THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Sep 12 2023

S.C. SUPREME COURT

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

App. Case No. 2019-000528
Opinion No. 2023-UP-243 (S.C. Ct. App. filed June 21, 2023,
withdrawn and refiled August 16, 2023)

David J. Benjamin, Petitioner,

vs.

State of South Carolina, Respondent.

Petition for Writ of Certiorari

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

Other Counsel of Record:

Alan Wilson
Attorney General

T. Cruise Mitchell
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorneys for Respondent

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies, pursuant to Rule 242(d)(1), SCACR, that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 16, 2023.

ISSUE PRESENTED

I. Did the Court of Appeals improperly deny relief when counsel failed to properly utilize a lay witness and expert at trial amounting to prejudicial deficiency in the presentation and preparation of the defense.

   A. Did the Court of Appeals improperly agree with the lower court that even if trial counsel ineffectively utilized the expert, any deficiency did not prejudice Petitioner.

   B. Did the Court of Appeals improperly find that the record supports the lower court's finding that counsel did not ineffectively utilize the lay witness.

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.

After a timely Notice of Appeal was filed, Wendy Keefer, Esquire, James Lee Goldsmith, Esquire, and Robert L. Sirianni, Jr., Esquire, perfected the appeal. 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.

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, a Petition for Writ of Certiorari and Appendices were filed. On December 3, 2019, Respondent filed a 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. *Benjamin v. State*, Op. No. 2023-UP-243 (S.C. Ct. App. filed June 21, 2023). On June 29, 2023, a Petition for Rehearing and Petition for Rehearing *En Banc* was filed. On August 16, 2023, the South Carolina Court of Appeals provided written notice that the petition for rehearing *en banc* was distributed and rejected. The South Carolina Court of Appeals also issued an Order of the panel denying the petition for rehearing and withdrew, substituted and refiled the Opinion filed June 21, 2023. *Benjamin v. State*, Op. No. 2023-UP-243 (S.C. Ct. App. filed August 16, 2023).

ARGUMENT

I. The Court of Appeals improperly denied relief when counsel failed to properly utilize a lay witness and expert at trial amounting to prejudicial deficiency in the presentation and preparation of the defense.

HOW THE ISSUE AROSE BELOW

Following the grant of certiorari, Petitioner argued: 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. S.C. App. p. 59. By way of their Opinion, the Court of Appeals found that trial counsel was not ineffective in his utilization of the lay witness and even if counsel was ineffective in his use of the expert, any deficiency did not amount to prejudice. S.C. App. pp. 181-183.

As the record reflects, Petitioner was called to trial in front of the Honorable Diane S. Goodstein and a jury on March 4, 2013 on charges of attempted murder as to James Hampton

(Hampton) and Shawn DeFreitas (DeFreitas) and murder as to Dominique Lawton (victim). During the course of the trial, the State called a series of lay and law enforcement witnesses to address the events that took place during the late-night hours of September 17, 2011 into the early morning hours of September 18, 2011 at the Piggy Park in Calhoun County.

The State's witnesses included Petitioner's co-defendant Joshua Haggood (Haggood), and he provided his version of the events in question. App. pp. 259-314. During his testimony, Haggood admitted to having a .40 caliber weapon and placed a .32 caliber weapon in the possession of co-defendant Kevin Frazier (Frazier) and a .45 caliber weapon in the possession of Petitioner. App. pp. 264-267, 272. Haggood attributed the initial agitation inside the club to Petitioner and explained that it was Petitioner's idea for the 3 to go out and get their weapons and return to the club. App. pp. 275-277. He did not describe any further conflict inside the club, but he provided details of how victim discharged his pistol as everyone was leaving the club. App. pp. 278-281. He explained that everything became chaotic and Frazier shot his gun in the air and said "I'm just trying to get home. I am just trying to get home. I don't want any trouble." App. p. 282, lns. 2-10. He testified that when he went to pull his gun, Petitioner touched his shoulder and said: "[J]ust fall back. Chill out." App. p. 282, lns. 11-16. He recalled being ushered towards the car and victim and his group going the opposite way. App. p. 283.

