THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

App. Case No. 2019-000528

David J. Benjamin, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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INDEX

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Calhoun County Clerk of Court. Petitioner was indicted during the February 2013 term of the Calhoun County Grand Jury for one count of murder (2013-GS-09-0051) and two counts of attempted murder (2013-GS-09-0052, 0053).

On March 4, 2013, Petitioner proceeded to trial in front of the Honorable Diane S. Goodstein and a jury. He was represented by Nicholas Thomas, Esquire. On March 7, 2013, the jury returned a verdict of guilty on all charges, and the Honorable Diane S. Goodstein sentenced Petitioner to a term of forty (40) years for murder and concurrent terms of thirty (30) years for each count of attempted murder.

A timely Notice of Appeal was filed. The direct appeal was perfected by Wendy Keefer, Esquire, James Lee Goldsmith, Esquire, and Robert L. Sirianni, Jr., Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an opinion filed on December 16, 2015. *State v. Benjamin*, Op. No. 2015-UP-554 (S.C. Ct. App. filed December 16, 2015). On December 21, 2015, a Petition for Rehearing was filed, which was denied on January 20, 2016. The Remittitur was issued on May 27, 2016.

An Application for Post-Conviction Relief was filed on April 20, 2016. The State filed a Return and Motion for More Definite Statement on or about January 18, 2017. Petitioner, through counsel, filed an Amendment on June 18, 2018, which alleged that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina

Constitution, were violated prior to and during his trial. He also amended his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial counsel:

1. Ineffective assistance of trial counsel for failure to fully and properly advise and advocate for Applicant prior to the rejection of the fifteen year plea offer. Transcript pp. 12-18.

2. Ineffective assistance of trial counsel for failure to effectively and fully utilize the services of Kelly Fite or an expert in his or a similar capacity prior to and at trial.

3. Ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense.

4. 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. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016).

5. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

An evidentiary hearing was convened on July 12, 2018 at the Dorchester County Courthouse in front of the Honorable Robin B. Stilwell. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. During the course of the evidentiary hearing, Petitioner testified and called Antonio "Tony" Gidron, Robert Tressel, Pete Skidmore, and Nicholas Thomas, Esquire, to the stand. Respondent also called Nicholas Thomas, Esquire, to the stand.

At the conclusion of the evidentiary hearing, the court requested proposed Orders and allowed time for the parties to obtain the evidentiary hearing transcript. In accordance with the court's instructions, proposed Orders were submitted by both parties. On February 1, 2019, an Order of Dismissal was issued. Petitioner timely submitted a

Rule 59, SCRCP, Motion on April 14, 2019. An Order denying Petitioner's motion was issued on February 26, 2019.

On April 1, 2019, Petitioner, through counsel, filed a Notice of Appeal in the South Carolina Supreme Court. On June 29, 2019, the Petition for Writ of Certiorari and Appendices were filed. On December 3, 2019, Respondent filed the Return to Petition for Writ of Certiorari.

On December 16, 2019, the appeal was transferred from the South Carolina Supreme to the South Carolina Court of Appeals. On January 5, 2022, an Order was issued denying and granting certiorari in part.

On May 9, 2023, the South Carolina Court of Appeals conducted an oral argument. On June 21, 2023, the South Carolina Court of Appeals issued a *per curiam* Opinion affirming the lower court, from which this Petition for Rehearing and Petition for Rehearing *En Banc* follows. *Benjamin v. State*, Op. No. 2023-UP-243 (S.C. Ct. App. filed June 21, 2023).

ARGUMENT

Pursuant to Rule 221, SCACR, Petitioner respectfully petitions this Court for rehearing and for rehearing *en banc.* In conjunction with the arguments herein, Petitioner would respectfully request that the panel and entire Court review the Petition for Writ of Certiorari, Brief of Petitioner and the lengthy record contained in the previously filed Appendix. Petitioner submits that affirming the lower court is not in uniformity with the recent decisions of this Court regarding accomplice liability and is not supported by the record or the law.

Following the grant of certiorari, the issue raised and addressed by this Court was: 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. By way of the recent Opinion, this Court found that the record supports the lower court's finding that counsel did not ineffectively utilize the lay witness and that no prejudice resulted even if counsel ineffectively utilized the expert witness. Petitioner submits that these findings need to be reconsidered based upon the entire record and the following facts and argument.

