

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

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withdrawn and refiled August 16, 2023)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.

APPENDIX

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WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. 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.
- II. Whether 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. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016).

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. Smalls v. State, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

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. He 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. 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 Tressell, 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 Motion, pursuant to Rule 59, SCRPC, on April 14, 2019. An Order denying Petitioner's motion was issued on February 26, 2019, from which this appeal follows.

ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have 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.

- I. 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.

- A. Summary of the Evidentiary Hearing Testimony

1. Robert Tressell

At the evidentiary hearing, Robert Tressell 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 Kelly Fite, the defense expert at trial, and he explained that he became involved in Petitioner's PCR case at the recommendation of Mr. Fite, who is now retired. App. pp. 924-5. He acknowledged that he had reviewed Mr. 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 further 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 Calhoun County Sheriff's Department a color copy was requested, but it had not been produced prior to the evidentiary hearing. App. p. 928.

He recounted his interaction with Tony Gidron, defense trial witness, that included going to the scene. App. pp. 928-932. He detailed how Mr. Gidron walked him through the scene while conveying his eyewitness account. He deemed Mr. Gidron helpful in showing him where people and vehicles were located. App. pp. 929-30, 971. Mr. Gidron depicted his vantage point to him, and he recalled Mr. 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 Petitioner prior to trial, and he opined that it would have been vital to meet with Mr. Gidron at the scene prior to trial. App. p. 931.

As 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 further opined that that investigation fell "well below the standards for a murder investigation." App. p. 934, Ins. 17-20. In detail, he explained how he reached that conclusion. App. pp. 934-37, 943.

Despite the below standard investigation, he was able to determine that there were at least five firearms used at the scene, but he was unable to determine from the investigation which was fired first. App. p. 933. He was also able to ascertain the caliber of the weapons that left behind ballistic evidence and/or were recovered. App. pp. 938-39. After taking measurements at the scene and reviewing the discovery, he attempted to determine which of the weapons could have caused the injury to Mr. Lawton. 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.¹ He stated:

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, Ins. 1-6. He specifically opined that the .45 caliber weapon attributed to Petitioner by trial witness Hampton would not have caused the fatal injury to Mr. Lawton. App. p. 941, p. 953, Ins. 9-18. He further opined that Mr. Hampton's testimony was contradicted by the ballistics evidence that was recovered at the scene. App. p. 942. Regarding Mr. Haggood's testimony that Petitioner fired two shots while running, Mr. Tressell opined that no forensic evidence substantiated or corroborated Mr. Haggood's testimony. App. pp. 953-54.

Finally, Mr. Tressell addressed the trial testimony of Kelly Fite. Having already explained that he had worked with Mr. Fite on cases during his career, he acknowledged that Mr. Fite was qualified at the trial in a very similar area in which he was qualified at the evidentiary hearing. App. p. 945. Mr. Tressell addressed the testimony offered by Mr. Fite on touch DNA, Mr. Fite's concession that he had not reviewed the DNA report prior to cross examination, and Mr. Fite's concession that the testing he was proposing should have been done was actually done in the case. App. pp. 544-45, 548-49, 945-46. He acknowledged Mr. Fite's testimony on cross and redirect that touched on the caliber of bullet that could penetrate the victim's skull, and Mr. Fite's concession that a .45 caliber could penetrate a skull. App. pp. 947-48. In response, he raised concern with Mr. Fite's

¹ Mr. Tressell also discussed his findings regarding the 9mm projectiles found at the scene. App. p. 944.

testimony since he did not address the proper distance and opined it was "very unlikely" at the distance involved. App. p. 948, Ins. 4-21.

2. Peter Skidmore

When Peter Skidmore took the stand, he detailed his background and work history as a licensed investigator in North and South Carolina for twenty-five years. App. 973. He recounted being contacted by counsel and being retained to work on Petitioner's case. PCR p. 104. 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 Robert Tressell, locating and interviewing Tony Gidron and visiting the scene with Petitioner's counsel, Robert Tressell and Tony Gidron. App. pp. 974, 978-9.

Regarding the discovery, he noted that there was not a thorough investigation conducted on the witnesses at the scene. App. p. 975. He explained that there were seven witnesses listed in discovery but no corresponding witness statements. App. p. 975. Beyond Mr. Gidron and Mr. Haggood, he was unable to locate any additional eyewitnesses listed in the discovery. App. pp. 975-78. He addressed how Mr. Gidron would have been an asset prior to trial in locating additional witnesses. App. pp. 977-78.

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

He also explained how Mr. Gidron's interviews and time at the scene would have opened up the door to an investigation into a third party guilt claim involving the shot he saw coming from the road. App. pp. 977-79, 982-83. He agreed that the diagram used at

trial was inaccurate and explained how he could have been utilized to properly depict the scene as it appeared at the time of trial.² App. pp. 976, 981, 987.

3. Tony Gidron

When Tony Gidron took the stand, he explained that he was present on the night in question and testified at trial. He agreed with his trial 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 before trial and then just having to take the stand. App. p. 881. He also 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, Pete Skidmore and Robert Tressell 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.

Turning to his trial testimony, he affirmed it, and he reiterated that he did not see Petitioner with a gun and saw him keeping to himself. App. pp. 882-83. When asked, he further explained his eyewitness account from start to finish. App. pp. 882-897. He explained that he was nervous at trial and clarified what he meant when he testified that

² Mr. Skidmore also detailed 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.

victim appeared on a hook, and he added that he saw victim fall back with a gun in his hand. App. pp. 891-93.

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 before trial. App. pp. 904-905. When asked on cross-examination about whether Petitioner shot the 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.

4. Nicholas Thomas, Esquire

When called to the stand at the evidentiary hearing, Mr. Thomas was asked about his utilization of Kelly Fite as an expert. He explained that he received a referral from several lawyers and reached out to Mr. Fite. App. pp. 1003-4. He copied and mailed a hard copy of the discovery to Mr. Fite, which he admitted contradicted Mr. Fite's trial testimony. App. pp. 1004-5. He exchanged a couple of emails with Mr. 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 Mr. Fite at trial, he recalled having reservations about using Mr. 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. 3-10.³

Regarding his closing, he remembered barely wanting to “touch on him” since his testimony was not beneficial. App. p. 1008, lns. 7-10. He also remembered initially planning to utilize him for crime scene reconstruction, but he did not go to the scene or speak with any witnesses, including Mr. Gidron. App. pp. 1008-9. When asked about Mr. Fite’s answer at trial that he had not been asked to review the discovery or reconstruct the crime scene, Mr. 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.

While discussing Kelly Fite, Mr. Thomas explained it was difficult to secure Mr. 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 Mr. Gidron. He admitted that he would have wanted Mr. 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 Mr. Gidron on the phone twice on the Friday before trial. App. p. 1009.

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

³ When asked about his closing argument that Mr. Haggood was a liar, he responded that it would have been helpful to have an expert testify that it was more likely that the .45 that Mr. Haggood admitted shooting caused the fatal injury to the victim. App. p. 1013, lns. 5-14.

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 Mr. Gidron better and located him earlier. App. p. 1040.

Regarding Mr. Gidron's trial and evidentiary hearing testimony, Mr. Thomas concluded that he had no reason to 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 Mr. 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.

5. David Benjamin (Petitioner)

When Petitioner took the stand, he acknowledged that he was aware that counsel was utilizing the expert services of Kelly Fite to address the investigation, crime scene

and ballistics. App. pp. 1059-60. He explained that he understood part of the defense strategy to be attacking the poor investigation and chaotic crime scene. App. pp. 1060-61. When asked about the work and testimony of Robert Tressell, he was adamant that he would have wanted an expert utilized in his capacity prior to and at trial because Mr. Tressell's testimony helped support his defense. App. pp. 1060-62.

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

B. Discussion

At trial, the defense called Kelly Fite and Tony Gidron. App. pp. 542-582. In summary, Kelly 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, he explained how DNA is collected from ballistics evidence and addressed the circumference of a .45 caliber round, which was the caliber of the weapon attributed to Petitioner. App. pp. 544-6.

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

the ballistics evidence had been tested for DNA, as he previously 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.

Following Kelly Fite, Tony 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 explained 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 ninety nine percent sure he saw victim get hit. App. p. 562, ln. 10 – p. 563, ln. 6. He was asked if he saw Petitioner shoot him, 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, 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, but he had to do the right thing. App. pp. 566-67.

By way of his Amendment, 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, these issues are so interrelated it is necessary to address these allegations as one. Therefore, Petitioner submits that the lower court erred in failing to find that the proper utilization of Mr. Tidron and an expert was absent from Petitioner’s trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense.

Obviously, Tony Tidron was called at trial, along with expert Kelly Fite, but trial counsel was deficient in calling Mr. Tidron without proper preparation and without the proper utilization of an expert. At the evidentiary hearing, Petitioner carried his burden and demonstrated how Mr. Tidron should have been utilized in conjunction with an expert with the qualifications of Mr. Tressell or Mr. Fite. Additionally, at trial the state exposed how Mr. Fite should have been properly utilized and turned his testimony into a glaring weakness for the defense, as was explained by counsel at the evidentiary hearing.

Even though, Mr. Tidron was called at trial, Petitioner submits the instant case is analogous to Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), wherein this Court addressed whether trial counsel was ineffective for failing to call a witness at trial. This Court reasoned as follows:

This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in

accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, S.C. at 498-99, S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809.

Here, Petitioner called Mr. Gidron to the stand and carried his burden in demonstrating how counsel was deficient in his utilization of Mr. Gidron prior to and during trial. While on the stand at the evidentiary hearing, Mr. Gidron reiterated his trial testimony, but he provided additional testimony and explanation of the scene, addressed above, that was tantamount to Petitioner's defense. Notably, he placed a gun in the victim's hand when he was shot, provided further detail of the scene and provided explicit detail of seeing the fatal shot come from the roadway at the same time he saw Petitioner without a gun in hand. He, along with trial counsel and Mr. Skidmore, addressed the way he was not properly prepared prior to trial, and counsel explained how his nervousness on the stand came across as hostility. Trial counsel said that Mr. Gidron was the most important witness and he came across in a cloud of negativity due to his encounter with counsel's investigator and lack of preparation with counsel, which was

affirmed by a juror. Counsel further explained how Mr. Gidron's demeanor and testimony was different, in a positive way, at the evidentiary hearing.

At the evidentiary hearing, Mr. Gidron also addressed his concern with the investigation, which was further explored by Mr. Skidmore and Mr. Tressell. Regarding the diagram provided to the jury, he found it to be inaccurate and struggled to utilize it to explain the scene. Mr. Tressell also explained how the diagram was not helpful but how vital it was to go to scene with Mr. Gidron. Mr. Tressell also provided his opinions, which were absent from the testimony of Mr. Fite at trial. Petitioner submits that his expert opinions would have aided the defense to the point that outcome of his trial cannot be relied upon as having produced a just result.

In McKnight v. State, 661 S.E.2d 354, 378 S.C. 33 (S.C. 2008), McKnight argued that counsel was ineffective in calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense. In granting relief, this Court addressed counsel's decision to not utilize a defense expert utilized in McKnight's first trial and to call an expert that essentially bolstered the State's theory of the case. This Court noted:

This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation." See Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (quoting Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). Although we accept counsel's assertion that she was pressed for time in preparing for the second trial, in light of counsel's familiarity with the first trial and the relative ease with which counsel could have procured favorable expert testimony at the second trial, we conclude that counsel's decision to call Dr. Conradi alone to testify at the second trial was unreasonable. See Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding ineffective assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case).

Id. at 359.

This Court further reasoned:

In our opinion, counsel's two-fold error in calling an expert witness whose testimony was known to have previously been used to bolster the State's case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available, represents counsel's inadequate preparation for trial rather than a valid trial strategy. Accordingly, we find that counsel's performance in this regard was deficient. Because we further find that this deficient performance prejudiced McKnight's case, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.

Id. at 360.