After getting to their car, he placed Petitioner three steps in front of him as Petitioner shot twice "at that car," while he was trying to get in. App. p. 285, lns. 2-9. He recalled people shooting from "different directions," seeing someone shooting from behind "the van," and shooting back with his .40 caliber pistol. App. p. 286, ln. 22 – p. 287, ln. 5. He recalled shooting 3 to 4 times in the direction of the van and not knowing if he shot anyone. He recalled Frazier

shooting 2 to 3 times more in the air before they got in the car and pulled out of the parking lot. App. pp. 288-289.

As his direct continued, he recalled conversations in the car before dropping Frazier off at another club and bringing Petitioner to his mother's home. App. p. 290-292. Specifically, he attributed a statement to Petitioner about wasting bullets in response to Frazier shooting in the air. App. p. 291, ln. 23 – p. 292, ln. 1. He recounted returning to North Carolina and bringing the pistol back to its owner, who pawned it the next day. App. pp. 293-294.

Regarding his interaction with law enforcement, he admitted that he initially told law enforcement that none of them had guns. App. p. 298. He addressed the multiple versions of events he gave culminating in a fourth statement whereby he admitted shooting. App. pp. 298-300. He agreed that after going through the discovery, he realized that he had hit someone on the other side of the van. App. pp. 300-301.

On cross-examination, counsel asked Haggood about his military service, and he confirmed that he received marksmanship awards for being a sharpshooter and shot expert. App. pp. 302-303. He also confirmed that he had been in combat before and agreed that there was "hostile fire" when he walked out of the club and "shots were coming from all directions." App. p. 303, lns. 6-16.

Haggood testified that he did not see the incident inside the club, but victim was the aggressor outside of the club. App. p. 304. He described victim's actions outside the club as an unprovoked "ambush type thing." App. p. 304, lns. 15-20. He recalled Frazier being very upset, even irate, as they were trying to get to the car. App. p. 305, lns. 15-21. He recalled hearing "a lot of shots" before Frazier fired, and he agreed that Petitioner was shooting in an attempt to lay

cover fire to get to a safe point. App. p. 306, ln. 18 – p. 307, ln. 10. He testified that he did not see Petitioner shoot anyone nor did Petitioner say he shot anyone. App. p. 307, lns. 11-14.

Referring to his direct testimony, defense counsel asked Haggood about the lies he told along the way. App. p. 307, lns. 15-17. Counsel also asked: "You finally went in and told them and brokered a deal for your testimony, is that correct?".[1] App. p. 307, lns. 18-19. Haggood responded: "For the testimony here, yes." App. p. 307, ln. 20.

On redirect, Haggood testified that Petitioner's nickname from high school was "Killa Season" because he did not lose fights. App. pp. 308-309. In response to the State's questions, he explained that Petitioner was not a hot tempered guy. App. p. 309. The State further questioned him about where the shots were coming from and exactly how he saw Petitioner shoot 2 shots. App. pp. 310-312. On recross, Haggood explained that Petitioner did not get his nickname from killing people but it was a flattering nickname. App. p. 314.

After the State rested and the directed verdict motion was denied, the defense called Kelly Fite (Fite) and Tony Gidron (Gidron). App. pp. 542-582. Fite was called to the stand and qualified in the area of "firearms examination and homicide crime scene investigation and crime scene reconstruction." App. p. 544, lns. 1-7. Thereafter, Fite explained briefly how DNA is collected from ballistics evidence and addressed the circumference of a .45 caliber round, without reference to it being the caliber of the weapon attributed to Petitioner. App. pp. 544-6.

On his lengthier cross-examination, Fite was questioned about reviewing "some of the discovery," and he agreed with the Solicitor that you need to review "everything you can get."

[1] On direct, Haggood testified that he had entered a guilty plea on the Friday before trial to 1 count of assault and battery of a high and aggravated nature involving the shooting of Hampton. App. pp. 262-263. He agreed that he was looking at up to 20 years on that charge, but part of the plea was that the State was going to recommend no more than 10 years in exchange for his testimony. App. p. 263. He also testified that his sentence was to run concurrent with his sentence in Lexington County for aggravated assault. App. pp. 262-263.

App. p. 547, lns. 9-20. He was provided the DNA report and admitted he had not reviewed the DNA results. App. p. 548. He further admitted that the report actually showed that the ballistics evidence had been tested for DNA, as he testified should have been done. App. pp. 548-9.