Relevant to the consideration of the issue raised and ruled upon is the matter of the ballistics evidence and testimony, which is also discussed in the Brief of Petitioner that is incorporated herein by reference. From the record it appears that a .40 caliber weapon was attributed to Joshua Haggood (Haggood), a .45 caliber weapon was attributed to Petitioner, a .32 caliber weapon was attributed to Kevin Frazier (Frazier), a .380 caliber weapon was attributed to Dominique Lawton (victim), and a 9mm caliber weapon was attributed to an unknown shooter. Based upon the testimony presented at trial, it was established that the

victim let off a shot by the door of the club, Shawn Defreitas (Defreitas) was hit by a shot and looked back and saw Petitioner shooting towards the opposite side of club, and James Hampton (Hampton) was shot after seeing victim get shot and throwing a post in the direction of Petitioner. At the evidentiary hearing, Robert Tressel, homicide investigation and crime scene reconstruction expert, testified that he was able to determine that at least five firearms were used at the crime scene, but he was unable to determine from the subpar investigation of law enforcement and his own investigation which firearm was fired first. App. pp. 933, 937-938.

At trial, the witnesses that testified that Petitioner had a gun and/or was shooting were Haggood, Hampton and Defreitas. Hagood's testimony is addressed in detail in the Brief of Petitioner and incorporated herein by reference. Notably absent from the Opinion of this Court is Haggood's testimony that while people were arguing Frazier put his gun in the air and declared: "I'm just trying to get home. I'm just trying to get home. I don't want any trouble." App. p. 282, lns. 6-10. He also testified that when he went to pull his gun, Petitioner touched his shoulder and said: "just fall back. Chill out." App. p. 282, lns. 11-16. Even though Haggood's testimony was relied upon in upholding the finding of no prejudice due to accomplice liability, it appears this Court has failed to consider all of the testimony offered by Haggood, to include his testimony that Petitioner told him not to use his weapon, his testimony regarding Frazier and their efforts to get to their vehicle to get home, which was confirmed by other State witnesses.

Hampton testified that Frazier was waiving a revolver in the air at the front of the club and communicated that he just wanted to get home. App. p. 206-207. Hampton also testified that he saw Petitioner and Haggood with guns by the front door of the club and

that all 3 had guns as they were headed to their vehicle. App. p. 209-210, 212. He recalled Frazier shooting in the air, he began walking away, shots were coming from the vehicle of Petitioner behind him, and he ducked as he felt a bullet come past his head. App. p. 213. He testified that he did not see Haggood or Petitioner fire a shot. App. p. 214. He also testified that he threw a post in the direction of Petitioner's vehicle after seeing his 2 friends get shot. App. pp. 218-219. After throwing the post, he heard a few more shots, and he was hit in the arm by a shot. App. pp. 217-219. Haggood acknowledged that he pled guilty to Assault and Battery of a High and Aggravated Nature for shooting Hampton. App. p. 263.

Defreitas testified that he broke up an altercation between Frazier and Lawton outside of the club, Frazier had a gun, and he ushered him to the vehicle. App. p. 319. He did not recall seeing any other guns at that time, and he heard Frazier yelling that he just wanted to get home. App. pp. 319-321. He was at the car with Frazier and Benjamin when shots were being fired. App. p. 321. He went to move his car that was blocking them in and was hit in the leg. App. p. 322. He could not tell who shot him, but he looked up and saw Frazier shooting in the air and Petitioner shooting towards the opposite side of the club. App. pp. 322-324. He also could not tell where the shot came from that fatally hit Lawton. App. p. 325.

As referenced in the Opinion, Andrew Haynes, who was the DJ in the club, recalled warning Petitioner about Lawton's nickname and Petitioner responding, "I'm a killer." App. p. 135, lns. 10-22. He also testified about coming out of the club and seeing Frazier with a gun in the air, Frazier communicating that he just wanted to get home to his kids, getting between the parties and getting Frazier to the trunk of the vehicle where Frazier fired 6-7 rounds. App. pp. 138-139. He ran back in the club at that time and returned after

the shots died down. App. pp. 145-146. He recalled hearing a lot of shots but only seeing Frazier with a gun and shooting a gun. App. p. 147.