In the instant case, the record is absent of evidence of reasonable professional judgment exercised by counsel that limited his investigation and utilization of Mr. Fite. At trial, Mr. Fite told the jury that he was not provided the complete discovery and his expert testimony was rendered moot when he admitted the testing he was addressing had been attempted, as reported in discovery he had not reviewed. At the evidentiary hearing, counsel readily admitted that he did not properly communicate with Mr. Fite prior to trial, he should have asked him to go to the scene, he knew he should not have put him on the stand, and he tried to mention him as little as possible in closing argument. As a result, it is incredulous that the lower court found counsel's decision to utilize Mr. Fite in the capacity he did prior to and during trial amounts to a valid strategic decision. At the evidentiary hearing, counsel made it clear that he would have much preferred the testimony of Mr. Tressell at trial. Based upon the record and the above, Petitioner submits there is ample evidence of prejudice.

In sum, trial counsel called Kelly Fite, an expert with the qualifications who could have done the expert work Mr. Tressell conducted and Mr. Gidron at trial, but, as counsel

admitted, Mr. Fite offered regrettably poor testimony and Mr. Gidron was hostile and not believed by the jury. Mr. Fite and Mr. Gidron were Petitioner's only witnesses and counsel admittedly tried to avoid even mentioning Mr. Fite in closing, a closing for which he failed to complete his exhibits of the scene. As counsel stated, he should have had an expert at trial testify in the capacity Mr. Tressell did at the evidentiary hearing, yet somehow the lower court ignored this clear admission of ineffective assistance.

Therefore, Petitioner urges this Court to find that the proper utilization of Mr. Gidron and an expert was absent from trial, which amounts to deficiency in the presentation and preparation of the defense. As a result of this deficiency, Petitioner was clearly prejudiced and a new trial is warranted, wherein a jury could hear from a properly utilized witness and expert as was demonstrated at the evidentiary hearing. The testimony offered at the evidentiary hearing could amount to a viable defense in the eyes of a jury considering the above discussion. Mr. Tressell and Mr. Gidron's testimony regarding the caliber of the bullet and location of the shooter, in conjunction with testimony calling the investigation into question and accuracy of the testimony provided by the State, call the performance of counsel and the outcome of the trial into unavoidable question. In sum, Mr. Gidron and an expert were not properly utilized at trial and this prejudicial deficiency requires a new trial. Therefore, Petitioner has met both prongs of the Strickland analysis, and the lower court must be reversed.

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

By way of the Amendment and at the evidentiary hearing, Petitioner alleged that trial counsel was ineffective for failing to object and/or enter an exception to the inferred malice instruction. At trial, the court charged, in pertinent part, as follows:

Malice aforethought may be express or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That means either by direct evidence or by inference from the facts and the circumstances which are proved.

Expressed malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished.

For example, lying in wait for a person, or other acts of preparation going to show that the deed was within the defendant's mind would be expressed malice.

Malice may be inferred from conduct showing a total disregard for human life.

Now, we have talked about murder, the unlawful killing of another person with malice aforethought. We have talked about murder.

App. p. 683, ln. 15 – p. 684, ln. 7.

An inferred malice charge has two components, the charge detailing the circumstances from which malice can be inferred and the general permissive malice instruction. In State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), the South Carolina Supreme Court set forth a standard permissive inference charge to be used when instructing the jury on the inference of malice:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

After promulgating the standard charge, the following warning was issued: “We caution the bench, that hereafter only slight deviations from this charge will be tolerated.” Id.

In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court explained that Elmore’s first sentence constituted “[t]he standard implied malice charge” whereas the second sentence constituted “the general permissive inference instruction.” 385 S.C. at 612, 685 S.E.2d at 811, fn. 9. Since Elmore, South Carolina’s appellate courts have repeatedly instructed trial courts to give the general permissive inference charge when the standard implied malice instruction is given. See State v. Lewellyn, 281 S.C. 199, 201, 314 S.E.2d 326, 327 (1984) (“The trial bench is reminded that the proper charge on implied malice is that suggested in Elmore.”), State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 899, 802 (1985) (“The judge should make it clear to the jury that it is free to accept or reject these permissive inferences depending on its view of the evidence.”); Belcher, 385 S.C. at 612, 685 S.E.2d at 811, fn. 9 (2009) (distinguishing the standard implied malice charge from the general permissive inference charge); State v. Wilds, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) (“In a charge to the jury, the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence.”).

Here, the trial court’s charge on murder lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice: “If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.” State v. Belcher, 385 S.C. 597, 612, 685

S.E.2d 802, 810, fn. 9 (2009). While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, this Court has stated that all inferences should be accompanied by the general permissive inference instruction. See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) (“[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it”), overruled on other grounds by Belcher.

Also, in Belcher, this Court concluded that the inference of malice from the use of a deadly weapon is a “half-truth” because “[o]ther facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of [malice’s] component parts” which “include the absence of justification, excuse and mitigation.” Belcher, 385 S.C. at 609-10, 685 S.E.2d at 808. Similarly, the blanket instruction that malice can be inferred from conduct that shows a total disregard for human life conveys a half-truth because there are circumstances where an individual would act in such a way with justification, excuse or mitigation. Accordingly, the permissive inference instruction is required when the “total disregard” inference charge is given.

A trial attorney’s failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). Petitioner submits that the general permissive inference instruction should have been given during the murder charge when the trial court instructed the jury that “malice may also be inferred from conduct that shows a total disregard for human life.” App. p. 684, lns. 3-4. At the evidentiary hearing, counsel admitted he should have objected, and he added that wished he had objected to it. PCR

App. p. 121, Ins. 9-12. The record makes it clear that counsel was deficient when he did not enter an objection or exception when the trial court failed to give the complete and proper instruction.

By way of the Order of Dismissal, the lower court found that the instant case is distinguishable from Gibson since the court added the permissive inference language when charging the jury on attempted murder. App. p. 689, Ins. 3-11. In support of this finding, the court reasoned: “A jury charge is correct if, when read as a whole, it contains the correct definition and adequately covers the law. State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003). App. p. 1104. Petitioner submits that this reasoning is an error of law since the murder charge, when read as a whole omits the permissive inference language required under Elmore and Gibson. Here, the later addition under a separate charge, involving separate victims and evidence, does not cure the incomplete malice instruction given during the murder charge, which was in violation of Elmore and its progeny.⁴

Turning to the question of prejudice, the court “must decide whether the erroneous malice instruction contributed to the jury’s verdict based on all the evidence presented to the jury.” Gibson at 265, 786 S.E.2d at 265. “The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge.” Id.

At trial, the State offered testimony that established that Petitioner’s co-defendant’s shot a weapon during the “chaos,” as defined by the Solicitor. App. p. 538,

⁴ As trial counsel agreed at the evidentiary hearing, the record establishes that different evidence and argument regarding express malice was offered regarding the attempted murder charge, i.e. Joshua Haggood pled guilty and admitted to shooting James Hampton. PCR pp. 1050-51.

Ins. 2-4. Several witnesses testified that Mr. Frazier shot in the air upon exiting the club, and Mr. Haggood admitted to and pled guilty to the shooting of James Hampton. Additionally, through Mr. Haggood, the State elicited testimony that Petitioner armed himself and returned to the club, yet other witnesses stated that Petitioner was not seen with a gun that night. Mr. Haggood testified that Petitioner was “like kind of agitated” towards a group in the club before they went out to get their weapons. App. pp. 275-6. Michael Bullock testified that he saw the victim watching Petitioner, and Petitioner was not interested in him. App. p. 362. Mr. Haggood also testified that the victim was the aggressor and the shooting was an ambush. App. p. 304. If anything, it appears the State attempted to utilize Mr. Haggood to inject some form of express malice, yet his testimony clearly established that the victim was the aggressor, he was shooting in defense, and at most Petitioner shot in response to an “ambush.” Upon review of the entire transcript, Petitioner submits that the trial testimony is lacking and inconsistent in establishing malice apart from inferred malice instruction and that the lower court erred in finding otherwise.⁵

The lower court also erroneously found prejudice lacking because there was ample evidence of express malice and an abundance of evidence to convict Petitioner under the theory of accomplice liability. Under the facts of the Gibson case, the jury was also charged under the theory of accomplice liability during Gibson’s joint trial with his brother Adams. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). As the record and decision address, Gibson’s brother was the individual that was originally at the location

⁵ At the evidentiary hearing, Petitioner provided a narrative of what happened on the night in question. PCR pp. 1064-65. Petitioner submits it is not proper to consider this narrative in the prejudice analysis since the proper analysis requires the court to examine the evidence considered by the jury.

before Gibson's arrival, was engaged in the original aggression with the victim's group inside the club and was involved in a fight when Gibson admittedly shot his gun in the parking lot. Gibson, 416 S.C. 260, 262, 266-266, 786 S.E.2d 121, 122, 124. Interestingly, not only did this Court grant relief in Gibson, without discussion of the implications of accomplice liability evidence, this Court also denied certiorari, thereby upholding the relief granted, to co-defendant Adams Gibson on the exact same Elmore issue. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121, fn. 1(2016). Therefore, Petitioner submits that the lower court's justifications based upon the evidence of express malice and conviction under the accomplice liability theory are absolutely erroneous.

Petitioner also urges this Court to consider the arguments offered and findings of the trial court during the directed verdict motion. When asked by the trial court what evidence the State had to put a gun in Petitioner's hand and what evidence the State had under the accomplice liability theory, the State provided no evidence of express malice. The Solicitor explained, from his view of the evidence, that Petitioner was the only one shooting in the direction of Mr. Lawton and Mr. Defreitas and that Mr. Haggood shot Mr. Hampton. App. p. 536-7. After the court asked about "hand of one," the Solicitor responded:

These three individuals made a decision to go arm themselves after an altercation inside this club and returned to inside that club, continued drinking alcohol that spilled out when things shut down. You have – I mean – I agree, it's chaos out there, but I submit to you the three of them were part of that chaos.

App. p. 537, ln. 23 – p. 538, ln. 4. In response, the court denied the directed verdict motion finding that based upon the circumstantial evidence and inferences that could be

drawn, there was “evidence on each and every element of these offenses.” App. p. 541, Ins. 1-12 (emphasis added).

In closing argument, the State offered the following definition of inferred malice:

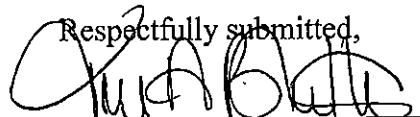
Implied malice is simply looking at the conduct of a person and seeing what that conduct tells you about what they intend. You know, arming – somebody arming themselves to prepare for a fight. Someone acting with complete disregard for the safety of those around them, shooting into a crowd, those are the actions from which you may infer malice.

App. p. 591, Ins. 2-7. Throughout the argument, the evidence offered in support of Applicant’s guilt was summed up by the following question to the jury: “Do you believe that the defendant fired a gun that night? And if you believe he did, then you must return a verdict of guilty.” App. p. 599, Ins. 1-4. It is clear from the State’s argument that the evidence the State offered in support of a conviction was based upon inferred (implied) malice, which directly demonstrates the prejudice of the erroneous instruction.

As a result, Petitioner urges this Court to find that the improper malice instruction contributed to the jury’s verdict in light of the evidence presented. Therefore, Petitioner has satisfied both prongs of the Strickland analysis, and a new trial is warranted.

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court grant certiorari, allow briefing of the issues addressed herein, and/or reverse the denial of post conviction relief.

Respectfully submitted,


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June 26, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

JUN 28 2019
S.C. SUPREME COURT

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2019-000528

David Jamar Benjamin,

Petitioner,

vs.

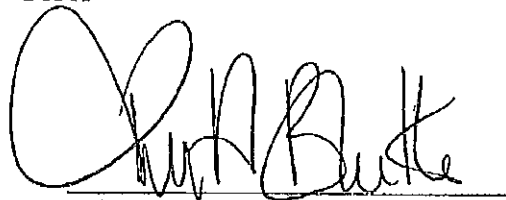
State of South Carolina

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I served this 28th day of June 2019 a Petition for Writ of Certiorari, Appendix and Transportation Order to Benjamin Limbaugh, of the Attorney General's Office, via hand delivery to the Office of the Attorney General addressed as follows:

Office of the Attorney General
Att: Benjamin Limbaugh, Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201



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Attorney for Petitioner

June 28, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CALHOUN COUNTY
Court of Common Pleas
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-000528

DAVID JAMAR BENJAMIN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES PRESENTED

- I. 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.
- II. Whether 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. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016).