On redirect, he was briefly asked about the entry and exit impact of a .45 caliber round. App. pp. 552-3. On recross, he stated: "...you don't expect a large caliber hollow point bullet to penetrate a person's head, but it does happen." App. p. 554, lns. 2-4.

Following Fite, Gidron was called to the stand. He explained that he was close friends with the victim's brother and the victim's nickname was "killa." App. p. 557. He also acknowledged that he had known Petitioner since sixth grade. App. p. 557.

He provided information about the club and the type of situations/people that frequent it. App. pp. 560-61. He also provided his account of the night in question, which included details regarding his interaction with Petitioner and victim, his knowledge that victim had a gun, and his attempt to get Petitioner and his friends out of the club safely and to their car. App. pp. 558-65. He explained how the car was stuck and the shooting he had witnessed. App. pp. 562-65. He detailed how he was trying to get the car out when the gunfire went off "from here" and he was 99% sure he saw victim get hit. App. p. 562, ln. 10 – p. 563, ln. 6. He was asked if he saw Petitioner shoot victim, and he responded no and explained what he saw Petitioner doing. App. p. 563, lns. 7-19. He explained his vantage point and how he was able to see both Petitioner and victim when victim was shot. App. p. 564, lns. 6-18. He stated that he did not see Petitioner point a gun at victim and that he saw shots from the road. App. p. 564.

He recalled when law enforcement arrived at the scene, and he provided his opinion that the scene was "handled poorly" by law enforcement. App. p. 566, lns. 5-9. When asked if he spoke with investigators, he recalled speaking with "someone." App. p. 566, lns. 17-19. He said

that he did not want to testify at trial, but he had to because he has a conscious and "it's been bothering me since it happened." App. pp. 566, ln. 20 – p. 567, ln. 11. He explained that he is "ninety-nine percent sure" Petitioner did not commit a crime. App. p. 567, lns. 6-8.

By way of an Amendment to his PCR Application, Petitioner alleged: 1) 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; and 2) Ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense. As was argued by Petitioner via proposed Order and filed motion, the issues were so interrelated it was necessary to jointly address the allegations. As a result, Petitioner alleged that the lower court erred in failing to find that the proper utilization of Mr. Gidron and an expert was absent from Petitioner's trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense.

At the evidentiary hearing, Robert Tressel (Tressel) was qualified as an expert in the area of homicide investigation and crime scene reconstruction. App. p. 924. He detailed his familiarity over the last forty years with Fite, and he explained how he became involved in Petitioner's PCR case at the recommendation of Fite, who was retired. App. pp. 924-5. He acknowledged that he had reviewed Fite's testimony, along with all the discovery files. App. pp. 925-6. He detailed going to the South Carolina Court of Appeals, Calhoun County Clerk of Court's Office and Calhoun County Sheriff's Department to review evidence and exhibits. He explained that he wanted to see the diagram utilized at trial, but he found it "not very helpful." App. p. 927, lns. 7-17, p. 949. He also explained there was a "somewhat better" diagram in the discovery, but it was copied in black and white despite indicating it was color coded. App. pp.

927-28. While at the Sheriff's Department a color copy was requested, but it was not produced. App. p. 928.

Tressel recounted his interaction with Gidron, which included going to the scene. App. pp. 928-932. He detailed how Gidron walked him through the scene while conveying his eyewitness account. He deemed Gidron helpful in showing him where people and vehicles were located, to include Gidron explaining his vantage point. App. pp. 929-30, 971. He recalled Gidron being adamant that "the gunshots that was fired when Mr. Lawton fell came from the roadway," not from the direction of Petitioner. App. p. 930. He agreed that he would have been willing to assist the defense prior to trial, and he opined that it would have been vital to meet with Gidron at the scene. App. p. 931.

At to his expert work and findings, he explained that he was unable to produce a diagram or reconstruct the scene since there were no measurements or proper documentation taken at the scene during the original investigation. App. pp. 933, 937, 963, 970-71. He opined that the investigation fell "well below the standards for a murder investigation." App. p. 934, lns. 17-20. When asked, he explained how he reached that conclusion:

> Well, we look at the whole totality of the incident. The crime scene, of course, is chaotic. It's outside with a multitude of people running, screaming, vehicles trying to leave. First officers who were on the scene failed to secure the crime scene. They failed to keep people from leaving. They failed to keep witnesses on the scene after they had arrived.

