." (App'x pp. 463-64).

lead, barium and antimony." Based upon these findings, Agent Roberts opined that "a gun fired near" the front and back of the driver's side of the car. He further opined that the shooter was located between six and ten feet from the tested areas, and that either the doors were open or the windows were down at the time. (App'x pp. 464-68).

SLED Agent James Green is an expert firearms examiner, who examined a number of items that were submitted in this case. (App'x pp. 474-76; 478-99). Agent Green examined three firearms connected to this case, State's Exhibits 36-37. State's Exhibit 36 is a "Highpoint firearms Model CF-380 and a … .380 auto caliber, serial number of P844000." State's Exhibit 37 is an "Armenius, Model HW3-32, Smith & Wesson long caliber revolver with a serial number of 232359." State's Exhibit 36 was a semi-automatic pistol with a detachable magazine of bullets,[24] while State's Exhibit 37 is a .32 caliber revolver that holds seven cartridges. Both weapons were in working order. (App'x pp. 478-82; 484).

Agent Green explained that it is possible to eject a live round from State's Exhibit 36, either "if it were a misfire" or a person "charges" the weapon, *i.e.*, pulls back the slide to load a live bullet into the chamber, when there is a live round already in the chamber. (App'x pp. 482-84). Another weapon submitted for testing was State's Exhibit 34, Joshua Haggood's "Springfield Armory, 23 Model XD-40 S&W caliber, with a serial number of US298932." This .40 semi-automatic pistol was also in working order. (App'x pp. 484-85).

State's Exhibit 40, the unfired .380 caliber round found close to the front door of the club, was the "correct caliber for use in … State's Exhibit 36," the victim's pistol. Also, it could have

[24] Because State's Exhibit 36 is a semi-automatic pistol, a bullet should be fired every time the trigger is pulled, the casing of that bullet is ejected, and a new bullet is loaded into the chamber. SLED protocol is not to speculate on ejection patterns of semi-automatic weapons because too many variables can impact where a casing ultimately stops after it is ejected from the gun. (App'x pp. 481-82).

been ejected by someone charging the weapon, as explained. State's Exhibit 41, a spent shell casing found behind the van, was "a fired .380 auto caliber cartridge case and it was fired by State's Exhibit 36." Likewise, State's Exhibit 56, the .380 caliber bullet recovered from the tail light assembly of William Pinckney's Ford Taurus, was fired by State's Exhibit 36. (App'x pp. 485-89).

Haggood's semi-automatic .40 caliber pistol, State's Exhibit 34, was the only weapon submitted to Agent Green that could have fired State's Exhibits 47-49, the three .40 caliber cartridge casings found in the grass and gravel on the right corner area of the club. State's Exhibit 34 was consistent with firing those casings, but his testing was inconclusive as to whether that was the only .40 caliber gun that could have fired them.[25] (App'x pp. 489-90).

The bag of seventeen bullets provided by Mr. McGarrah (State's Exhibit 35) was the same brand of ammunition as the casings in State's Exhibits 47-49. Agent Green was able to match the cartridge cases in State's Exhibit 35 to each other. While he could also match State's Exhibits 47-49 to each other, he could not match the casings in State's Exhibit 35 to State's Exhibits 47-49. (App'x pp. 490-91).

Similarly, he opined that the fired bullet recovered from the van (State's Exhibit 50) "was most consistent with being … a bullet loaded in some .40 Smith & Wesson caliber cartridges. This bullet "bore the same general rifling characteristics as test specimens from the State's Exhibit 34 pistol," but his testing was inconclusive. He explained that "[s]ome firearms just mark inconsistently." Comparison of the fired .40 caliber bullet removed from James Hampton's arm (State's Exhibit 33) to State's Exhibit 34 was also inconclusive, even though this bullet had

[25] He opined that "the markings were not of the quality or quantity" to either include or exclude State's Exhibit as firing the casings. (App'x p. 490).

"similar general rifling characteristics." An additional obstacle to accurately comparing State's Exhibit 33 to Haggood's weapon was that this bullet had dried blood on it. (App'x pp. 491-94).

Although neither a .45 caliber pistol nor a 9 mm. weapon were submitted for Agent Green's testing (App'x p. 485), he opined that the five .45 cartridge casings (State's Exhibits 42-46) found at the right corner of the club and near the .40 caliber casings were all fired by the same weapon. He explained that a .45 caliber bullet is too large to have been fired by any of the other weapons he had examined. He further explained that a .40 caliber bullet was too small to have been fired by a .45 caliber pistol and too large to have been fired by either the .380 pistol (State's Exhibit 36) or the .32 caliber revolver (State's Exhibit 34; App'x pp. 494-96).