RESPONDENT'S STATEMENT OF ISSUES PRESENTED

- I. The PCR court correctly found that trial counsel's utilization of a lay witness and expert witness at trial did not prejudice Petitioner in the preparation and presentation of his defense 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.
- II. The PCR correctly determined Petitioner failed to establish trial counsel was ineffective for not objecting to the jury instruction on malice when the instruction fully complied with *Belcher* and when read as a whole provided the correct statement of law.

STATEMENT OF THE CASE

David Jamar Benjamin (Petitioner) is currently in the Perry Correctional Institution, of the South Carolina Department of Corrections, where he is serving a sentence of forty years imprisonment for murder and two concurrent thirty year sentences for attempted murder, as the result of events occurring in Calhoun County, on the morning of September 18, 2011. The Calhoun County Grand Jury indicted him on February 25, 2013, for one count of murder (2013-GS-09-0051) and two counts of attempted murder (2013-GS-09-0052 & -0053). Nicholas Gray Thomas, Esquire, represented him on these charges, while Assistant First Circuit Solicitors Donald N. Sorenson and Theodore N. Lupton prosecuted the case.

Petitioner proceeded to a jury trial before the Honorable Diane Schafer Goodstein, on March 4-7, 2013. The jury convicted him of the charged offenses, and each juror confirmed the verdict when polled. Judge Goodstein imposed concurrent sentences on him of forty years imprisonment for murder and thirty years imprisonment for each of the attempted murder convictions.

On March 15, 2013, Petitioner filed a motion for a new trial based on the insufficiency of the evidence and a motion to reconsider the sentence. Judge Goodstein heard his motions on June 20, 2013. Both Petitioner and counsel were present at the hearing. Mr. Sorenson again represented the State.¹ Judge Goodstein denied his motions in separate Orders filed on July 9, 2013.

He timely served and filed a Notice of Appeal. An appeal was perfected by Wendy Keefer, Esquire. Throughout the appeal process, Petitioner was also represented by James Lee Goldsmith, Jr., Esq. and Robert L. Sirianni, Jr., Esq. The South Carolina Court of Appeals affirmed Petitioner's conviction in an opinion filed December 16, 2015. *State v. Benjamin*, Op. No. 2015-

¹ A copy of that transcript has not been included in the record.

UP-554 (S.C. Ct. App. 2015). On December 21, 2015, Petitioner petitioned for a rehearing. The Court denied the petition in an order filed January 20, 2016. The Remittitur was returned on May 27, 2016.

On April 20, 2016, Petitioner filed an application for post-conviction relief. Respondent made its return on or about January 18, 2017. An evidentiary hearing was convened on July 12, 2018, at the Dorchester County Courthouse. Petitioner was present at the hearing and was represented by Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Christian Saville, of the South Carolina Attorney General's Office. In an order dated February 1, 2019, the Honorable Robin B. Stilwell denied Petitioner's application for post-conviction relief. This appeal follows.

STATEMENT OF THE FACTS

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, he 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). Also, he claimed there was no documentation in the investigative file of 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).

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 post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. The PCR court correctly found that trial counsel's utilization of a lay witness and expert witness at trial did not prejudice Petitioner in the preparation and presentation of his defense at trial.

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

Petitioner alleges the PCR court erred in finding trial counsel was not ineffective for his use of Mr. Kelly Fite as an expert witness at trial because Fite's trial testimony was subpar compared to that of Robert Tressel, and therefore, trial counsel was deficient for not retaining an expert who would have testified more favorably at trial. This contention is not supported by the record.

Petitioner argues trial counsel's decision to employ the services of Fite over those of Tressel, or another expert witness, 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 exclusively 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. This 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 was completely unaware of the quality or clarity of the testimony Fite would provide, and took all 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, Petitioner's trial counsel had no way of predicting exactly how Fite would testify, and it is clear *McKnight* is not applicable to the case at bar. Although trial counsel did state, after hearing Tressel testify, that his only potential regret at trial was calling Fite because in hindsight, trial counsel would have preferred Tressel's testimony over Fite's, this admission from trial counsel in no way suggests he was unreasonable in deciding to use Fite as an expert witness. Furthermore, trial 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 from 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, trial 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).

Much of Petitioner's argument 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, trial 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 codefendant, 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). Petitioner's rabid argument surrounding the quality of Fite's trial testimony for lack of preparation appears to have overshadowed the preparation of their own. Here, there is nothing in the record to indicate that trial counsel failed adequately to 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 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 trial counsel.

Here, trial 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 trial counsel failed to adequately prepare him. To the extent that 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 trial counsel should have found an expert willing to give more favorable ballistics testimony, it was unnecessary for trial counsel to shop for a contrary and more favorable opinion because *Strickland* does not

require counsel to continue looking for an expert just because an unfavorable opinion has been received from a defense expert. *See Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) (“The mere fact that his counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance”) (citing *Roach v. Martin*, 757 F.2d 1463, 1477 (4th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985)).

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 give a better explanation of the ballistic evidence in this case, the outcome of trial would remain unchanged. Petitioner’s largest problem at trial was not the quality of an expert witness, but rather, accomplice liability. Unsurprisingly absent from Petitioner’s argument is any mention of the enormous burden Petitioner faced 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. The record is clear that 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. Therefore, Petitioner has not carried his burden of showing that the

outcome of the trial would have been different had trial counsel utilized Fite differently. Accordingly, Petitioner has failed to show prejudice and this Court should deny certiorari as to this claim.

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

Next, Petitioner alleges trial counsel was ineffective for failing to fully prepare Antonio Gidron to testify as a witness, and the lack of preparation prejudiced Petitioner at trial. This allegation is 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, as Petitioner notes, this Court in *Bannister* addressed whether trial counsel was ineffective for failing to call a witness at trial. Here, it is without question that trial counsel located and prepared Gidron to testify at trial, and did in fact call him as a witness at trial. *Bannister* does not apply here. Petitioner's assertion that the inability of trial 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*.

Here, the record reflects trial counsel took reasonable steps to investigate, locate, and prepare Gidron as best he could, 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)).

Trial counsel explained that Gidron was extremely nervous to testify, which made him come across as a hostile witness. (App’x p. 1038, ll. 9-17). Furthermore, trial counsel 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, trial counsel described how Gidron became combative when the private investigation came to subpoena Gidron, resulting in a physical altercation. Trial 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). Trial counsel also explained that Gidron’s demeanor at trial was markedly different from his demeanor at the PCR hearing. Trial 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. Trial Counsel noted he wished Gidron would have presented himself in that same fashion at trial. (App’x p. 1011).

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, trial 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 trial counsel's adequate performance regarding this allegation, Petitioner has also failed to satisfy his burden of showing prejudice from trial 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 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.

II. The PCR correctly determined Petitioner failed to establish trial counsel was ineffective for not objecting to the jury instruction on malice when the instruction fully complied with *Belcher* and when read as a whole provided the correct statement of law.

Petitioner argues the trial court's instruction was improper in light of *Belcher*, and relies on *Gibson* to assert trial counsel's deficiency for failure to object to the lack of a permissive inference of malice charge. This allegation is meritless as the jury instruction *did* in fact include the permissive inference instruction as enumerated in *Gibson*, and the jury instruction thoroughly conveyed the correct statement of law. Furthermore, there was ample evidence of express malice presented at trial.

In *Gibson*, this Court held trial counsel was ineffective for failing to object to an improper instruction which completely omitted the above permissive inference language set forth in *Elmore*. The trial court in *Gibson* had instructed the jury that malice may be inferred by the use of a deadly weapon, but completely neglected to charge the jury that the inference would simply be an evidentiary fact and so forth as ordered by *Elmore*.

State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), provided for the following jury instruction:

“The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive ... We caution the bench, that hereafter only slight deviations from this charge will be tolerated.”

Elmore, 279 S.C. at 421.²

Petitioner’s case is readily distinguishable from *Gibson* as the trial court in Petitioner’s case did in fact properly charge the jury on the permissive inference language. As trial counsel noted at the PCR hearing, page 689 of the trial transcript reveals the trial court gave the proper instruction:

Now, malice, as we have talked about, may be express or inferred. Again, the same definitions apply as before.

Now, ladies and gentlemen, if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference of malice is simply an evidentiary fact to be considered by you, along with other evidence in the case, and you give it the weight that you decide it should receive.

² In *Belcher*, this Court referred to the first sentence of the suggested *Elmore* charge as the standard implied malice charge and the second sentence as the permissive inference charge. *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

(App'x p. 689, ll. 3-11) (emphasis added); (App'x p. 1025).

The record reveals the trial court properly instructed the jury as to the permissive inference language pursuant to *Gibson* and *Elmore*. Furthermore, this case is analogous to *State v. Cottrell*, 421 S.C. 622 (2017), where this Court held a jury instruction, which stated malice could be inferred from conduct showing a total disregard for human life, fully complied with *Belcher*.

Here, the trial court gave the instruction following the charge for attempted murder, which followed the charge for murder. The trial court clearly instructed the jury that the "same definitions apply as before" regarding malice for attempted murder as they apply to murder. (App'x p. 689, ll. 3). A jury charge is correct if, when read as a whole, it contains the correct definition and adequately covers the law. *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003). The trial court clearly enumerated the principle of permissive inference in satisfaction of *Gibson* and *Elmore*, and furthermore made it clear this principle applied to both the charges of murder and attempted murder. After giving the permissive inference instruction, the trial court proceeded to read the charges for lesser-included offenses which did not involve malice. (App'x p. 690). Additionally, the trial court stressed the State's burden of proof beyond a reasonable doubt and the jury's role as the sole judge of facts throughout the jury instructions as well.

Notwithstanding the fact the record refutes Petitioner's allegation of an improper jury instruction, Petitioner is unable to prove he was prejudiced by the trial court's instruction. Contrary to Petitioner's assertion that his case is similar to *Gibson*, where it was conceivable that the only evidence of malice was defendant's use of a handgun, there is ample evidence in the record for the jury to infer malice based on Petitioner's conduct showing a total disregard for human life, including his indiscriminate shooting across the club parking lot, endangering bystanders leaving the club and residents nearby.

As trial counsel acknowledged at the PCR hearing, testimony at trial indicated Petitioner was engaged in a confrontation with Lawton when Lawton bumped into him on the dance floor. (App'x p.156, ll. 21; p. 130, ll. 9). Trial counsel acknowledged testimony revealed Petitioner glared at Lawton throughout the night to the point the club staff acknowledged the problem. (App'x p. 1026, ll. 25; p. 354-355). Trial counsel testified he, unfortunately, recalled testimony that when DJ Haynes approached Petitioner to calm him down and ask him not to follow around Lawton Petitioner said, "I'm killa." (App'x p. 157; p. 135-6). Testimony revealed Petitioner and his group then left the club to retrieve their guns from Petitioner's car. (App'x p. 1027; p. 134; p. 276). In fact, codefendant Haggood testified Petitioner was agitated and said he "wasn't trying to get caught slipping" before they all went to get their guns. (App'x p. 276). After retrieving the guns, the group then returned to the club. (App'x p. 278). Then, not only did multiple eyewitnesses testify Petitioner had a gun, but codefendant Haggood testified Petitioner fired multiple shots during the chaotic shootout. (App'x p. 286-7). As trial counsel explained, the location where Petitioner was placed during the shooting, the driver door area of his car, had a straight shot to the location where Lawton was found dead from a gunshot wound. (App'x p. 1034). Therefore, like the abundance of evidence in this case to implicate Petitioner under accomplice liability, there was ample evidence in this showing express malice. Accordingly, Petitioner failed to establish trial counsel was constitutionally ineffective for not objecting to the trial court's instruction of malice, and therefore failed to show prejudice as the trial court properly instructed the jury regarding the permissive inference language enumerated in *Gibson*. Accordingly, certiorari should be denied as to this issue.