App. p. 934, ln. 22 – p. 936, ln. 3. He also explained that it is fundamental to try and locate and/or interview as many witnesses as possible, which was not done here. App. p. 936. He further explained how the numbering of the evidence of the crime scene resulted in duplication and confusion. App. p. 936-937.

Despite the below standard investigation, he was able to determine that there were at least 5 firearms used at the scene, but he was unable to determine from the investigation which was fired first. App. pp. 933, 937-938. He was also able to ascertain the caliber of the weapons that left behind ballistic evidence and/or were recovered. App. pp. 938-939. After taking measurements at the scene and reviewing the discovery, he attempted to determine which of the weapons could have caused the injury to victim. App. p. 940. He detailed how he reached his expert opinion that of the weapons known to be at the scene the .40 caliber weapon most likely fired the fatal shot.[2] He explained:

> So if I had to pick a weapon fired at a distance of in excess of 60 feet that could go through the hardest bone in the body and then exit the second hardest bone at the back of the head, it would be the .40 caliber. I don't believe the .45 would penetrate all the way through.

App. p. 941, lns. 1-6. He specifically opined that the .45 caliber weapon attributed to Petitioner would not have caused the fatal injury to victim. App. p. 941, p. 953, lns. 9-18. Regarding Haggood's testimony that Petitioner fired 2 shots while running, Tressell opined that no forensic evidence substantiated or corroborated Haggood's testimony. App. pp. 953-54.

Finally, Tressel addressed the trial testimony of Fite. Having already explained that he had worked with Fite on cases during his career, he acknowledged that Fite was qualified at the trial in a very similar capacity as he was at the evidentiary hearing. App. p. 945. Tressel addressed the testimony offered by Fite on touch DNA, Fite's concession that he had not reviewed the DNA report prior to cross-examination, and Fite's concession that the DNA testing he proposed was completed in the case. App. pp. 544-45, 548-49, 945-46. When asked about Fite's testimony on cross and redirect that touched on the caliber of bullet that could penetrate

[2] Tressel also discussed his findings regarding the 9mm projectiles found at the scene. App. p. 944.

the victim's skull and Fite's concession that a .45 caliber could penetrate a skull, he agreed that Fite was touching on the matter that he addressed regarding the caliber of the gun likely to cause the fatal injury. App. pp. 947-48. He raised concern with Fite's testimony about the .45 caliber penetrating the victim's skull since he did not address the proper distance and opined it was "very unlikely" at the distance involved. App. p. 948, lns. 4-21.

When Peter Skidmore took the stand, he detailed his background and work history as a licensed investigator in North and South Carolina over the last twenty-five years. App. 973. He recounted being contacted by counsel and being retained to work on Petitioner's case. App. p. 974. He detailed his work on the case, which included reviewing the evidence at the South Carolina Court of Appeals, Calhoun County Clerk and Sheriff's Office, working with Tressel, locating and interviewing Gidron and visiting the scene with PCR counsel, Tressel and Gidron. App. pp. 974, 978-9.

Regarding the discovery, he noted that there was not a thorough investigation into the witnesses at the scene. App. p. 975. He explained that there were 7 witnesses listed in discovery but no corresponding witness statements. App. p. 975. Beyond Gidron and Haggood, he explained that 7 years later he was unable to locate any additional eyewitnesses listed in the discovery since the witnesses were now out of state or deceased. App. pp. 975-78. He addressed how Gidron would have been an asset prior to trial in locating additional witnesses. App. pp. 977-78. Specifically, he testified that Gidron would have essential to an investigation and explained: "It would have been a huge help. It would've allowed me to maybe possibly track down some other folks that were there that night. He is entrenched in the community. He's well-respected in the community. And it would've been very helpful." App. p. 977, lns. 2-11. After the State unsuccessfully entered an objection regarding his testimony that Gidron's eyewitness

account could have opened the door to a third-party guilt investigation, he further explained how going to the scene with Gidron would have aided in the investigation:

> Like I said, he – he knew people at the club. He knew how people interacted with one another. That's why he was trying to diffuse the situation, based on what he told me, and felt that something was going to happen. And he probably, seven years ago, had he been talked to and interviewed several times, would've been able to give us more names and locations of where these people were.