Agent Green further opined that the three bullets found about 7' - 8' in front of where the victim had been lying (State's Exhibits 57-59) were "consistent with being a .45 auto or a .45 gap caliber cartridges" and that they were consistent with the type of bullets that would have come out of the five shell casings introduced as State's Exhibits 42-46. Although comparison of State's Exhibit 59 with the other bullets was inconclusive because the jacket covering it "was abraded and gouged," Agent Green opined that State's Exhibits 57-58 were both fired by the same weapon. A possible explanation for the damage to State's Exhibit 59 was that it had been caused by penetrating a vehicle door and striking the vehicle's door post. Because the two .32 cartridge casings (State's Exhibits 38-39) had been removed from the cylinder of the weapon, Agent Green did not test them, which is a SLED protocol. (App'x pp. 496-98).

Finally, Agent Green opined that State's Exhibits 51-55 were five fired 9 mm. Luger cartridge casings, which had all been fired by the same firearm. By Agent Green's microscopic comparison of the class characteristics of the casings with State's Exhibit 34, he was able to

determine that the victim's semi-automatic .380 caliber pistol did not fire these casings. Also, the other firearms that he examined were too large to have fired them. (App'x pp. 494-96; 498-99).

Dr. Janice Ross is the forensic pathologist who performed the autopsy on Dominique Lawton's body. (App'x pp. 525-26). The victim was 5'7'' tall and his estimated weight was roughly one hundred sixty-five pounds. (App'x p. 532). Dr. Ross only found one injury: "a gunshot wound that went through the head and lacerated the brain." (App'x p. 526). She explained that:

> The entrance wound was in the left forehead, just above the eyebrow, and it went pretty much straight back and exited maybe a little bit to the left. It went backwards and to the left and exited the left side of the head.

(App'x p. 526, lines 14-17).

She opined that the wound's track meant that the victim's head was facing the shooter when he was shot. This wound ultimately caused the victim's death because "the brain was lacerated and then [it began swelling], and the swelling and the enlargement of the brain from the swelling then impinge[d] on areas of the brain that have to do with breathing and heartbeat." As a result, the victim died "[f]rom the brain damage … which eventually results in failure to breath, [or] respiratory failure." Without a ventilator, the victim would have quit breathing within minutes up to an hour. (App'x pp. 526-27)[26].

Dr. Ross opined that this was the type of injury that likely would have been fatal even with medical intervention. She measured the entrance wound as .3" x .4." However, she explained that it was impossible for her to determine, on autopsy, what caliber weapon caused the injury, and she did not recover the bullet that had caused the wound. (App'x pp. 528-31).

[26] The victim remained on life support for some time after the injury and was pronounced dead on the 19th. (App'x pp. 400; 459).

Testimony Presented at the Post-Conviction Relief Hearing

Antonio Gidron

Antonio Gidron was present at the Piggy Park nightclub when the shooting occurred and testified at Petitioner's trial. According to Gidron, he did not have time to prepare for his testimony with trial counsel before testifying at trial. Nevertheless, Gidron also testified he went out to the scene with trial counsel, but "don't know who that guy was from." (App'x p. 882, ll. 2). Further, Gidron never spoke to or gave a statement to law enforcement because he didn't "meddle in people business." (App'x p. 912, ll. 18-19). At the evidentiary hearing, Gidron testified the victim, Dominique Lawton, had a gun in his hand when he was shot, but never thought to mention it at Petitioner's trial. (App'x p. 904).

Gidron testified the crime scene was handled poorly, and law enforcement was having difficulty locking down the scene. (App'x p. 898). Gidron could not recall the difficulty the solicitor had in contacting him prior to the trial. (App'x p. 919).

Gidron recalled his trial testimony that he was "99% sure" Petitioner didn't do anything. (App'x p. 910). Gidron claimed he was able to see Petitioner and Lawton at the same time, "like a big-screen tv" when Lawton was shot. However, when asked why he would not say he was one-hundred-percent sure Petitioner did not shoot Lawton, he responded, "you can never be exact." (App'x p. 910).

Robert Tressel

Petitioner called Robert Tressel, an expert in homicide investigations and crime scene reconstruction, to testify at the evidentiary hearing regarding his review of the case. Tressel was qualified, without objection, as an expert in the area of homicide investigation and crime-scene reconstruction. Tressel explained he felt the preservation and investigation of the crime scene by

law enforcement was substandard for a homicide case and had a problem reviewing this case because the crime scene photographs were taken after virtually all of the cars had left the parking lot where the shooting occurred. (App'x p. 929). Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to reconstruct the crime scene. (App'x p. 932). Tressel likened the chaotic shooting scene in this case to "a shootout at the O.K. Corral." (App'x p. 938). He was aware Kelly Fite was offered as an expert by the defense at trial, and had known Fite for over forty years, and the two often referred each other. As Tressel explained, he went in March 2018 to review the exhibits which were presented at trial.