[Conclusion and signature page to follow]

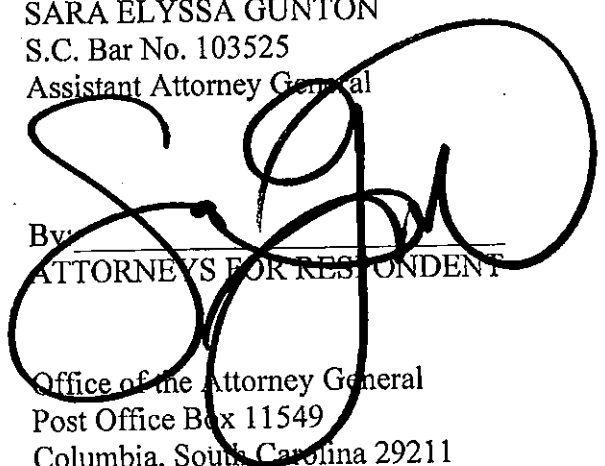
CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari, as the post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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November 27, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

DEC 02 2019

S.C. SUPREME COURT

CERTIORARI TO CALHOUN COUNTY
Court of Common Pleas
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-000528

DAVID J. BENJAMIN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

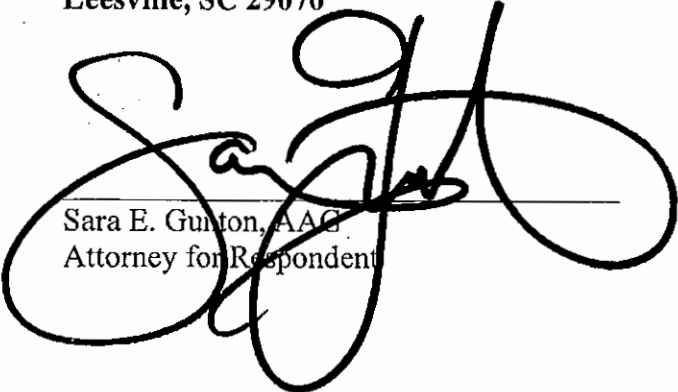
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Tricia A. Blanchette
Law Office of Tricia A. Blanchette, LLC
PO Box 2147
Leesville, SC 29070

This 27th day of November, 2019.


Sara E. Gulton, AAG
Attorney for Respondent

The South Carolina Court of Appeals

David J. Benjamin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000528

ORDER

This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted as to Question I. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT
BY  CLERK

Columbia, South Carolina

cc:

Tricia A. Blanchette, Esquire
Samantha Jo Weidauer, Esquire
David Jamar Benjamin
The Honorable Robin B. Stilwell

FILED
Nov 05 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

MAR 08 2022

SC Court of Appeals

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-000528

David Jamar Benjamin,

Petitioner,

vs.

State of South Carolina

Respondent.

BRIEF OF PETITIONER

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ISSUE PRESENTED

- I. 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.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

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. 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), SCRPC, 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 Tressell, 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

Motion, pursuant to Rule 59, SCRCPP, 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, from which this Brief follows.

ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; see *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238, 467 S.E.2d 926 (1996); see also *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have 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.

- I. 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.

- A. Summary of the Evidentiary Hearing Testimony

1. Robert Tressell

At the evidentiary hearing, Robert Tressell 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 Kelly Fite, the defense expert at trial, and he explained how he became involved in Petitioner's PCR case at the recommendation of Mr. Fite, who is now retired. App. pp. 924-5. He acknowledged that he had reviewed Mr. 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 further 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 Calhoun County Sheriff's Department a color copy was requested, but it had not been produced prior to the evidentiary hearing. App. p. 928.

He recounted his interaction with Tony Gidron, defense trial witness, that included going to the scene. App. pp. 928-932. He detailed how Mr. Gidron walked him through the scene while conveying his eyewitness account. He deemed Mr. Gidron helpful in showing him where people and vehicles were located. App. pp. 929-30, 971. Mr. Gidron depicted his vantage point to him, and he recalled Mr. 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 Mr. Gidron at the scene prior to trial. 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 further opined that that 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 five 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 Mr.

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

Finally, Mr. Tressell addressed the trial testimony of Kelly Fite. Having already explained that he had worked with Mr. Fite on cases during his career, he acknowledged that Mr. Fite was qualified at the trial in a very similar capacity in which he was qualified at the evidentiary hearing. App. p. 945. Mr. Tressell addressed the testimony offered by Mr. Fite on touch DNA, Mr. Fite's concession that he had not reviewed the DNA report prior to cross-examination, and Mr. Fite's concession that the DNA testing he was proposing should have been done was actually done in the case. App. pp. 544-45, 548-49, 945-46. When asked about Mr. Fite's testimony on cross and redirect that touched on the caliber of bullet that could penetrate the victim's skull and Mr. Fite's concession that a .45 caliber could penetrate a skull, he agreed that Mr. 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 Mr. Fite's testimony about the .45 caliber penetrating the

¹ Mr. Tressell also discussed his findings regarding the 9mm projectiles found at the scene. App. p. 944.

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.

2. Peter Skidmore

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 Robert Tressell, locating and interviewing Tony Gidron and visiting the scene with Petitioner's counsel, Robert Tressell and Tony Gidron. App. pp. 974, 978-9.

Regarding the discovery, he noted that there was not a thorough investigation conducted on the witnesses at the scene. App. p. 975. He explained that there were seven witnesses listed in discovery but no corresponding witness statements. App. p. 975. Beyond Mr. Gidron and Mr. Haggood, he explained that seven 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 Mr. Gidron would have been an asset prior to trial in locating additional witnesses. App. pp. 977-78. Specifically, he testified that Mr. Gidron would have been 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 Mr. Gidron's eyewitness account could have opened the door to a third-party guilt investigation, Mr. Skidmore further explained how going to the scene with Mr. 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.

Mr. Skidmore explained his understanding of Mr. Gidron's negative experience with trial counsel's investigator. App. pp. 988-989. He further explained how he approached Mr. Gidron and advised counsel on how to as well. App. pp. 976, 988-89. He also explained how Mr. Gidron's interviews and time at the scene would have opened up the door to an investigation into a third-party guilt claim involving the shot he saw coming from the road. App. pp. 977-79, 982-83.

Mr. Skidmore agreed with Mr. Tressell 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. Mr. Skidmore 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.

3. Tony Gidron

When Tony Gidron took the stand, he explained that he was present on the night in question and testified at trial. He agreed with his trial testimony, specifically 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 before trial and then just having to take the stand. App. p. 881. He also 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, Pete Skidmore and Robert Tressell 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 two 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.

4. Nicholas Thomas, Esquire

When called to the stand at the evidentiary hearing, Mr. Thomas was asked about his utilization of Kelly Fite as an expert. He explained that he received a referral from several lawyers and reached out to Mr. Fite. App. pp. 1003-4. He copied and mailed a hard copy of the discovery to Mr. Fite, which he admitted contradicted Mr. Fite's trial testimony. App. pp. 1004-5. He exchanged a couple of emails with Mr. 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 Mr. Fite at trial, he recalled having reservations about using Mr. 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. Mr. Thomas also remembered initially planning to utilize Mr. Fite for crime scene reconstruction, but Mr. Fite did not go to the scene or speak with any witnesses, including Mr. Gidron. App. pp. 1008-9. When asked about Mr. Fite's answer at trial that he had not been asked to review the discovery or reconstruct the crime scene, Mr. 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 Mr. 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 Mr. Fite, Mr. Thomas explained it was difficult to secure Mr. 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 Mr. Gidron. He admitted that he would have wanted Mr. 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 Mr. Gidron on the phone twice on the Friday right before trial. App. p. 1009.

On cross-examination by Respondent, Mr. Thomas was asked why he thought Mr. Gidron was not a good witness at trial. App. p. 1038, lns. 7-8. He responded that Mr. Gidron's nervousness on the stand came across as hostility. App. p. 1038, lns. 7-17. He noted the contributing factors he identified were Mr. Gidron's negative interaction with his investigator and his own failure to communicate to Mr. 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 Mr. Gidron better and located him earlier. App. p. 1040.

Regarding Mr. Gidron's trial and evidentiary hearing testimony, Mr. Thomas concluded that he had no reason to 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 Mr. 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.

5. David Benjamin (Petitioner)

When Petitioner took the stand, he acknowledged that he was aware that counsel was utilizing the expert services of Kelly Fite to address the investigation, crime scene and ballistics. App. pp. 1059-60. He explained that he understood part of the defense strategy to be attacking the poor investigation and chaotic crime scene. App. pp. 1060-61. When asked about the work and testimony of Robert Tressell, he was adamant that he would have wanted an expert utilized in his capacity prior to and at trial because Mr. Tressell's testimony helped support his defense. App. pp. 1060-62.

Regarding Mr. Gidron, Petitioner explained that he provided Mr. Gidron's name to counsel prior to trial. App. p. 1063. When asked if he was aware of the hostility counsel described with Mr. Gidron, he recalled counsel telling him that counsel's

investigator had a “little altercation” with Mr. Gidron, but that was all. App. p. 1063, lns. 12-20. He agreed that he wanted Mr. Gidron’s utilized at trial in the capacity he was prior to and at the evidentiary hearing. App. pp. 1063-64.

B. Discussion

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. 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 and Shawn 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, South Carolina.

The State’s witnesses included Petitioner’s co-defendant Joshua Haggood. Mr. Haggood provided his version of all the events in question. App. pp. 259-314. During his testimony, Mr. Haggood admitted to having a .40 caliber weapon and placed a .32 caliber weapon in the possession of co-defendant Kevin Frazier and a .45 caliber weapon in the possession of Petitioner. App. pp. 264-267, 272. Mr. Haggood attributed the initial agitation inside the club to Petitioner and explained that it was Petitioner’s idea for the three 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 Mr. 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 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 their car. 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 three to four times in the direction of the van and not knowing if he shot anyone. He recalled Mr. Frazier shooting two to three 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 had in the car before dropping Mr. 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 Mr. 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 Mr. 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.

Mr. 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 Mr. 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 Mr. 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 and Petitioner did not say he shot anyone. App. p. 307, lns. 11-14.

Referring to his direct testimony, defense counsel asked Mr. Haggood one question about the Solicitor asking him 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?”² App. p. 307, lns. 18-19. Mr. Haggood responded: “For the testimony here, yes.” App. p. 307, ln. 20.

On redirect examination, Mr. 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 Solicitor’s questions, he maintained that despite the nickname Petitioner was not a hot tempered guy. App. p. 309. The State further questioned him about where

² On direct, Mr. Haggood testified that he had entered a guilty plea on the Friday before trial to one count of assault and battery of a high and aggravated nature involving the shooting of James Hampton. App. pp. 262-263. He agreed that he was looking at up to twenty years on that charge, but part of the plea was that the State was going to recommend no more than ten 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.

the shots were coming from and exactly how he saw Petitioner shoot two shots. App. pp. 310-312. On recross-examination, Mr. Haggood explained that Petitioner did not get his nickname from killing people but it was basically a flattering nickname. App. p. 314. Following Mr. Haggood's testimony, the State called a series of witnesses to include law enforcement, lay and expert witnesses.

After the State rested and the directed verdict motion was denied, the defense called Kelly Fite and Tony Gidron. App. pp. 542-582. Kelly 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, Ins. 1-7. Thereafter, Mr. 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 much lengthier cross-examination, Mr. Fite was questioned about reviewing "some of the discovery," and he agreed with the Solicitor that you need to review "everything you can get." App. p. 547, Ins. 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 had suggested should have been done. App. pp. 548-9. Specifically, the following testimony was elicited after Mr. Fite reviewed the report containing the DNA findings:

Question: Okay. And in looking at that report, they ultimately did not any DNA off any of those shell casings, is that correct?

Answer: That is correct.

Question: And, in your experience, that is while it's possible it's fairly typical, is that correct, to not get DNA off of a shell casing that's been fired?

Answer: That's correct, but there is a possibility and it has been done.

Question: Okay. And in this case they attempted to do it and couldn't get them, is that correct?

Answer: That's correct.

App. p. 549, lns. 1-12.

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 Kelly Fite, Tony 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 explained 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 ninety nine percent 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 or at the evidentiary hearing, 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 his Amendment, 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, these issues are so interrelated it is necessary to address these allegations as one. As a result, Petitioner submits that the lower court erred in failing to find that the proper utilization of Mr. Tidron and an expert was absent from Petitioner's trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense.

As stated, Tony Tidron was called as a witness and Kelly Fite as an expert at trial. As the record demonstrates, trial counsel was deficient in calling Mr. Tidron without proper preparation and without the proper utilization of an expert. At the evidentiary hearing, Petitioner carried his burden and demonstrated how Mr. Tidron should have been utilized in conjunction with an expert with the qualifications of Mr. Tressell or Mr.