App. p. 978, ln. 20 – p. 979, ln. 3. He explained his understanding of Gidron's negative experience with trial counsel's investigator. App. pp. 988-989. He further explained how he approached Gidron and advised counsel on how to as well. App. pp. 976, 988-89.

He agreed with Tressel that the diagram used at trial was inaccurate, and he explained how he could have been utilized to properly depict the scene as it appeared at the time of trial. App. pp. 976, 981, 987. He also recalled attending the meeting at the Sheriff's Office where a color diagram was requested and not provided with the explanation that the retired lead investigator had files in his garage, which greatly concerned him. App. p. 980.

When Gidron took the stand, he explained that he was present on the night in question and testified at trial. He acknowledged his testimony that he was very good friends with the victim's brother and friends with Petitioner. App. p. 882. He explained that he was closer to the victim's brother than Petitioner. App. p. 913. Turning to the night in question, he described the scene as chaotic, and reiterated his trial testimony that the investigation was poorly handled.

Regarding his interaction with counsel or an investigator prior to trial, he recalled a guy popping up on his doorstep and then taking the stand. App. p. 881. He recalled going to the scene with a guy he did not know before trial. App. pp. 881-83. He acknowledged that he went to the scene with counsel, Skidmore and Tressel prior to the evidentiary hearing and walked them through the scene. App. pp. 886, 901. When shown the diagram utilized at trial, he indicated that

he was not given any visual aids at trial, and he attempted to explain the scene and the inaccuracies in the trial diagram. App. pp. 887-890. When trying to utilize the diagram from trial, he concluded: "I just can't get it right." App. p. 899. He explained that he was nervous at trial and clarified what he meant when he testified that victim appeared on a hook, and he added that he saw victim fall back with a gun in his hand. App. pp. 891-93.

Regarding his trial testimony, he affirmed it in relevant part. App. pp. 882-883. He reiterated that he did not see Petitioner with a gun, and he saw Petitioner keeping to himself. App. pp. 882-83. When asked about each section of his trial testimony, he further explained his eyewitness account from start to finish. App. pp. 882-897. He explained based upon his location and proximity to the victim he was scared when he got "hit" since he was "right in the line of that." App. p. 893, ln. 22 – p. 894, ln. 1. Thereafter, he provided the following testimony with reference to the diagram:

Question:	Based upon your present-sense impression that night, did it appear to you that the shots were coming from the club area where Mr. Benjamin's car were – was at or from the road?
Answer:	Talking about when he got hit?
Question:	Yes, when he got hit.
Answer:	It was coming from the road. Because the way he – he kicked back, he never even had a chance to even turn toward – that car was, like, to his far – to our far right. I –
Question:	Okay.
Answer:	--- could see him. But he – he never had a chance to even look at them, because he was too busy focusing, I guess, trying to get the gun right.
Question:	And what vehicle did you see on the road where you say gunfire coming from?

Answer: Right behind that tree. It was a person behind that tree. And it was blue – a blue Malibu at the top of the road. And a little farther up on the side, it was a blue Honda. But I knew it was a – a blue – even though it was dark, I knew that was a blue Malibu. It wasn't – it was only, like, one or tow of those cars down there.

Question: Okay. And based upon your perception that night, it appeared to you that that's where the gunfire was coming when the victim was struck?

Answer: Yes, ma'am. The way it was, like, leaning – after it came out that car, but it was a person standing right there in, like, the car here – the person was here in the – right behind the tree. But that spark came from right there.

App. p. 894, ln. 13- p. 895, ln. 17.

On cross-examination, he agreed that he testified that the victim had a gun in his waistband, but he explained that he did not testify about the gun in victim's hand since he was not directly asked, was nervous, and he had not gone through his eyewitness account with counsel before trial. App. pp. 904-905. When asked on cross-examination about whether Petitioner shot victim, he responded: "I know he didn't." App. p. 910, ln. 24 – p. 911, ln. 8. He further testified that from his vantage point no one at the vehicle with Petitioner could have shot victim. App. p. 911, lns. 4-8. He explained that the gunfire that killed victim came from a person standing behind a tree near the road. App. pp. 894-895.