Regarding the 9mm, Investigator Dukes testified that there were 9mm shell casings found within 15 feet of Lawton, but he had no idea who had the 9mm weapon. App. pp. 377-378, 410. In closing argument, the Solicitor stated that if the State could figure out who shot the 9mm, they would also be charged. App. p. 616-617. The Solicitor also referenced the investigator's testimony that the investigation was still ongoing. App. p. 617

In light of the testimony and this Court's findings, it is also necessary to look at the State's theory of the case. In the State's opening argument, the Solicitor addressed accomplice liability while discussing Frazier's action of waiving his gun in the air and his words that were different from his actions. App. pp. 101-102. The State argued that Frazier's actions triggered everything and argued regarding Petitioner:

> At this point, nobody else has a gun out. David Benjamin starts shooting into the crowd over towards where the victim Dominique Lawton is. One person is immediately hit in the leg. The victim of one of the attempted murders, Shawn Defreitas. He is immediately hit in the leg while he's running for cover. **And Benjamin walks his rounds into the head of Dominique Lawton killing him.**

App. p. 102, lns. 10-16 (emphasis added).

The State's theory was also addressed during the directed verdict stage of the trial. After the defense moved for a direct verdict, the trial court asked the State to address what evidence existed to put a gun in Petitioner's hand and pointing the gun in the area of the victims. App. p. 535, lns. 1-8. In response, the State relied heavily upon Mr. Haggood's testimony and argued that they had established that Petitioner had possession of .45 caliber gun and based upon the testimony it showed that "basically around the same time" that Lawton was fatally shot Petitioner was the only person shooting in that

direction. App. pp. 536-537. As to the third victim, the State argued that it was their position that Haggood shot Hampton. App. p. 537.

Thereafter, an exchange took place between the Solicitor and the court regarding "accomplice liability theory" and the court noted that the State had requested "hand of one is the hand of all" and she was unsure which victim the State was thinking it applied to. App. p. 537, ln. 19 – p. 538, ln. 12. In response, the Solicitor stated: "I think primarily Mr. Hampton." App. p. 538, ln. 13.

During closing argument, the State told the jury:

> It boils down to basically one initial question. Do you find that we have proved to you beyond a reasonable doubt that David Benjamin had a gun and fired a gun, I submit to you a .45 caliber gun, the early morning hours of September 18th of 2011? It boils down to that question, because if the answer is yes, he's guilty. If the answer is no, that we hadn't proven that, I submit to you under your oath you have to find him not guilty, and I apologize for wasting your time.

App. p. 618, lns. 3-12.

After telling the jury that they also must consider accomplice liability, the Solicitor argued:

> In this case I submit to you, and I'm going to show you when I walk through the evidence in this case, that David Benjamin fired that .45 caliber gun striking Dominique Lawton in the left side of his head killing him, striking Shawn Defreitas in his right hip exiting the inside of his right thigh; that Joshua Haggood fired his .40 caliber gun striking Mr. Hampton.
>
> So the other issue you are going to have is then determining under the hand of one hand of all if Mr. Benjamin is guilty from Mr. Haggood's actions.

App. p. 619, lns. 8-17.

Finally, in closing argument the State also explained their theory on what actions of the
Petitioner resulted in the five .45 caliber shell casing found at the scene:

> There's five shell casings that are found at the corner of the club.

> I submit to you he's downward angle, got two bullets that go into the ground. One into the ground initially and maybe one of them through Shawn Defreitas' leg and then into the ground. Got a third one that hits Danny Saxon's vehicle, which is why it's so damaged that he couldn't even compare it to the other two. He got two more, ladies and gentlemen, as I submit to you, as Mr. Lupton said in his opening, as he's tracking up. One of them that catches Dominique Lawton square in the left side of his forehead and another one that probably misses as he's dropping.

App. p. 637, ln. 22 – p. 638, ln. 9.

In the finding that prejudice has not been established despite the ineffective utilization of expert Kelly Fite, this Court has overlooked that the State's theory regarding the killing of Lawton was not based upon accomplice liability. This Court has misapprehended the importance of Mr. Tressel's testimony that the weapon capable of firing the shot that fatally injured Lawton was most likely the .40 caliber weapon attributed to Haggood and that the .45 caliber attributed to Petitioner would not have caused the fatal injury. App. pp. 940-941. The record demonstrates that the State invoked the theory of accomplice liability solely for the shooting of Hampton for which Haggood pled to ABHAN and received a 10-year sentence. As a result, Petitioner urges this Court to reconsider the following finding: "And the key point of Tressel's testimony was that the fatal shot likely came from the gun fired by Benjamin's co-defendant instead of the gun attributed to Benjamin. Thus, even given Fite's[1] testimony that Benjamin did not fire the fatal shot, this does not discredit the State's theory of the case." Clearly, Mr. Tressel's testimony directly refuted the State's theory of the case that Petitioner was solely responsible for the shooting of both Lawton and Defreitas. By finding no prejudice due to

[1] Petitioner questions if this Court meant Tressel and not Fite. Either way Petitioner's argues that this finding must be reconsidered.

the accomplice liability theory, the lower court and now this Court has misunderstood the State's theory of the case and utilization of accomplice liability.