Tressel stated he had a problem reviewing this case because all of the photographs were done after virtually all of the cars had scattered from the crime scene. (App'x p. 929). He also claimed there was no documentation in the investigative file regarding where certain vehicles were parked. (App'x p. 929). Based on Gidron's representations made to Tressel when they visited the scene, Tressel testified Gidron was able to see Petitioner and the victim at the same time during the shooting. (App'x p. 930). As Trial Counsel's investigator was unable to meet with Gidron at the scene prior to trial, Tressel testified, now years later, it would have been vital to do so.

Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to produce a diagram. He explained outside crime scenes are difficult to work. Furthermore, Tressel opined there were not enough measurements taken when law enforcement responded for him to make a diagram. (App'x p. 932). It was Tressel's opinion the investigation of the crime scene by law enforcement fell "well below" the standards for a homicide investigation, and he understood it was the investigator's first homicide investigation. (App'x p. 934; p. 943).

In preparation for the evidentiary hearing, Tressel also reviewed Kelly Fite's testimony in the trial transcript. According to Tressel, he did not remember Fite offering an opinion regarding

the level of investigation in the case. (App'x p. 946). Tressel testified that if he would have been retained at trial, he would have been more adamant that the defense offer the other diagram into evidence which contained the location of shells. However, the diagram he was speaking of was color-coded and only the black and white copy has been able to be located, and therefore Tressel has not seen what the colors would indicate. (App'x p. 949-50; p. 969). On cross-examination, Tressel testified he did not consult with Fite regarding this case, and conceded he did not speak with any eyewitnesses other than Gidron. (App'x p. 960; p. 957). Tressel did not think Fite could have reconstructed the crime scene with the materials available. (App'x p. 963).

Tressel testified there was no ballistics evidence to corroborate codefendant Haggood's testimony at trial that Petitioner fired two shots on the move to his car due to the absence of shells to the right and rear of where Petitioner would have been. However, Tressel later conceded the resting place of the shells after being ejected from the gun would "absolutely" depend on what angle Petitioner was holding the gun. (App'x p. 958). Furthermore, Tressel conceded he had no way of determining how Petitioner was holding the gun. (App'x p. 958). Tressel also conceded that the problem with shell casings is they are very movable, and he recalled testimony from trial and the PCR hearing that there was a large group of people coming and going at the scene. (App'x p. 958).

Tressel acknowledged there was a positive gunshot residue result in the apex of the driver door of the car in which Petitioner was allegedly standing during the shooting. (App'x p. 958). He also acknowledged a group of .45 caliber shell casings in the general vicinity of the rear of Petitioner's car. (App'x p. 966). Tressel was unable to determine what caliber bullet caused the fatal wound to Lawton. (App'x p. 966). Tressel speculated a .40 caliber bullet was more likely to have caused the fatal injury in this case than a .45 caliber bullet. (App'x p. 941).

Trial Counsel

According to trial counsel, the testimony of codefendant Josh Haggood changed the entire approach of the defense strategy, as before there had been "strength in unity," but it became "havoc in division" once Haggood decided to testify. (App'x p. 997). This is because, as trial counsel explained, it gave rise to accomplice liability. (App'x p. 998).

Trial counsel testified Kelly Fite came highly recommended by two "very good friends who are very successful criminal defense attorneys … They had had great success with Mr. Fite." (App.x p. 1003, ll. 24-25). Trial counsel's notes revealed he spoke with Fite in September 2012, and mailed the entire discovery package to him with copies of the evidence disks in October 2012. (App'x p. 1004). He noted that although Fite's testimony at trial indicated Fite did not have some of the discovery material, like the DNA report regarding ballistics evidence, trial counsel explained he had given Fite everything he had been provided in discovery. (App'x p. 1004). As the trial progressed, trial counsel had actually considered not calling Fite because he felt the jury was losing interest and had heard "about enough" and knew the scene was chaotic from just about every other witness. (App'x p. 1006). Given the jury's lack of interest at that point in time, trial counsel explained, if he had a regret in this case, it was using Fite, with the hindsight of knowing how the testimony went, but noted Fite is "heralded by all." (App'x p. 1007, ll. 5-6). After hearing Tressel's testimony, trial counsel mentioned that, in hindsight, he would have preferred Tressel's PCR testimony over Fite's trial testimony. Trial counsel believed Fite was going to create a crime scene reconstruction, but Fite did not, and trial counsel wished he would have been more precise in what he asked him to do. (App'x p. 1008; p. 1012). Further, trial counsel stated he "barely wanted to touch on him [Fite] in closing – I didn't feel it was necessarily harmful to the case. But I didn't feel it was beneficial." (App'x p. 1008, ll. 8-10).