When called to the stand at the evidentiary hearing, Nicholas Thomas, Esquire, (Thomas) was asked about his utilization of Fite as an expert. He explained that he received a referral from several lawyers and reached out to Fite. App. pp. 1003-4. He copied and mailed a hard copy of the discovery to Fite, which he admitted contradicted Fite's trial testimony. App. pp. 1004-5. He exchanged a couple of emails with Fite about the theory he expected the State to pursue, but they did not discuss anything in great detail. App. pp. 1004-5.

When asked about his decision to utilize Fite at trial, he recalled having reservations about using Fite. App. p. 1006. He further explained:

> And if I – if I had a regret, I don't think I would've used Mr. Fite, especially knowing how poorly his testimony went in my case. And I know he's – he's heralded by all, did such a great job. I – I don't know if it's because he was close to his retirement at that point. I know he was coming from a case in Fulton County.
>
> You know, I would've much preferred the witness that was presented earlier today.

App. p. 1007, lns. 3-10. Thomas also remembered initially planning to utilize Fite for crime scene reconstruction, but Fite did not go to the scene or speak with any witnesses, including Gidron. App. pp. 1008-9. When asked about Fite's answer at trial that he had not been asked to review the discovery or reconstruct the crime scene, Thomas responded that he wished he would have "asked him in – in precise detail what I wanted him to do." App. p. 551, p. 1011, ln. 20 – p. 1012, ln. 17. Regarding strategy in closing due to Fite's testimony, he remembered barely wanting to "touch on him" since his testimony was not beneficial. App. p. 1008, lns. 7-10.

While discussing Fite, Thomas explained it was difficult to secure Gidron and the service of his subpoena resulted in an altercation with his investigator. App. p. 1009. He went to the scene himself, but he never went with Gidron. He admitted that he would have wanted Gidron to interact with an investigator and expert as was done prior to the evidentiary hearing. App. p. 1013. From the time he got notice of trial, the best he remembered being able to do was speak with Gidron on the phone twice on the Friday right before trial. App. p. 1009.

On cross-examination, Thomas was asked why he thought Gidron was not a good witness at trial. App. p. 1038, lns. 7-8. He responded that Gidron's nervousness on the stand came across as hostility. App. p. 1038, lns. 7-17. He noted the contributing factors he identified were Gidron's negative interaction with his investigator and his own failure to communicate to Gidron

that he would be needed in court to testify. App. p. 1038. He stated: "It's just unfortunate that his persona on the stand came off – in a cloud of negativity." App. p. 1039, lns. 8-9. After being interrupted, he further stated: "Because he was my most important witness. And to me, he was more important than Kelly Fite." App. p. 1039, lns. 11-12. He also explained that based upon a conversation with a juror after trial, he realized he should have prepared with Gidron better and located him earlier. App. p. 1040.

Regarding Gidron's trial and evidentiary hearing testimony, Thomas concluded that he did not question his veracity and found him very believable. App. p. 1010. Yet, he opined that the jury did not find him believable. App. p. 1048, lns. 8-15. When asked about Gidron's evidentiary hearing testimony, he concluded: "His presentation today was much more on-point. He was calm, cool, and collected today, even though he did – did describe being nervous. I wish he would've presented himself in the same fashion at trial." App. p. 1011, lns. 9-12.

Regarding the diagram and the scene, he acknowledged that the diagram was "poorly drawn," but he explained that he had his own pictures of the scene that he wanted on poster board for closing argument. App. pp. 1017-18. Unfortunately, he did not have enough time prior to closing argument to get them completed. App. pp. 1017-18. He admitted it was his first murder trial, and he learned that you need to be prepared and not expect a break before closing. App. pp. 1017-19. He readily admitted that "it most certainly hurt my closing." App. p. 1019, lns. 20-21. On cross, he also agreed that his unfinished visual aid was created to demonstrate that Haggood was the shooter. App. p. 1042.