This Court has also overlooked the importance of discrediting Haggood's testimony via the testimony of a properly utilized expert. At the evidentiary hearing, Nicholas Thomas, Esquire, (trial counsel) testified that he did not believe that .45 caliber killed Lawton, and it would have been helpful to have the testimony that the caliber of weapon Haggood admitted shooting was more likely to have caused the fatal injury. App. pp. 1006, 1013, 1017. He admitted that his was his first General Sessions trial and he was not prepared for closing since his exhibits were still at the printer. App. p. 1017. He agreed that his unfinished visual aid was to show that Haggood was the shooter. App. p. 1042.

Regarding Haggood, Mr. Thomas also testified that Haggood was the elephant in the room that discounted the chaotic crime scene defense. App. p. 1049-1050. He stated: "Not having Mr. Haggood's testimony was the ideal defense." App. p. 1050, lns. 12-13. This Court's Opinion fails to address how discrediting Haggood and placing the lethal caliber of weapon in his hand would have affected the outcome of trial.

Per *Strickland v. Washington*, 466 U.S. 668, 686-687, 691-692 (1984), the purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Here, Petitioner submits that he has established that there is a reasonable probability but for counsel's errors the outcome of the proceeding would have been different. As explained in *Strickland*, a reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.* at 694-695. When the State's theory was that Petitioner was responsible for the

weapon and shot that killed Lawton and the expert and lay witness testimony established otherwise, Petitioner submits that the outcome of his trial is not reliable.

Additionally, this Court's decision fails to address how the record establishes equivocal evidence of accomplice liability, which is necessary to instruct the jury on the same. *See Barber v. State*, 393 S.C. 232, 712 S.E.2d 436 (2011). In line with recent decisions by the South Carolina Supreme Court and this Court, Petitioner submits that the testimony regarding the unknown shooter of the 9mm weapon, the ongoing investigation and the shots fired from the road from individual(s) he was shown to have no connection with, call into question the accomplice liability instruction. *State v. Washington*, 431 S.C. 394, 848 S.E.2d 770 (2020) (Finding that an alternate theory of liability may not be charged to a jury merely on the theory that the jury may believe some of the evidence and disbelieve other evidence.); *See also State v. Johnson*, Op. No. 5950 (S.C. Ct. App. filed Nov. 9, 2022), *cert granted*, S.C. Sup. Ct. Order dated April 20, 2023, *State v. Campbell,* 435 S.C. 528, 868 S.E.2d 414 (S.C. Ct. App. 2021), *cert granted*, S.C. Sup. Ct. Order dated September 8, 2022. Additionally, Haggood's testimony that Petitioner instructed him to not use his weapon, cuts against the evidence of accomplice liability.[2]

Turning to the matter of Mr. Gidron, Petitioner urges this Court to reconsider the finding that "Evidence supports the PCR court's decision that trial counsel did not ineffectively utilize Gidron." In making this finding, it appears this Court places the blame for Gidron's "subpar" performance on the stand on Gidron not trial counsel. Petitioner submits that the record supports a finding that trial counsel was ineffective.

[2] As argued above, Petitioner also submits that the State's theory of the case does not support a finding of equivocal evidence to support a charge of accomplice liability as to all 3 victims.

Specifically, it appears that this Court has overlooked counsel's own admission regarding his handling of Gidron. During cross-examination by the State at the evidentiary hearing, the following testimony was elicited from trial counsel regarding his post-trial conversation with a juror regarding Gidron:

> Question: Okay. As a result of those conversations, do you think there's something you could've done differently with Mr. Gidron to have secured a different verdict?
>
> Answer: I do. I – I – if I could have found him earlier and had additional time to prep him, even going as far as – as having him go into either a courtroom or mock courtroom, to have a better understanding of what it was going to be like for him, I think he may have presented himself better.

App. p. 1040, lns. 8-15. Counsel also testified that Gidron was his most important witness and he came off in cloud of negativity that did not present well to the jury or come off as believable.