Furthermore, trial counsel reasserted that while he would have liked to have Tressel's testimony at trial, "it goes back to the change in our defense approach due to the testimony of Mr. Haggood … it created a major roadblock for us and a major impediment to the type of defense we were going to present. (App'x p. 1012-13). As he explained, a chaotic crime scene was not going to change the testimony and believability of codefendant Haggood's testimony that Petitioner went to the car and retrieved a .45 caliber pistol and returned to the club before the incident. (App'x p. 1036).

Haggood made an excellent witness for the State according to trial counsel. (App'x p. 1028). After watching Haggood's interviews with law enforcement, trial counsel did not feel Haggood would make a very good witness for the State, but then Haggood put on a different persona in the courtroom once he was able to plead guilty and testify against Petitioner. (App'x p. 1028). Trial counsel testified Haggood presented incredibly well, was charismatic, and felt the jury found Haggood to be credible. (App'x p. 1028).

Trial counsel recalled great difficulty in securing Gidron prior to trial. Trial counsel personally visited the scene ten to twelve times and visited the scene with his private investigator. (App'x p. 1009). In fact, trial counsel testified the best he could do with Gidron was two telephone conversations as Gidron was difficult to locate and even had a physical altercation with his investigator. (App'x p. 1009). Although Gidron did not want to be involved, trial counsel was able to go over his trial testimony by phone. (App'x p. 1009; p. 1039). Trial counsel testified Gidron's testimony at the PCR hearing was more on-point at trial as Gidron was calm, cool, and collected at the PCR hearing. Trial counsel noted he wished Gidron would have presented himself in that same fashion at trial. (App'x p. 1011). Instead, trial counsel testified Gidron's nervousness during his trial testimony made him seem hostile. (App'x p. 1038).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give [] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction

or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id*. at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential[, as] it is all too tempting for a defendant to second-guess counsel's assistance after conviction or [an] adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth

Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id*. (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. *Id*. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed [at] the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and

raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. *Harrington*, 562 U.S. at 105.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id*. At 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show that the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Id*. at 693 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules . . . [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id*. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

I. The post-conviction relief court correctly found Petitioner failed to establish trial counsel was constitutionally ineffective for failing to effectively utilize lay witness, Antonio Gidron, and expert witness, Kelly Fite, at trial where Petitioner cannot establish he suffered any prejudice and where trial counsel was not deficient in the preparation and presentation of either witness because he made reasonable and adequate efforts to prepare and discuss the case with both witnesses prior to trial and because trial counsel made adequate efforts to utilize both witnesses' testimony at trial.

At the post-conviction relief hearing, Petitioner alleged trial counsel was ineffective for failing to effectively and fully utilize the services of Kelly Fite because Fite's testimony hurt the defense as he was ill-prepared to testify. Petitioner alleges that his presentation of an expert similar to Fite at the post-conviction relief hearing, has shown Counsel could have better prepared and utilized Fite. Petitioner contends the lower court erred in finding trial counsel was not ineffective for his use of Fite as an expert witness at trial, arguing Fite's trial testimony was subpar compared to that of post-conviction relief hearing witness Robert Tressel, and therefore, trial counsel was deficient for not retaining an expert who would have testified more favorably at trial. Respondent asserts this contention is not supported by the record and is without merit. Additionally, Petitioner alleges trial counsel was ineffective for failing to fully prepare Antonio Gidron to testify as a witness and that the lack of preparation prejudiced Petitioner at trial. Respondent contends this allegation is also without merit.

a. *Trial counsel properly prepared and utilized Kelly Fite as an expert witness at trial.*

Petitioner argues Counsel's decision to employ the services of Fite over those of Tressel, or another similar expert witness of Tressel's, prejudiced Petitioner's defense at trial and that, had counsel obtained a different expert witness, Petitioner would have been acquitted. In making this assertion, Petitioner relies on *McKnight v. State*, 661 S.E.2d 354, 378 S.C. 33 (2008). However, this reliance is misplaced.

In *McKnight*, this Court was asked if trial counsel was ineffective for calling an expert witness whose testimony was known to undermine the defense without calling another expert witness who could provide favorable testimony. In that case, McKnight proceeded to trial in January 2001 regarding the death of her nearly full-term stillborn baby girl, after an autopsy report concluded the death had occurred due to McKnight's cocaine use and was labeled a homicide. McKnight's counsel called two expert witnesses, Dr. Conradi and Dr. Karch, to testify as to possible alternative causes of death. Dr. Conradi provided testimony that essentially ruled out any natural causes of death, which severely undercut McKnight's defense. Dr. Karch's testimony rebutted the State's experts' testimony and bolstered McKnight's defense. That trial ended in a mistrial. During the second trial in May 2001, McKnight's counsel again used Dr. Conradi, fully aware that her testimony had undermined the defense. Dr. Karch was unavailable, and McKnight's counsel made no attempt to secure another expert witness who could effectively rebut the State's expert testimony. This Court found that "it was unreasonable for counsel to produce a single expert witness at the *second trial* whose testimony had clearly benefited the State's case in the *first trial*" and granted McKnight relief. *McKnight*, at 44, 661 S.E.2d at 359 (emphasis added).