Fite. Additionally, at trial the state exposed how Mr. Fite should have been properly utilized and turned his testimony into a glaring weakness for the defense, as was explained by counsel at the evidentiary hearing.

Even though, Mr. Gidron was called at trial, Petitioner submits the instant case is analogous to *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1999), wherein the South Carolina Supreme Court addressed whether trial counsel was ineffective for failing to call a witness at trial. The Court reasoned as follows:

This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, *supra*, S.C. at 498-99, S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809.

Here, Petitioner called Mr. Gidron to the stand and showed how counsel should have properly handled and utilized Mr. Gidron prior to and during trial. Additionally, the failure to effectively utilize Mr. Gidron was conceded by trial counsel.

While on the stand at the evidentiary hearing, Mr. Gidron reiterated his trial testimony, and he provided additional testimony and explanation of the scene, as addressed above, that was tantamount to Petitioner's defense. Notably, he placed a gun in the victim's hand when he was shot, provided further detail of the scene and provided explicit detail of seeing the fatal shot come from the roadway at the same time he saw Petitioner without a gun in hand. He, along with trial counsel and Mr. Skidmore, addressed the way he was not properly prepared prior to trial, and counsel explained how his nervousness on the stand came across as hostility. Trial counsel testified that Mr. Gidron was the most important witness and he came across in a cloud of negativity due to his encounter with counsel's investigator and lack of preparation with counsel, which was affirmed by a juror. Counsel explained how Mr. Gidron's demeanor and testimony was different, in a positive way, at the evidentiary hearing. 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. *See Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998) (noting a court may find ineffective assistance of counsel when trial counsel admitted the testimony of a witness might have made the difference in obtaining an acquittal), *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance.). Clearly, the lower court must be reversed since the record, to include counsel's admissions, does not support the following finding regarding Mr. Gidron: "This Court finds 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.**" App. p 1099 (emphasis added).

Furthermore, Mr. Gidron also addressed his concern with the investigation at the evidentiary hearing, which was further explored by Mr. Skidmore and Mr. Tressell. Regarding the diagram provided to the jury, he found it to be inaccurate and struggled to utilize it to explain the scene. Mr. Tressell also explained how the diagram was not helpful but how vital it was to go to scene with Mr. Gidron. Mr. Tressell also provided his opinions regarding the crime scene and investigation, which were absent from the testimony of Mr. Fite at trial. In complete contrast to the testimony provided by Mr. Fite, Petitioner submits that Mr. Tressell's expert opinions would have aided the defense to the point that the outcome of his trial cannot be relied upon as having produced a just result. As the record establishes and the lower court must have ignored, the proper utilization of an expert, in conjunction with an investigator and Mr. Gidron, clearly would have allowed counsel to effectively attack the State's investigation, the theory of the case and witnesses called at trial. Counsel's failure to do so is not "proper performance" but clearly deficient. App. p. 1101

In *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), McKnight argued that counsel was ineffective in calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense. In granting relief, the South Carolina Supreme Court addressed counsel's decision to not utilize a defense expert utilized in McKnight's first trial and to call an expert that essentially bolstered the State's theory of the case. The South Carolina Supreme Court noted:

This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation." See *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)

(quoting *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). Although we accept counsel's assertion that she was pressed for time in preparing for the second trial, in light of counsel's familiarity with the first trial and the relative ease with which counsel could have procured favorable expert testimony at the second trial, we conclude that counsel's decision to call Dr. Conradi alone to testify at the second trial was unreasonable. See *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding ineffective assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case).

Id. at 359.

The Court further reasoned:

In our opinion, counsel's two-fold error in calling an expert witness whose testimony was known to have previously been used to bolster the State's case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available, represents counsel's inadequate preparation for trial rather than a valid trial strategy. Accordingly, we find that counsel's performance in this regard was deficient. Because we further find that this deficient performance prejudiced McKnight's case, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.

Id. at 360.

In the instant case, the record is absent of evidence of reasonable professional judgment exercised by counsel that limited his investigation and utilization of Mr. Fite. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360. At trial, Mr. Fite told the jury that he was not provided the complete discovery and his expert testimony was rendered moot and prejudicial when he admitted the testing he was addressing had been attempted, as reported in discovery he had not reviewed until cross-examination. At the evidentiary hearing, trial counsel readily admitted that he did not properly communicate with Mr. Fite prior to trial, he should have

asked him to go to the scene, he knew he should not have put him on the stand, and he tried to mention him as little as possible in closing argument. In light of the record, it is incredulous to find counsel's utilization of Mr. Fite amounted to effective assistance. App. p. 1097.

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Gilchrist v. State*, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002). However, "strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hillerby v. State*, 431 S.C. 323, 847 S.E.2d 500 (Cl. App. 2020)). Here, counsel did not attempt to excuse his utilization of Mr. Fite as a valid strategic decision nor does the record demonstrate that he exercised reasonable professional judgment in his preparation and utilization of Mr. Fite.

Even without the testimony of Mr. Tressell, it is apparent from trial counsel's own admissions and the trial record that Mr. Fite was not properly prepared or utilized as an expert witness and trial counsel's performance was not "adequate." App. p. 1097. After qualifying Mr. Fite as an expert, trial counsel asked him a brief series of questions regarding how evidence is typically collected and secured at a crime scene, along with a few questions about the circumference of a .45 caliber round, before turning him over to the State for cross-examination. App. pp. 544-546. Somehow, the lower court reviewed Mr. Fite's brief testimony and concluded: "Trial counsel was able to effectively use Mr. Fite to further demonstrate how chaotic and poorly documented he felt the crime scene

was in this case, which was a strategy at trial to raise a reasonable doubt. Tr. p. 544.” App. p. 1097.

Upon proper review of the record, it reflects that trial counsel never asked Mr. Fite a specific question about the scene or evidence as it related directly to Petitioner’s case, yet the State now argues in support of the lower court’s erroneous finding that Mr. Fite was ineffective not trial counsel. Return p. 14. It is a relief that the State is willing to concede that Mr. Fite was unprepared to testify and ineffective, but it is misplaced to assign this error to Mr. Fite.³ Furthermore, this argument that Mr. Fite was ineffective blatantly contradicts the findings of the lower court. App. pp. 1096-1098. Here, the proper finding is that counsel was ineffective and the record supports this finding that was not made by the lower court.

Counsel’s utilization of Mr. Fite is analogous to the deficient performance addressed in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), where the South Carolina Supreme Court upheld the lower court’s finding that counsel failed to further investigate and more thoroughly challenge the gunshot residue evidence. In granting relief, the lower court 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. In upholding the lower court’s decision, the Supreme Court noted that during the defense expert’s questioning and the State’s closing argument the State emphasized to the jury that the defense expert confirmed the State’s expert’s findings. Specifically, the Court noted: “The Deputy Solicitor specifically argued

³ The State’s argument attacking PCR counsel’s preparation and questioning of Mr. Tressell is also misplaced and appears to be a personal attack on PCR counsel for making a misstatement that was not even addressed on cross-examination by the State at the evidentiary hearing or raised in the Order of Dismissal as a basis for denying relief. Return pp. 13-14.

in closing that the defense could not attack Powell's testimony 'because their own expert, Mike Avery, was hired by the defense to review Mr. Powell's work.... He found no fault with Joe Powell's findings...'” *Ard*, 642 S.E.2d at 598, fn. 16.

As stated, *Ard* is analogous to the instant case since the record supports a finding that counsel was deficient in his utilization of Mr. Fite, with such deficiency being evidenced in both the trial record and the evidentiary hearing record. Similarly to *Ard*, the State capitalized on the poor use of Mr. Fite during cross-examination and closing argument, but putting the deficiency beyond *Ard* is counsel's admission that he wanted to barely touch on Mr. Fite in his own closing argument. App. p. 1008, lns. 7-10. Here, the lower court must be reversed for failing to find that Petitioner met the first prong of the *Strickland* analysis since counsel's performance was deficient.

Turning to prejudice, Petitioner must show that “there is a reasonable probability that, but for counsel's errors, the result of trial would have been different.” *Strickland*, 466 U.S. at 691-692; *Rhodes v. State*, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Furthermore, when a defendant's conviction is challenged, “the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695. Here, counsel's deficient performance goes right to the heart of creating a reasonable doubt as to Petitioner's guilt.

Contrary to the State's argument in support of the lower court's findings on prejudice, Petitioner's largest problem was not accomplice liability, but it was the prejudice that resulted from counsel's failure to properly utilize the only witnesses called

for the defense – Mr. Gidron and Mr. Fite. Yes, from start to finish the State has hung its hat on accomplice liability, and the State is now claiming Petitioner is purposefully avoiding addressing it and the testimony of Mr. Haggood. Return p. 15. Petitioner has no issue with addressing these matters that actually further demonstrate how counsel's deficiencies resulted in prejudice.

As was addressed on appeal, the issue of accomplice liability was discussed 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 the victim 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 Mr. Haggood shot Mr. 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. Defense counsel made brief argument, which included the following regarding Mr. Haggood:

And without some testimony of a defendant – of a co-defendant who has already made a deal with the State, without his testimony, there is nothing that put that .45 caliber handgun in his hand, let alone there is no evidence that said a .45 caliber handgun killed the decedent Dominique Lawton.

App. p. 539, Ins. 9-14. After counsel concluded his argument, the court denied the motion for a directed verdict. App. pp. 540-541.

Following the conclusion of the trial, counsel filed a Motion to Reconsider Sentence asking for a reduction in sentence arguing that Petitioner's conviction was "likely achieved due to accomplice liability theory or "hand of one." App. pp. 733-734. He further argued: "Direct and circumstantial evidence indicates that the Defendant, David Jamar Benjamin, more likely than not, was not the individual whose bullets caused the death of Dominique Lawton or the injuries to James Hampton and Shawn Defreitas." App. p. 734.

On direct appeal, both parties argued regarding the strength of the evidence and accomplice liability as it related to the defense motion for a directed verdict and a new trial. App. pp. 735-837. In a *per curiam* opinion, this Court affirmed the trial court's rulings. App. pp. 838-840. By way of a Petition for Rehearing, appellate counsel argued:

The Court of Appeals decision correctly recognizes that accomplice liability may exist under the theory that "the hand of one is the hand of all" but the opinion fails to explain a key element of this type of criminal liability.

In order for this accomplice theory to be a proper basis for criminal liability, there must be evidence that there was some agreement among the players to undertake the criminal activity. *See State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010). Benjamin must have known of the other co-defendants' intended crimes. The State's case simply did not present sufficient evidence, if any, evidence – direct or circumstantial – on this key element.

Though the opinion cites to cases and summarizes this piece of accomplice liability, it does not identify how – in this case – such liability was properly imposed. As a matter of law, there simply was not sufficient evidence to convict Benjamin as an accomplice in these crimes.

App. pp. 842-84. The Petition for Rehearing was denied on January 20, 2016. App. p. 845.

At this juncture, this Court has ruled upon the appellate arguments made regarding accomplice liability, but the record before this Court on direct appeal obviously did not contain the record created at the evidentiary hearing. Therefore, the issue is not whether the State established accomplice liability at trial, but whether credibility would have been shaken and a reasonable doubt established if counsel was not deficient. By way of the Order of Dismissal, the lower court erroneously concluded that counsel was effective in utilizing Mr. Fite in his trial strategy of raising a reasonable doubt due to the chaotic and poorly documented scene, yet Petitioner is now trying to get this Court to merely focus on prejudice in the realm of defeating the State's accomplice liability theory. App. p. 1097.

During closing argument, counsel admittedly briefly mentioned Kelly Fite, but he spent considerable time addressing Mr. Haggood's testimony and motivation for testifying at Petitioner's trial. App. pp. 608-611. He pointed out that Mr. Haggood was the only witness that said they went to the car, got guns and returned to the club. App. p. 610, lns. 5-12. After arguing that Mr. Haggood kept changing his story to law enforcement, trial counsel specifically argued: "He had a reason to lie. And once he made his deal, he's out." App. p. 611, lns. 1-15. Thereafter, counsel addressed the statute on the hand of one is the hand of all. App. p. 611, ln. 21. He concluded his argument on accomplice liability and closing argument by calling himself a salesman and addressing reasonable doubt and whether the jury had heard enough to tip the scales in the favor of a conviction or a reasonable doubt. App. p. 614, ln. 14 – p. 615, ln. 11. Petitioner submits

that those scales would have been tipped in his favor if counsel had provided effective representation.