When Petitioner took the stand, he explained that he knew about the plan to utilize Fite. App. pp. 1059-60. He understood part of the defense strategy was to attack the poor investigation and chaotic crime scene. App. pp. 1060-61. When asked about the work and testimony of

Tressel, he was adamant that he would have wanted an expert utilized in his capacity prior to and at trial because Tressel's testimony helped support the defense. App. pp. 1060-62.

Regarding Gidron, Petitioner explained that he provided Gidron's name to counsel prior to trial. App. p. 1063. When asked if he was aware of the hostility counsel described with Gidron, he recalled counsel telling him that counsel's investigator had a "little altercation" with Gidron. App. p. 1063, lns. 12-20. He agreed that he would have wanted Gidron utilized at trial in the capacity he was prior to and at the evidentiary hearing. App. pp. 1063-64.

ARGUMENT FOR REVERSAL

I. The Court of Appeals improperly denied relief when counsel failed to properly utilize a lay witness and expert at trial amounting to prejudicial deficiency in the presentation and preparation of the defense.

Highly relevant to the consideration of the prior rulings and need for reversal is the matter of the ballistics evidence and testimony, which is also discussed in the Brief of Petitioner and above. From the record it appears that a .40 caliber weapon was attributed to Haggood, a .45 caliber weapon was attributed to Petitioner, a .32 caliber weapon was attributed to Frazier, a .380 caliber weapon was attributed to 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, Defreitas was hit by a shot and looked back and saw Petitioner shooting towards the opposite side of club, and Hampton was shot after seeing victim get shot and throwing a post in the direction of Petitioner. At the evidentiary hearing, Tressel 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. Haggood's testimony is addressed in detail above. Notably absent from the Opinion of the Court of Appeals 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: "[J]ust 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 the Court of Appeals failed to properly consider all of the testimony offered by Haggood, to include his testimony that Petitioner told him not to use his weapon and his testimony regarding Frazier and their efforts to get to their vehicle to get home, which was confirmed by other State witnesses.

Turning to Hampton, he 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.

Regarding Defreitas, he 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 offered 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

To properly consider Petitioner's argument for reversal, 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 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.

A. The Court of Appeals improperly agreed with the lower court that even if trial counsel ineffectively utilized the expert, any deficiency did not prejudice Petitioner.

In finding that prejudice has not been established despite the ineffective utilization of expert Kelly Fite, the Court of Appeals has completely ignored that the State's theory regarding the killing of Lawton was not based upon accomplice liability. The Court of Appeals also misapprehended the importance of 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 not the .45 caliber attributed to Petitioner. 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 question 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 Tressel's testimony that Benjamin did not fire the fatal shot, this does not discredit the State's theory of the case." S.C. App. p. 183. Clearly, 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 the accomplice liability theory, the lower court and now the Court of Appeals has misunderstood the State's theory of the case and utilization of accomplice liability and opens the door to unnecessary confusion in the interpretation of standing precedent involving the matter of accomplice liability.

In erroneously finding no prejudice due to accomplice liability, the Court of Appeals has also overlooked the importance of discrediting Haggood's testimony via the testimony of a properly utilized expert. At the evidentiary hearing, 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, trial counsel 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. The standing 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, the standing Opinion breaks from recent precedent in that it 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.[3] Therefore, Petitioner urges this Court to grant certiorari so this matter of accomplice liability and prejudice can be properly addressed.

B. The Court of Appeals improperly found that the record supports the lower court's finding that counsel did not ineffectively utilize the lay witness.

Turning to the matter of Mr. Gidron, Petitioner urges this Court to address the finding that "Evidence supports the PCR court's decision that trial counsel did not ineffectively utilize Gidron." S. C. App. p. 182. In making this finding, it appears the Court of Appeals 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 and letting the Opinion stand will be in conflict with the well established standard of review. *See Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984).

Specifically, it appears the Court of Appeals has completely ignored counsel's own admissions 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.

[3] 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.

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. In light of the record, the finding by the Court of Appeals that counsel was not deficient in his preparation and presentation of Gidron should not stand.

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 the Court of Appeals did 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.

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court to grant certiorari, allow for further argument and/or reverse the denial of post conviction relief that was affirmed by the South Carolina Court of Appeals.

Respectfully submitted,

Tricia A. Blanchette
Bar. No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

September 12, 2023