Here, *McKnight* is clearly distinguishable from the instant case. Trial counsel took reasonable measures in selecting and preparing Fite for Petitioner's case. Review of the record does not provide a single clear instance where Fite's testimony "undermined" the defense. Furthermore, unlike in *McKnight*, where counsel called Dr. Conradi at the second trial *knowing* her testimony would bolster the State's case, because her testimony did exactly that during the first trial, trial counsel did not know the exact testimony of Fite, and it is clear *McKnight* is not applicable to the case at bar. Although Counsel did state, after hearing Tressel testify, his only potential regret at trial was calling Fite because in hindsight, he would have preferred Tressel's

testimony over Fite's, this admission from Counsel in no way suggests he was unreasonable in deciding to use Fite as an expert witness. Furthermore, Counsel clarified that Fite's testimony was not "harmful to the case." (App'x p. 1008, ll. 8-10).

Trial counsel emphasized Fite came highly recommended by other criminal defense attorneys, who had great success using Fite, adding Fite was "heralded by all, did such a great job." (App'x p. 1004, ll. 24-25; p. 1005, ll. 1-4; p. 1007, ll. 5-6). Referring to his notes at the evidentiary hearing, Counsel testified that in September 2012 he called Fite about the case, and in October 2012, mailed Fite all discovery materials he had been given. (App'x p. 1004). Counsel further indicated at the evidentiary hearing that he exchanged emails with Fite regarding what he believed the State's theory would be. (App'x p. 1004). Counsel testified that he communicated to Fite his belief the State would attempt to attribute a .45-caliber-automatic weapon used in the shooting to Petitioner. (App'x pp. 1004-05).

Petitioner's argument further centers on Petitioner's alleged use of a .45 caliber weapon when the evidence suggests that a .40 caliber weapon inflicted the fatal injury to Lawton. It is Petitioner's assertion that Fite was defective in his capacity as an expert witness because he did not clearly draw the distinction between the likelihood of a .40 caliber round being able to penetrate through the skull compared to the likelihood of a .45 caliber round. Indeed, Counsel noted Fite testified he was not able to explicitly rule out a .45 caliber round as the cause of the fatal injury to Lawton. "Usually, you don't expect a large caliber hollow point bullet to penetrate a person's head, but it does happen." (App'x p. 554, ll. 3-4). However, Tressel, the expert witness used by Petitioner to establish Fite's testimony as subpar, was also not able to rule out the possibility of a .45 caliber round causing the fatal injury to Lawton. (App'x p. 941, ll. 13-16). All Tressel could state was that of all the weapons known to be present at the time of the shooting, the .40 caliber weapon attributed

to Petitioner's co-defendant, Joshua Haggood, most likely fired the fatal shot, but was not able to affirmatively state with one-hundred-percent certainty that Lawton was killed by a .40 caliber round.

Curiously, Petitioner went on to question Tressel on the trial testimony of witness James Hampton, asking "And he is one of the witnesses that testifies about seeing Mr. Benjamin shooting is that correct? A: That's correct" (App'x p. 941, ll. 17-23). Tressel went on to add, "well, Mr. Hampton testified that … Mr. Benjamin was laying down cover fire as he ran to the vehicle. Yet there's no .45 shell casings in front of the club." (App'x p.942, ll. 7-10). However, review of James Hampton's trial testimony clearly refutes this claim by Petitioner. James Hampton explicitly stated that he did not remember anything about the gun Petitioner had, and further, did not see Petitioner, nor Haggood fire their weapons. (App'x p. 212, ll. 18-20; p. 214, ll. 5-8; p. 225, ll. 16-18).

There is nothing in the record to indicate Counsel failed to adequately prepare Fite to testify at trial. Trial counsel provided Fite with all discovery materials available to him. Moreover, Fite came highly recommended, and Tressel himself testified he has known Fite for forty years and the two often refer persons each other. As Petitioner's own expert witness testified at the PCR hearing, Tressel himself was unable to reconstruct the crime scene in this case. The fact the crime scene was allegedly too inadequately documented to give rise to a reconstruction was no fault of Fite or Counsel.