Furthermore, Petitioner submits that the lower court erred in finding the testimony “merely cumulative” since the proper utilization of an expert, whether it be Mr. Fite or Mr. Tressell, and the proper use of Mr. Gidron would have called the State’s investigation, theory of the case and witnesses into question. App. p. 1096. Yes, counsel argued that the scene was chaotic and called an expert and Mr. Gidron at trial, but the record clearly establishes that he failed to utilize Mr. Gidron and Mr. Fite in a way that should be deemed proper and effective at trial. Clearly, the testimony at issue is not merely cumulative and was not categorized as such by trial counsel.

In conclusion, trial counsel called Kelly Fite, an expert with the qualifications who could have done the expert work Mr. Tressell conducted and Mr. Gidron at trial, but, as counsel admitted, Mr. Fite offered regrettably poor testimony and Mr. Gidron was hostile and not believed by the jury. Mr. Fite and Mr. Gidron were Petitioner’s only witnesses and counsel admittedly tried to avoid even mentioning Mr. Fite in closing, a closing for which he failed to complete his exhibits of the scene. As counsel stated, he should have had an expert at trial testify in the capacity Mr. Tressell did at the evidentiary hearing, yet somehow the lower court ignored this clear admission of ineffective assistance. “Counsel’s function... is to make the adversarial process work in the particular case,” and counsel clearly did not meet this function in his utilization of Mr. Gidron and Mr. Fite as the only witnesses for the defense. *Strickland*, 466 U.S. at 690.

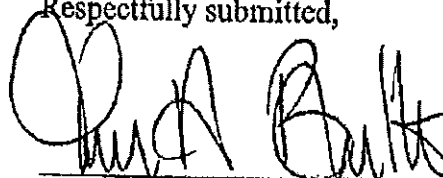
Therefore, Petitioner urges this Court to find that the proper utilization of Mr. Gidron and an expert was absent from trial, which amounts to deficiency in the

presentation and preparation of the defense. As a result of this deficiency, Petitioner was clearly prejudiced and a new trial is warranted, wherein a jury could hear from a properly utilized witness and expert as was demonstrated at the evidentiary hearing. The testimony offered at the evidentiary hearing could amount to a viable defense in the eyes of a jury. Mr. Tressell and Mr. Gidron's testimony regarding the caliber of the bullet and location of the shooter, in conjunction with testimony calling the investigation into question and accuracy of the testimony provided by the State, call the performance of counsel and the outcome of the trial into unavoidable question. In sum, Mr. Gidron and an expert were not properly utilized at trial and this prejudicial deficiency requires a new trial. Therefore, Petitioner has met both prongs of the *Strickland* analysis, and the lower court must be reversed.

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court reverse the denial of post conviction relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

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March 3, 2022

RECEIVED

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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

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, SCRPC, 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 Ellore, 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 Haggood⁴ 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).

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 beer¹⁰ 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 air¹⁴ 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 caused 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 Dominique 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 Shivers²² 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), SCRCPP; *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 hoped 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 hand 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 Haggood'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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July 18, 2022

LAW OFFICE OF
TRICIA A. BLANCHETTE

RECEIVED

Apr 28 2023

SC Court of Appeals

April 28, 2023
VIA E-FILING & US Mail

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

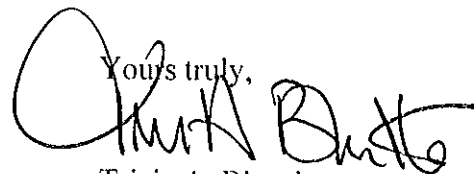
RE: David Jamar Benjamin v. State; App. Case No. 2019-000528

Dear Ms. Kitchings:

The above referenced appeal is scheduled for an oral argument on May 9, 2023. Pursuant to Rule 208(b)(7), SCACR, I would like to submit the following citations as supplemental authority in this matter. I submit that they are pertinent and relevant authorities that have come to my attention due to recent decisions of the this Court following the submission of the Briefs and in preparation for argument on the matter of prejudice.

1. State v. Campbell, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert granted*, S.C. Sup. Ct. Order dated September 8, 2022.
2. State v. Johnson, Op. No. 5950 (S.C. Ct. App. filed November 9, 2022), *cert granted*, S.C. Sup. Ct. Order dated April 20, 2023.
3. State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020).
4. Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011).

I have enclosed a copy of the cases with this letter. Thank you for your assistance with this matter. Please contact me if any additional information is needed. I have copied opposing counsel via electronic mail.

Yours truly,


Tricia A. Blanchette
Attorney at Law

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

435 S.C. 528
868 S.E.2d 414

The STATE, Respondent,
v.
Montrelle Lamont CAMPBELL, Appellant.

Appellate Case No. 2018-000115
Opinion No. 5885

Court of Appeals of South Carolina.

Heard September 15, 2021
Filed December 22, 2021
Rehearing Denied February 24, 2022

Appellate Defender Lara Mary Caudy and
Appellate Defender David Alexander, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief
Deputy Attorney General W. Jeffrey Young,
Deputy Attorney General Donald J. Zelenka,
Senior Assistant Deputy Attorney General Melody
Jane Brown, and Assistant Attorney General
William Joseph Maye, of Columbia; and Solicitor
Scarlett Anne Wilson, of Charleston, all for
Respondent.

KONDUROS, J.:

[868 S.E.2d 416]

[435 S.C. 531]

Montrelle Lamont Campbell appeals his
convictions for murder and attempted murder.
He contends that because attempted murder is a
specific intent crime, the trial court erred in
charging the jury that malice may be inferred
when a deadly weapon is used. Additionally, he
maintains that because no evidence supported an
accomplice liability charge, the trial court erred
by instructing the jury on "the hand of one is the
hand of all" theory of accomplice liability. We
reverse and remand.

FACTS/PROCEDURAL HISTORY

On September 17, 2015, Katrina Brown was at her
apartment in Gadsden Green¹ with her sister
Kerri Brown and her friend Tonya Mosely when a
woman named Kadeshia arrived around 11:30
p.m. Kadeshia was an old friend of Kerri's, but
Katrina knew her. While the women were visiting,
a man knocked on Katrina's door and told
Kadeshia that someone was waiting for her
outside. Kadeshia told the man to "[t]ell them I'm
coming" but continued her conversation in
Katrina's apartment. Eventually, Kadeshia's
brother, Campbell, walked into Katrina's
apartment without permission. Campbell, also
known as "Troll," sat down without saying
anything.

[435 S.C. 532]

Katrina asked Campbell to leave because she did
not know him,² and Campbell eventually left
without saying a word. Katrina and Kadeshia then
had a verbal altercation because Katrina believed
Kadeshia should have apologized. Shortly after
Kadeshia left, Katrina walked outside to smoke a
cigarette. While Katrina was outside, Campbell hit
her, knocking her to the ground. Campbell then
stood over her and looked prepared to hit her
again. Instead, Campbell moved back into the
middle of the street while Kerri and Tonya helped
Katrina up. Katrina, Kerri, and Tonya then
followed Campbell into the middle of the street
and "had a few words" with him. The women went
back inside Katrina's apartment after she noticed
Campbell looked prepared to reach for something
inside of a car.

The next night, September 18, 2015, Katrina
hosted a party at her apartment in Gadsden
Green. The party ended around 6:30 a.m. on
September 19, 2015, when a gunman shot at least
fourteen bullets from a rifle into Katrina's
apartment. The bullets struck Kerri in her head,
Katrina's cousin Tierra Brown in her arm, and
Katrina's friend Antwan Frost in the chest. Kerri
and Tierra survived but Frost did not.

Because no one saw the shooter, police asked
Katrina if she knew whether anyone wanted to
harm her. Katrina testified she did not have a

conflict with anyone in the neighborhood other than Campbell. While processing the crime scene, police recovered fourteen rifle shell casings and obtained security camera footage of the area around the time of the shooting from multiple locations.

The security footage showed a gold Buick parking on Nunan Street. Police determined Tomeka President owned the gold Buick in the security footage and identified Trivell "Vell" Richardson and Andrew "Ace" Rivers as the individuals exiting the car. The footage showed Richardson and Rivers walking toward Gadsden Green and Richardson eventually walking back to the car followed by a third individual holding a rifle. Richardson and Campbell were both charged with murder and two counts of attempted murder for the shooting at Katrina's apartment.

[868 S.E.2d 417]

[435 S.C. 533]

At Campbell's trial, President testified that Campbell was at her Austin Lakes apartment in North Charleston when she went to sleep around 11:45 p.m. the night before the shooting. President also stated Campbell was not there when she woke up the next morning³ and her car and car keys were missing.

Richardson testified⁴ he was at the Austin Lakes apartment complex in North Charleston during the early morning hours⁵ on the day of the shooting when Campbell approached him in President's gold Buick. Campbell asked Richardson to go with him to get cigarettes, and Richardson got in the car. However, Richardson recalled that instead of stopping at the gas station, Campbell got on the interstate and drove downtown.

After parking on Kennedy Street, Campbell exited the car, told Richardson to park it on Nunan Street, and began walking towards Gadsden Green. Richardson asked Rivers, who was on Kennedy Street when they arrived, to ride with him while he parked the car. Richardson and

Rivers began walking towards Gadsden Green after parking the car on Nunan Street.

Richardson explained that he called Campbell to ask where he should leave the car keys because Richardson was uncomfortable being in Gadsden Green and wanted to leave. As Richardson and Rivers were walking toward Gadsden Green, Richardson said they heard gunshots. Richardson stated he returned to the car but Rivers ran in the opposite direction. While Richardson was trying to start the car, Campbell got in with a rifle and told him to "go." Richardson testified he then drove back to Austin Lakes in North Charleston.

Following the close of the State's case, the trial court denied Campbell's motion for a directed verdict. Campbell did not testify but presented testimony from Peggy Blake, who lived across the street from Katrina at the time of the shooting.

[435 S.C. 534]

Blake testified she heard the shooting and saw a black man wearing a hoodie and holding a "sporty rifle" get into a lime green car that drove away. However, police were unable to find a lime green car on the security camera footage.

Following the close of Campbell's case and the State's rebuttal, Campbell renewed his motion for a directed verdict, which the trial court also denied. The trial court then held a charge conference and informed the parties it planned to charge the jury that malice may be inferred by the use of a deadly weapon and instruct the jury on the hand of one is the hand of all theory of accomplice liability. Campbell first objected to the accomplice liability jury instruction, arguing no evidence implicated a second party. Campbell also objected to the inferred malice jury instruction, asserting it was inappropriate under *Belcher*.⁶ After the trial court stated that *Belcher* did not apply because Campbell presented no evidence of mitigation such as self-defense, Campbell maintained his objection, arguing that "attempted murder does have a different burden. Since it[s] burden is higher, I think having that instruction

basically is counter somewhat to that different burden."

The State argued both it and Campbell presented sufficient evidence for an accomplice liability charge because the charge has an any evidence standard. Regarding Campbell's objection to the inferred malice charge, the State "ha[d] nothing further to add" but asserted that the charge was proper. Ultimately, the trial court noted Campbell's objections but decided to give both the inferred malice and accomplice liability instructions.

The trial court charged the jury that "[m]alice aforethought may be expressed or

[868 S.E.2d 418]

inferred Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a

[435 S.C. 535]

deadly weapon" The trial court also instructed the jury regarding accomplice liability:

[I]f a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the common plan and purpose If two or more people are acting together ... assisting each other and committing the offense, the act of one is the act of all. Or it is sometimes said, the hand of one is the hand of all.

Following deliberations, the jury convicted Campbell of murder and attempted murder. The

trial court sentenced him to life in prison for murder and thirty years' imprisonment for each attempted murder charge with the sentences running concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus* , 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate "[c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Marin* , 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Mattison* , 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan* , 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Inferred Malice

Campbell argues the trial court erred by giving an inferred malice jury instruction because attempted murder is a specific intent crime and requires both express malice and a specific intent to kill pursuant to our supreme court's ruling in *State v. King* , 422 S.C. 47, 810 S.E.2d 18 (2017). We agree.