Petitioner submits that the testimony offered by Gidron refuted the State's theory of the case and would have directly affected the outcome of trial if Gidron had been properly utilized. Additionally, counsel's own admission regarding Gidron amounts to a showing of prejudice. *Pauling v. State*, 331 S.C. 606 (1998) (Finding that counsel's testimony that a triage nurse's notes were substantive evidence that a sexual battery did not occur and was evidence to impeach victim's credibility was sufficient to show prejudice.), *Martinez v. State*, 304 S.C. 39 (1991) (Finding prejudice based upon counsel's own admission that the witness testimony "may have made the difference in obtaining an acquittal."). Even though this Court's Opinion does not directly address the matter of prejudice, Petitioner urges this Court to find that he has established both deficiency and prejudice resulting from counsel's utilization of Gidron.

In summary, Petitioner urges this Court to reconsider the standing Opinion and not affirm the unreliable result of his trial that was investigated by a first-time lead homicide investigator and defended by an attorney that was admittedly unprepared to properly handle his first General Sessions trial. Trial counsel considered Haggood the "elephant in the room" that saved an awful case for the State. App. pp. 998, 1037, 1049-1050. Per counsel, finding out what Haggood intended to say changed the face of the case, opened up accomplice liability and presented a major impediment to the planned chaotic crime scene defense – a defense the lower court's Order finds counsel was effective in presenting via his expert Kelly Fite. Counsel knew about the "elephant," but he did not change course nor did he effectively utilize Tony Gidron or his expert Kelly Fite to go on the attack. Instead, he used an expert who became an embarrassment that he did not want to address in closing and who the State mocked for coming so far to confirm their expert and bolster their case.

Additionally, Gidron was the most important witness per counsel, and he came off as hostile and his poor performance due to lack of preparation was confirmed by counsel with a juror. Simply put counsel should have properly utilized an expert and his lay witness (Gidron) to go on the attack. He failed to attack Haggood's credibility with the ballistics testimony and evidence that attributed the fatal caliber to him, and he failed to effectively attack the State's theory of the case that Petitioner fired the fatal shot.

Counsel testified that he believed Gidron, and he agreed that the fatal shot did not come from .45 attributed to Petitioner. App. p. 1006, 1017. Counsel even prepared an exhibit for closing to show that Haggood was the shooter in the case, but he nor his exhibits were not properly prepared. App. p. 1042. Petitioner urges this Court to

reconsider the Opinion and find that counsel did not provide effective representation and the outcome of the trial was not a result that justifies reliance. Therefore, a new trial must be granted.

CONCLUSION

In consideration of the arguments contained in the record and herein, Petitioner respectfully requests that this Court reverse the Opinion filed on June 21, 2023 and grant a new trial.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

This 29 day of June 2023.

RECEIVED
Jun 29 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
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Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2019-000528

David J. Benjamin, Petitioner,

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State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I served this 29th day of June 2023 a copy of the Petition for Rehearing and for Rehearing *En Banc* on T. Cruise Mitchell, Assistant Attorney General, by sending via email pursuant to Rule 262, SCACR, to his following registered email address: Cruisemitchell@scag.gov.

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June 29, 2023

Gmail **Tricia Blanchette <blanchettelaw@gmail.com>**

David Benjamin v. State

1 message

Tricia Blanchette <blanchettelaw@gmail.com> Thu, Jun 29, 2023 at 3:14 PM
To: Cruise Mitchell <cruisemitchell@scag.gov>

Cruise,

I am attaching the Petition for Rehearing that I will be submitting for e-filing following the sending of this email. I intend to provide the Court of Appeals this email as proof of service. I will copy you on my email to the Court of Appeals.

Please let me know if you have any issue with opening the attachment. I will be out of the office from June 30th-July 5th.

Best,

Tricia Blanchette

--
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LAW OFFICE OF
TRICIA A. BLANCHETTE

RECEIVED
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SC Court of Appeals

June 29, 2023
VIA E-FILING

The Honorable Jenny Kitchings
Clerk, South Carolnia Court of Appeals
1220 Senate Street
Columbia, South Carolina 29211

RE: David Jamar Benjamin v. State; App. Case No. 2019-000528

Dear Ms. Kitchings:

For filing in the above referenced appeal, I am submitting a Petition for Rehearing and for Rehearing En Banc, with Certificate of Service and email proof of service.

I appreciate your assistance with this matter. Please let me know if anything further is needed. I will be out of the office with limited access to phone messages and email from June 30th – July 5th.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Cruise Mitchell, Assistant Attorney General (via email)
David Benjamin

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