Here, Counsel's decision to retain Fite was based on the strong recommendations he received from other members of the profession. Trial counsel had no reason to suspect Fite would appear at trial relatively unprepared, as he provided Fite with all relevant discovery, and nothing in the record indicates Counsel failed to adequately prepare him. To the extent Fite was unprepared to testify, it was not because trial counsel was ineffective, but rather because Fite was, and our

Federal Courts have consistently held that there is no constitutional right to effective assistance of an expert witness. *See, e.g., Thomas v. Taylor*, 170 F.3d 466, 472 (4th Cir. 1999) (trial counsel cannot be held ineffective for preparing an expert witness to testify); *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir.1998) (holding that the Constitution does not entitle a criminal defendant to the effective assistance of an expert witness); *See also Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008) (counsel is not ineffective for structuring a case on the basis of opinion received at the time counsel consulted expert). Moreover, contrary to Petitioner's assertion that Counsel should have found an expert willing to give more favorable ballistics testimony, it was unnecessary for Counsel to shop for a more favorable opinion as Fite did not advise counsel of an adverse opinion prior to trial. Though Fite may have not testified as favorably as counsel would have hope at trial, Counsel reasonably retained and employed Fite who he believed would be well suited to this case.

Petitioner's contention that the finding of Fite as ineffective and not trial counsel is erroneous, is without merit. In support of this claim Petitioner states that the utilization of Fite in this current matter is analogous to the deficient performance of trial counsel addressed in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). However, *Ard* does not apply here.

In *Ard*, the court was presented with the question of whether the post-conviction relief court erred in finding ineffective assistance of trial counsel. In that case, Joseph Lee Ard had been convicted of murder arising from the April 23, 1993, shooting of his then pregnant girlfriend. The applicant in *Ard* contended that had trial counsel not been deficient, sufficient evidence would have been found to uphold his claim that the gun was in the hand of the victim at the time that it went off. The evidence of that fact would have given rise to enough reasonable doubt to possibly change the outcome of his trial. As explained by the Petitioner, the court in *Ard* addressed counsel's failure to further question the State's gunshot residue expert (Powell) and counsel's utilization of

an expert (Avery) that was not independent. *Ard,* 642 S.E.2d at 597-598. Specifically, the court held that respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence presented and utilized an independent expert, where doing so would have "had a significant impact on the guilt phase of the case." *Ard,* 642 S.E.2d at 597.

The court's finding in *Ard* that the expert (Avery) was improperly utilized was based upon the fact that he was not "independent". Therein, the expert (Avery) had reviewed the gunshot residue report in question prior to the case in his former role at SLED, where he acted as the supervisor of the State's gunshot residue expert (Powell). The expert's former position and his relationship with the case seriously called into question his ability to deliver an unbiased opinion regarding the gunshot residue as well as the findings of the State's expert. "In order for Avery to question Powell's findings he would have implicitly had to have cast doubt on his own oversight of that very same analysis" *Id.* 642 S.E.2d at 333. Here, Mr. Fite was an independent expert and *Ard* is not applicable.

Furthermore, Petitioner claims the cross-examination and closing arguments of the State evidenced a deficiency in the use of Mr. Fite. This claim is again equated to the events in *Ard*. However, again the reliance on this case is misplaced. The Court held in that case that the deficiency in the cross-examination of the State's witness resulted from the fact that "counsel did not discuss the gunshot residue with Powell during their pretrial investigation" *Id.* 642 S.E.2d at 334. The State's gunshot residue expert (Powell) subsequently testified that had counsel done so, he would have entered into a discussion rendering sufficient evidence to give counsel "an opportunity to prepare an effective cross-examination which would have resulted in Powell testifying that the evidence was not inconsistent with Coffee [the victim] handling the gun." *Id.* 642 S.E.2d at 334.

The court established in *Ard*, that the failure of counsel to take reasonable steps to open communication with the State's expert, which would have rendered information that would create substantial reasonable doubt in the jury, amounted to ineffective assistance of counsel. In the current matter, there is no evidence that any failure on the part of Counsel amounted to a similar offense. Finally, the court in *Ard* very carefully stated that:

> "The PCR court's findings are based almost exclusively on Powell's testimony as to what information he would have provided to counsel if only they had asked-either prior to trial or on cross-examination. Neither this Court, nor the PCR court, has handed respondent a "second chance" because he has, many years after conviction, found a favorable expert. Instead, the PCR court properly focused on the evidence that counsel failed to appropriately examine the State's forensics evidence and failed to obtain the assistance of an appropriate expert." *id.* 642 S.E.2d at 336.

There was no testimony offered to establish that had Counsel acted in another manner, Fite would have granted more information than that which was gathered from him during the process of the trial. As was held in *Ard*, Petitioner's ability to find a favorable expert many years after his conviction is not enough to establish ineffective assistance of counsel.

Notwithstanding trial counsel's lack of deficiency, Petitioner has also failed to satisfy his burden of proving he was prejudiced regarding trial counsel's use of Fite as an expert witness. Even if trial counsel could have forced Fite to review every piece of material provided, and given a better explanation of the ballistic evidence in this case, the outcome of trial would remain unchanged. In direct opposition to their claims, Petitioner's largest problem at trial was not the quality of an expert witness, but rather, accomplice liability. The Petitioner faced this enormous burden at trial given the testimony of codefendant Haggood and other witnesses, which clearly placed Petitioner, codefendant Haggood, and codefendant Fraizer together as a group the entire night. (App'x p. 1027-1036, p. 1098).