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"A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015). "[A] specific intent to kill is an element of attempted murder as codified in section 16-3-29." *King* , 422 S.C. at 56, 810 S.E.2d at 22.

In *Burdette* , our supreme court held the trial court erred by giving an inferred malice jury instruction because, pursuant to *Belcher* , "[t]here was evidence presented at trial that tended to

reduce, mitigate, excuse, or justify" the defendant's killing of the victim. 427 S.C. 490, 495, 832 S.E.2d 575, 578 (2019). The supreme court further "consider[ed] whether the permissive inference charge may be given in any setting, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice." *Id.* at 502, 832 S.E.2d at 582 (emphasis omitted).

The supreme court noted "[i]t is always for the jury to determine the facts, and the inferences that are to be drawn from th[o]se facts." *Id.* (quoting *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)). The supreme court observed that "[w]hen the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, ... the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." *Id.* The supreme court determined that "[e]ven telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence." *Id.* at 502-03, 832 S.E.2d at 582.

The supreme court concluded that "[a] jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence" and held that "[r]egardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice

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may be inferred when the deed is done with a deadly weapon." *Id.* at 503-05, 832 S.E.2d at 582-83. Additionally, the supreme court stated that its ruling was effective in all cases pending

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on direct review or not yet final if the issue was preserved. *Id.* at 505, 832 S.E.2d at 583.

In the present case, the trial court instructed the jury that malice could be inferred by the use of a deadly weapon over Campbell's objection. *Burdette* made clear that trial courts cannot instruct the jury that malice may be inferred by the use of a deadly weapon, regardless of the evidence presented. Although our supreme court decided *Burdette* after Campbell's trial, its holding applies to all cases that were pending on direct appeal if the issue was preserved, which it was in this case.² *Id.* Accordingly, the trial court erred by giving the charge.

The State argues any error by the trial court instructing the jury on inferred malice was harmless. The State asserts the jury could have found Campbell had express malice based on the evidence that Campbell had recently hit Katrina, Campbell drove across town in his girlfriend's car, and fourteen rounds were fired from a rifle into Katrina's apartment. We disagree.

"An erroneous instruction alone is insufficient to warrant this [c]ourt's reversal." *Id.* at 496, 832 S.E.2d at 578. "[E]rroneous jury instructions are subject to a harmless error analysis." *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* at 496, 832 S.E.2d at 578-79 (quoting *State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)).

In *State v. Brooks*, this court held the trial court's error in giving an inferred malice jury instruction was harmless because "the jury could have found that [the defendant]'s conduct

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showed a total disregard for human life, allowing the jury to infer malice from this conduct." 428 S.C. 618, 632, 837 S.E.2d 236, 243 (Ct. App. 2019), *cert. denied*, S.C. Sup. Ct. order dated Aug. 10, 2020. The court of appeals noted the defendant in *Brooks* displayed his gun, taunted his targets, ignored a hands up gesture by one of his targets, and ignored his friend's "no" plea. *Id.* at 630-31, 837 S.E.2d at 242-43. Additionally, the court of appeals interpreted the defendant's attempts to cover up his guilt as indications of malice. *Id.* at 631, 837 S.E.2d at 243.

In the present case, the evidence of express malice is significantly less than the amount in *Brooks*. The State contends Campbell's previous altercation with Katrina, Campbell driving across town to commit the crime, and someone firing a weapon fourteen times into Katrina's apartment is sufficient evidence of express malice to overcome the trial court's erroneous inferred malice jury instruction. However, Campbell's previous altercation with Katrina and Campbell driving across town is not a total disregard for human life like the defendant in *Brooks* displayed.

Moreover, we cannot state beyond a reasonable doubt that the erroneous instruction did not contribute to the verdict. The jury could have reasonably found malice partially based on the use of a weapon. Indeed, the jury may have found malice based solely on the use of a weapon. Therefore, the error in giving the inferred malice instruction was not harmless. Accordingly, we reverse the trial court giving the instruction.

II. Accomplice Liability

Campbell asserts the trial court erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability because no evidence supported the

[868 S.E.2d 420]

charge. Campbell argues neither party presented evidence he acted with another pursuant to a common design or plan. We agree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The law to be charged to the jury is

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determined by the evidence presented at trial." *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (quoting *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "If there is any evidence to support a jury charge, the trial [court] should grant the request." *Id.*

[A] person who joins with another to commit a crime is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act; if two or more are together, acting together, and assisting each other in committing the offense, all are guilty; a finding of a prior arranged plan or scheme is necessary for criminal liability to attach to the accomplice who does not directly commit the criminal act; when an act is done in the presence of and with the assistance of others, the act is done by all.

State v. Washington, 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020).

In *Washington*, our supreme court affirmed in part, reversed in part, vacated in part, and remanded to the trial court for a new trial this court's decision to affirm the conviction of a defendant who had been indicted for murder and convicted of the lesser included offense of voluntary manslaughter. *Id.* at 397, 848 S.E.2d at 781. The supreme court observed that the trial court's instruction "convey[ed] the gist of the accomplice liability theory" and was correct for a case that warranted the instruction. *Id.* at 406, 848 S.E.2d at 785.

The supreme court acknowledged, "an alternate theory of liability may not be charged to a jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.' " *Id.* at 409, 848 S.E.2d at 787 (quoting *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011)). The supreme court noted that "[f]or an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.' " *Id.* at 407, 848 S.E.2d at 786 (alteration in original) (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 439). After observing that the record contained evidence the defendant was both the shooter and not the shooter, the supreme court reasoned that "[t]he question becomes whether there was equivocal evidence the shooter, if not [the defendant], was an accomplice of [the defendant]." *Id.*

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The supreme court compared *Washington's* case to *Wilds v. State*, in which this court affirmed the post-conviction relief court's grant of relief on the issue of accomplice liability. 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014). In *Wilds*, this court found the post-conviction relief court correctly determined the trial court erred in charging accomplice liability because neither party presented evidence that anyone besides the defendant was the shooter. *Id.* at 440, 756 S.E.2d at 791. The supreme court in *Washington* reasoned that, like the jury in *Wilds*, the jury in *Washington* may have doubted the possible accomplice's testimony he did not shoot the victim. *Washington*, 431 S.C. at 410, 848 S.E.2d at 787. Still, the supreme court found some evidence must have been presented that the only possible accomplice shot the victim to warrant an accomplice liability jury instruction. *Id.* Because no evidence of that kind was presented, the supreme court determined the trial court erred by instructing the jury on accomplice liability. *Id.* at 403, 410, 848 S.E.2d at 784, 787.

Here, the trial court erred by charging the jury on accomplice liability. Blake's testimony that she saw a man wearing a hoodie and holding a rifle leave the scene of the shooting in a lime green car is evidence that someone other than Campbell may have been the shooter, as Campbell was allegedly wearing a jersey and the video footage and Richardson's testimony indicate he left in President's gold Buick. Because Richardson's testimony presented evidence that Campbell was the

[868 S.E.2d 421]

shooter, like *Washington*, the question is whether the Record contains equivocal evidence the man seen by Blake was Campbell's accomplice.

Based on the evidence presented at trial, only Richardson could have been Campbell's accomplice. On the day of the shooting, Richardson rode with Campbell from North Charleston to Gadsden Green, parked the car for Campbell, and drove Campbell back to North Charleston. Like in *Wilds* and *Washington*, the jury could have doubted Richardson's testimony that he was not involved in a common plan or scheme with Campbell to carry out the shooting. Nevertheless, neither party presented evidence that Richardson and Campbell had joined together in a common plan or scheme to carry out the shooting. Indeed, Richardson testified he did not know Campbell was going to drive to Gadsden Green or why Campbell asked him to park the car on Nunan Street.

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Even if Richardson's involvement was equivocal evidence he and Campbell worked together to carry out the shooting, the Record must have also contained some evidence Richardson was the shooter for the accomplice liability instruction to be proper; it did not. Again, the jury could have doubted Richardson's testimony that he was not the shooter. Still, while security footage showed Richardson walking in Gadsden Green around the time of the shooting, it also showed him walking

without a rifle, wearing a white T-shirt and ball cap rather than a hoodie, and getting into the gold Buick rather than a lime green car. Consequently, Richardson does not meet the description of the man seen by Blake.

Thus, neither party presented evidence that either Campbell was working with the man seen by Blake or that Richardson was the shooter. Therefore, the trial court erred by giving an accomplice liability jury instruction. Accordingly, we reverse the trial court and remand for a new trial on the murder and attempted murder charges.

CONCLUSION

The trial court committed reversible error by giving both inferred malice and accomplice liability jury instructions. Therefore, Campbell's convictions of murder and attempted murder are

REVERSED AND REMANDED.

HILL and HEWITT, JJ., concur.

Notes:

¹ Gadsden Green is a government housing community in Charleston.

² Katrina did not learn Campbell was Kadeshia's brother until the next day.

³ President did not state what time she woke but testified she had to be at work by 7:00 a.m.

⁴ Richardson was not tried with Campbell; he testified he was still facing charges but was hoping for leniency for testifying on behalf of the State.

⁵ Richardson stated he left a strip club around 4:00 a.m. before going to Austin Lakes.

⁶ *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("[I]nstructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where

evidence is presented that would reduce, mitigate, excuse[,] or justify the homicide."), *overruled by State v. Burdette*, 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019) (holding "regardless of the evidence presented at trial, a trial court shall no longer instruct a jury that malice may be inferred from the use of a deadly weapon").

⁷ Campbell filed his notice of appeal on January 23, 2018, and *Burdette* was decided on July 31, 2019.

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**The State, Respondent,
v.
Devin Jamel Johnson, Appellant.**

No. 5950

Appellate Case No. 2019-000938

Court of Appeals of South Carolina

November 9, 2022

Heard April 7, 2022

Appeal From Charleston County R. Markley
Dennis, Jr., Circuit Court Judge

Appellate Defender Susan Barber Hackett,
of Columbia, for Appellant.

Attorney General Alan McCrory Wilson,
Deputy Attorney General Donald J. Zelenka,
Senior Assistant Deputy Attorney General Melody
Jane Brown, and Senior Assistant Attorney
General W. Edgar Salter, III, of Columbia; and
Solicitor Scarlett Anne Wilson, of Charleston, all
for Respondent.

KONDUROS, J.

Devin Jamel Johnson appeals his conviction
of murder. He contends the trial court erred in
admitting into evidence his statement to law
enforcement, removing a juror midtrial, and
instructing the jury on accomplice liability. We
reverse.

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FACTS/PROCEDURAL HISTORY

On June 8, 2011, at 10:18 p.m., Akeem
Smalls (Victim) was shot while in the courtyard
breezeway of Building C at Georgetown
Apartments in Charleston County, South
Carolina. He died a short time later as a result of
being shot. When Victim was shot, he was just
outside of an apartment where Sharmaine

Johnson lived at the time. Sharmaine^[1] was
Johnson's sister and Victim's girlfriend. At the
time of the shooting, Victim owed Johnson \$420.

All four of the fired shell casings discovered
at the crime scene were identified as 9mm FC
Luger casings. Officers discovered an unfired FC
9mm bullet with Johnson's fingerprint on it in a
drawer of a nightstand in Sharmaine's apartment.

Officers interrogated Johnson regarding
Victim's shooting. During the interrogation,
Johnson initially denied being in Charleston at
the time of the shooting. After a few hours of
interrogation, Johnson admitted he had been at
Georgetown Apartments at the time Victim was
shot. Johnson also indicated someone named
Creep^[2] was with him at the time of the shooting.
Johnson stated he saw the shooting, claiming a
person named Dee shot Victim and that Johnson
and Creep fled the scene out of fear.

Subsequently, officers obtained a search
warrant for Johnson's cell phone records,
including his historical cell site location
information. Verizon provided Johnson's cell
phone records, which included call history logs
and text messages. The company also supplied
cell site location data for outgoing and incoming
calls. A grand jury subsequently indicted Johnson
for murder and possession of a weapon during the
commission of a violent crime.