The record shows all three codefendants acted together and each possessed and fired a weapon that night. Petitioner's group exited the club, retrieved weapons, returned to the location where there was potential for an altercation with Lawton, remained in that location, then codefendant Frazier fired a shot in the air and it led to an exchange of gunfire. (App'x p. 1033-32). Codefendant Haggood explicitly stated that he carried a .40 caliber semiautomatic pistol. (App'x p. 265). Therefore, even if Fite did a better job at highlighting that a .40 caliber round was more likely to have inflicted the fatal injury to Lawton than a .45 caliber round from the weapon attributed to Petitioner, it would not overcome the presumption of guilt under accomplice liability.

The Petitioner cites *State v. Mattison*, 388 S.C. 469 (S.C., 2010) in his argument that the State has not adequately established the facts in this case amount to a conviction of Benjamin as an accomplice in these crimes. In *Mattison*, this Court granted certiorari in order to determine the validity of the lower courts' jury instructions regarding accomplice liability. In that case the Court looks to *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998) in their holding stating:

> "The law says that proof of mere presence at the scene of the crime is not sufficient to find someone guilty. But, of course the law also says that the hand of one is the had of all. The law says that- if a person- if a crime is committed by two or more persons who are acting together in the commission of a crime, the act of one is the act of both." *Kelsey,* 331 S.C. at 76-77, 502 S.E.2d at 76.

Petitioner's baseless accusation that the State has not presented any evidence to establish the key element of accomplice liability is not rooted in fact. In pointing to *Mattison,* Petitioner is claiming the State bears the responsibility of and has failed in proving that Benjamin must have known of the intended crimes of his co-conspirators.

The record here establishes, through witness testimony, the three codefendants were acting in conjunction with one another through the entirety of the commission of these crimes. While the State would agree that the issue herein is not whether the State established accomplice liability at

trial, as the record clearly establishes that it has. The issue instead, continues to be whether credibility would have been shaken and a reasonable doubt established if counsel was found to be deficient through its utilization of the expert and witness.

Petitioner asserts that had trial counsel more effectively utilized Mr. Fite, there would have been reasonable doubt established and the outcome of the trial would have been different. This claim is speculative and without merit. The trial strategy of Counsel was established and upheld by the lower court in the Order of Dismissal issued on February 1, 2019. Wherein, proper utilization of the expert was found in Counsel's use of testimony to attempt to establish a reasonable doubt due to the nature of the crime scene. (App'x p. 1097). Furthermore, the Petitioner in this argument fails to consider the well-established case law surrounding accomplice liability.

"Under the hand of one is the hand of all theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by this confederate incidental to the execution of the common design and purpose" *State v. Condrey*, 349, S.C. 184, 194, 562, S.E.2d 320,324 (Ct.App.2002) "Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." *State v. Langley*, 334 S.C. 643,648-49,515 S.E2d 98, 101 (1999) (quoting *State v. Austin*, 299 S.C. at 459, 385 S.E.2d at 832). "Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." *State v. Zeigler*, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005).

The evidence regarding the lower court's findings of accomplice liability in this matter are in line with the facts arising from witness testimony at the trial. Specifically, we look to the testimony of Mr. Haggood, who along with numerous other witnesses alerted the court to the fact

that the three men exited the club in unison to retrieve their weapons from the car that Petitioner drove to the party before returning to the scene of the crime (App'x p. 1095). This testimony was an essential factor in establishing that the men were involved a conspiracy sufficient to prove accomplice liability. This fact was further confirmed by Counsel's testimony that the decision of Mr. Haggood to testify at trial "threw things into a redirection" in the case. (App'x p. 1027-1036). Petitioner's contention that the utilization of the expert in this case calls into question the State's investigation, theory of the case, and witnesses, therefore, is without merit.

Petitioner through this claim is making the assumption that had Counsel utilized the expert and witness in a different manner then, the findings gained from those witnesses would have proved that Benjamin was not responsible for firing the specific bullet that killed Mr. Lawton. However, based upon the fact that the charges are arising under the accomplice liability statute, whether or not Benjamin fired that specific bullet is not an essential factor to establish his guilt. The expert and witness through any other utilization as can be imagined by Petitioner would not have rendered claims sufficient to refute the witness testimony of Mr. Haggood and change the outcome of this trial.

As the lower court explained in their holding, "a chaotic crime scene was not going to change the testimony and believability of codefendant Hagood's testimony that [Petitioner] went to the car and retrieved a .45 and returned to the club before the shooting which left the victim, with whom the [Petitioner] had been in conflict throughout the night, dead directly in front of [Petitioner's] car." (App'x p. 1098). Accordingly, Petitioner has failed to show prejudice and this Court should uphold the decision of the lower court.

b. *Trial counsel properly prepared and utilized witness Antonio Gidron at trial.*

In support of Petitioner's claim Counsel was ineffective for failing to properly prepare Antonion Gidron to testify as a witness and that Counsel's lack of preparation prejudiced Petitioner at trial, Respondent contends this allegation is also without merit.

In support of this claim, Petitioner relies on *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1999), as analogous to the instant case. However, in *Bannister*, this Court addressed whether trial counsel was ineffective for failing to call a witness at trial. Here, it is without question that Counsel located and prepared Gidron to testify at trial and did in fact call him as a witness at trial. Therefore, *Bannister* does not apply here. Petitioner's assertion that the inability of Counsel to control and coach a hostile and uncooperative witness into a star performer on the witness stand should amount to the same level of ineffectiveness as failing to call a witness defies the rational bounds of reasonable performance set forth in *Strickland*.

Petitioner asserts Counsel's testimony regarding his failures as to Mr. Gidron were erroneously ignored by the lower court in failing to find ineffective assistance of counsel. However, Petitioner fails to mention that those failures were no of fault of Counsel. It has been well established in the record that both Counsel and the solicitor's office had great difficulty locating Mr. Gidron. (App'x. p. 1040, 11. 11-25). The record reflects Counsel took reasonable steps to investigate, locate, and prepare Gidron, given Gidron's aversion to involvement in the case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly

assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel, especially when the allegation is supported only by mere speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

At the evidentiary hearing, Counsel explained Gidron was extremely nervous to testify, which made him come across as a hostile witness. (App'x p. 1038, ll. 9-17). Furthermore, Counsel testified he had extreme difficulty locating Gidron, let alone communicating with him, and the record reflects even the solicitor was entirely unable to contact Gidron. (App'x p. 568; p. 1009). To complicate matters, Counsel described how Gidron became combative when the private investigation came to subpoena him, resulting in a physical altercation. Counsel noted that, despite Gidron's hostility, he was able to speak with Gidron on the phone the Friday prior to trial, adding it was the best he could do. (App'x p. 1009). Counsel further explained Gidron's demeanor at trial was markedly different from his demeanor at the PCR hearing. Counsel testified Gidron's testimony at the PCR hearing was more on-point than at trial as Gidron was calm, cool, and collected at the PCR hearing. Counsel stated he wished Gidron would have presented himself in that same fashion at trial. (App'x p. 1011).

Petitioner alleges Mr. Gidron was called to the stand at the evidentiary hearing to demonstrate how counsel should have properly handled and utilized Mr. Gidron prior to and during trial. At the evidentiary hearing, Petitioner notes Mr. Gidron provided additional testimony and explanation of the scene that was tantamount to Petitioner's defense.

Though counsel testified that Mr. Gidron's demeanor and testimony was different, in a positive way, at the evidentiary hearing, the lower court properly found Counsel made reasonable and adequate efforts to effectively utilize Gidron as a witness at trial, despite Gidron's hostility which was no fault of trial counsel" (App'x p. 1099).

It is clear trial counsel made reasonable and adequate efforts to effectively utilize Gidron as a witness at trial, despite Gidron's hostility which was no fault of trial counsel. Despite Gidron's demeanor, Counsel was still able to elicit from Gidron that he never saw Petitioner leave the car and he did not want to see Petitioner "go down" for something he was "99% sure" Petitioner did not do. (App'x p. 564; p. 567). Furthermore, the fact that Gidron was more willing to cooperate with PCR counsel *five years* after Petitioner's trial, does not create a presumption that trial counsel was ineffective. It is not incumbent upon trial counsel to ensure that a witness is likeable or completely at ease testifying during a murder trial. For these reasons, Petitioner has failed to satisfy his burden of proving trial counsel was deficient regarding the use of Gidron at trial.

Notwithstanding Counsel's adequate performance regarding this allegation, Petitioner has also failed to satisfy his burden of showing prejudice from Counsel's performance with Gidron. Although trial counsel stated he would have preferred the calmer demeanor of Gidron exhibited at the PCR hearing, Gidron's substantive testimony did not significantly deviate from his testimony at trial. Despite Gidron's lack of cooperation, he still testified at trial that the "rain of fire" came from Haggood, not Petitioner. (App'x p. 576-577). Gidron testified at the hearing that the shots he believe to have struck Lawton came from the road, which is consistent with his earlier trial testimony. (App'x p. 562). Clearly, the jury heard significantly similar testimony from Gidron at trial but chose not to believe it. Accordingly, Petitioner failed to show any reasonable probability that trial counsel could have handled Gidron any differently to achieve a different outcome.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's findings in full.

Respectfully submitted,

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