At trial, the State requested the trial court
charge the jury "'the hand of one is the hand of all'
... because it 'ha[d not] been able to identify a co-
defendant.'" *State v. Johnson*, 418 S.C. 587, 591,
795 S.E.2d 171, 173 (Ct. App. 2016) (alteration in
original). "The court denied the request, stating it
did not 'buy' the State's rationale that the
evidence showed two individuals were involved in
the crime." *Id.* The

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court explained that all of the testimony
presented indicated Johnson was the shooter. *Id.*
After deliberations began, "the jury asked, '[I]f the
other individual pulled the trigger, can the

defendant still be guilty?" *Id.* at 592, 795 S.E.2d at 173 (alteration in original). The trial court determined its prior decision not to charge "the hand of one is the hand of all" was incorrect; Johnson disagreed. *Id.* at 592, 795 S.E.2d at 173-74. "[T]he trial court offered [Johnson] the opportunity to reargue his closing argument before [it] recharged the jury," but Johnson declined and moved for a mistrial. *Id.* at 592-93, 795 S.E.2d at 174. The trial court charged the jury on "hand of one, hand of all" and mere presence. *Id.* at 593, 795 S.E.2d at 174. After the recharge, Johnson asserted the evidence did not support the new charge. *Id.* The jury convicted Johnson of both offenses-murder and the possession of a weapon during the commission of a violent crime. *Id.* at 590, 795 S.E.2d at 172.

Johnson appealed, arguing the trial court erred in "instructing the jury concerning 'the hand of one is the hand of all' because the evidence did not support the instruction" and the timing of the instruction prevented Johnson from addressing the theory in his closing argument, "rendering the trial fundamentally unfair."^[3] *Id.* at 588, 795 S.E.2d at 171-72. This court reversed his convictions, finding the trial court's decision to later give the charge fundamentally prejudiced Johnson because he "crafted his closing argument in reliance on the trial court's adamancy" during the charge conference that it would not give the charge. *Id.* at 598, 795 S.E.2d at 177. The court addressed only that issue because it was dispositive. *Id.* at 590, 795 S.E.2d at 172.

The State retried Johnson beginning on April 1, 2019.^[4] At the outset of the trial, the court held a *Jackson v. Denno*^[5] hearing on the admissibility of Johnson's

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statement to David Osborne.^[6] Johnson argued the statement was not admissible because it was involuntary due to a combination of factors: the length of time of the interview, his repeated requests for cigarettes, and references investigators made about his daughter. Following

testimony from Osborne, the trial court found the statement admissible.

At trial, Tenika Elmore testified that at the time of Victim's death, she and Johnson lived together in Orangeburg. Elmore provided that at that time, she worked in North Charleston and Johnson would occasionally drive her or ride with her to work in her car, a blue 2008 Toyota Camry. The Camry was missing both passenger-side hubcaps. On the day of the shooting, Elmore, Johnson, and Johnson's six-year-old daughter traveled in Elmore's car to Charleston for Elmore to work. Johnson and his daughter dropped Elmore off, and she worked all day. Johnson was alone when he picked her up after work. Elmore believed he was supposed to pick her up at 11 p.m., but she said he was late, which was normal. After Johnson and Elmore picked up Johnson's daughter from his mother's house, they stopped at a gas station on the way back to Orangeburg. Elmore identified Johnson in photos shown to her during her testimony and confirmed that on that night, he was wearing the clothing shown in the photos. The video surveillance from the gas station showed Johnson wearing a white tank top^[7] and dark pants on the evening of the crime.

Osborne testified that during law enforcement's investigation of Victim's killing, officers were interested in one portion of video surveillance from Georgetown Apartments showing a car backing into a parking spot and two men exiting the vehicle and walking toward Building C. Osborne indicated that about a minute before the shooting occurred, the two individuals walked towards the breezeway, which was the location of the shooting. The shooting occurred outside of the camera's view. Osborne provided that seconds after the shooting, the two individuals ran back to the car and fled the complex in it. He testified the pair was in a hurry when they came back to the car. He explained the vehicle depicted in the surveillance video was a blue Toyota Camry consistent with the color, make, and model of Elmore's car and both cars were missing the passenger side hubcaps. He provided he could tell the vehicle in the video was missing hubcaps because of

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the difference in shininess around the wheel area on the two sides of the car. According to Osborne, the driver of the car wore a white tank top and black pants. Osborne testified the only people that could be seen on the videos entering the breezeway area was a man with a dog and the two individuals from the car. He believed the breezeway was the only way to get to the interior of the apartment building without going through an apartment. Osborne was unsure if someone could come in from the pool area. On cross-examination, Osborne acknowledged many cars shown on the security video of the parking lot of the apartment complex had backed into parking spaces. He also agreed the apartment complex security cameras had several blind spots.

Osborne testified about the statement Johnson gave to him. Osborne indicated that for the first four hours of the interview, Johnson claimed he was in Orangeburg at the time Victim was shot. Osborne provided that during the interview, he left the room and allowed Johnson to use Osborne's cell phone. Osborne stated that after Johnson talked on the phone with his mother and Elmore, his story began to change—he admitted being at Georgetown Apartments and indicated he saw the shooting. Based on Johnson's statements, Osborne opined Johnson admitted to being the driver of the vehicle seen in the video.

Robert Holmes testified that he and Victim sold marijuana provided to them by Johnson. Holmes stated Victim stole marijuana valued at about \$1,000 from Johnson. Holmes testified that about a week before the shooting, Johnson was looking for Victim and was unhappy with him. On cross-examination, Holmes acknowledged he had told Osborne that Victim had taken \$500 worth of marijuana but later gave Johnson money for the marijuana. Holmes also admitted he told Osborne that Victim thought everything was fine between Johnson and himself after that.

Vanessa Morton testified that while watching the news on television, she learned law

enforcement was looking for her son Diangelo Bumcum. She indicated she immediately called the police, who then came to her house. She provided Bumcum did not try to run, despite knowing the police were coming and he willingly went with them. Morton told police she would help them search her house and gave the police the clothing her son had been wearing. Police arrested Bumcum for Victim's murder. Morton testified police arrested her son because he was the last person seen with Victim. The charges against Bumcum were later dismissed, and he was released several months after his arrest. Morton identified her son in a photo from about ten minutes before the shooting and indicated he was wearing a white tank top.

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Bumcum testified that on the night of Victim's killing, he saw Victim on the porch outside an apartment in Building C of Georgetown Apartments. Bumcum provided he stopped to talk with Victim and their conversation was friendly. On cross-examination, he testified he went inside the apartment to use the restroom. He then left to go to another apartment building in the complex and about thirty to forty-five minutes later, learned Victim had been killed. Bumcum testified he worked at Jiffy Lube performing car services around the time period Victim was killed.

Detective Craig Kosarko testified that at the same time Osborne was questioning Johnson, he was questioning Bumcum. Detective Kosarko stated that at the end of the interview, he collected the shirt Bumcum was wearing during the interview because Bumcum stated he wore it on the day of the shooting. Osborne also participated in Bumcum's interrogation at times. Osborne testified that after talking to Bumcum, he looked at the video from the apartments again and observed someone walking from Building C to Building D about ten minutes before the shooting. He testified that due to the video quality, he had difficulty identifying details of the person's face but the body type of the person shown on the video was consistent with

Bumcum's. He indicated the person did not appear to be walking in a hurry. Osborne testified that Bumcum's shirt tested positive for particles of lead, which Osborne attributed to Bumcum's job. Osborne testified that lead is one of three types of particles that need to be detected to identify gunshot residue; the other two being antimony and barium. Osborne provided that all three substances must be present to have a positive test result for gunshot residue. Osborne provided that lead is prevalent in brake pads and Bumcum worked at Jiffy Lube. However, Osborne indicated he never asked Bumcum about it.

Osborne also testified that during the interrogation of Johnson, Detective Kosarko showed Johnson a picture of Bumcum. Osborne indicated that Johnson first stated he did not know the person in the photo. However, Osborne provided that later in the interview, once Johnson admitted being at the apartment complex, he identified Bumcum as the shooter.

Detective Kosarko testified that a series of text messages from Johnson to Terry Stevens from the day Victim was killed showed Johnson was attempting to get Stevens to help him with something. At 4:37 p.m., Johnson texted "i go wet dude ass up da nite." The final message to Stevens, at 9:34 p.m. stated, "i cnt wait on u i gotta handle my bizz."

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Detective Kosarko also testified the phone records showed that on the night Victim was killed, ten phone calls were placed to and from Johnson's phone number between 9:01 p.m. and 10:02 p.m. and no phone calls were placed between 10:03 p.m. and 10:34 p.m. Additionally, twelve phone calls were placed between 10:35 p.m. and 11:40 p.m. Detective Kosarko indicated that the phone records also showed Johnson called his sister, Victim's girlfriend, twice at 9:30 p.m. on the evening of the crime. The phone records show the person placing those two calls dialed *67 before dialing the number, which Detective Kosarko explained would prevent the phone number from displaying on the phone of

the person receiving the call. The two phone calls lasted twelve seconds and twenty-eight seconds.

Detective Kosarko further testified about a series of text messages between Johnson and his mother the day following the shooting. Johnson's mother texted him asking if he was alright and he responded: "I want to b[e] alrite sha[y] got it all twist up rite now but i kno[w] [yo]u prayin[g]." Later that same day Johnson's mother texted him, "How you mean you want to alright[.]. Deal with [yo]urself, maintain your cool let them figure it out you had[]nothing to do with it." One minute later, Johnson's mother sent him another text that stated: "Clear all [yo]ur texts."

Elmore testified that "to wet somebody up" means "[t]o shoot them." On cross-examination, when asked if she had stated that "wet or to get wet" also "means to get drunk or intoxicated," she responded, "That's an interpretation, yes." Additionally, she confirmed she had not "heard [Johnson] say get wet meaning to stab or shoot somebody." She agreed Johnson used that term to mean intoxicated. Holmes testified that "to wet somebody up" means to shoot the person. On cross-, redirect, and recross-examination, he explained the terms wet and "wet up" are two different things; that getting wet means to get drunk or intoxicated, whereas wetting someone up means to shoot that person. Additionally, Osborne testified that based on his experience, to wet somebody up means "you're going to shoot somebody," explaining "when you shoot somebody multiple times, they bleed and then they get wet." Osborne also clarified, "Wet somebody up is different than get wet. Get wet is getting high. Wet somebody up or wet them up is shoot somebody." Detective Kosarko also stated that to wet somebody up meant to shoot or kill someone, describing "when you shoot somebody, their clothes get wet from the blood."

During the State's case, an issue arose with a juror; initially, the trial court was concerned the juror possibly had fallen asleep and later, the juror informed the

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court he knew one of the witnesses who had testified.^[8] After the court spoke to the juror and the parties argued about whether the juror should be excused, the trial court stated it was excusing the juror because the State provided it would have exercised a preemptory challenge if the juror had indicated during voir dire he knew one of the witnesses.

Prior to the trial court charging the jury, Johnson asked the trial court if it planned to charge the jury on accomplice liability. The trial court stated it was going to charge the jury on "what is the hand of one." Johnson replied he was objecting to that language being included in the charge.

Following closing arguments, the trial court charged the jury. The charge included the following language:

Now, in conjunction with the crime of murder, I would charge you of this principle of law. It's called the hand of one is the hand of all.

If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts or act done in carrying out the common plan or purpose. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all.

Now, prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of the crime. Mere knowledge or merely being present by another person and the crime is

committed, that's not sufficient to convict a person of the crime.

In order to convict the defendant -- even if the defendant was present when it is committed, is not sufficient to

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convict. You must -- guilt is -- to convict the defendant as a principal, a principal is proven by showing an actual or constructive presence at the scene as a result of a prior arrangement. Therefore, finding a prior arrangement, plan or common scheme is necessary for a finding of guilt as a principal.

The State must prove beyond a reasonable doubt by competent evidence that the theory of the hand of one is the hand of all. A principal in a crime is one who either actually commits the crime or who is present aiding, abetting or assisting in committing the crime.

When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more are acting with a common plan or scheme or intent are present at the commission of the crime, it does not matter who actually commits the crime. All are guilty.

And of course, as with any other aspect, the State has to prove each of those facts that we just discussed beyond a reasonable doubt. That means you are firmly convinced.

After the trial court charged the jury, Johnson objected:

I just wanted to note on the record that we are objecting to the hand of one/hand of all charge.

We don't believe that the State has presented any evidence that the person that . . . Johnson was with that night was the shooter. I think the evidence that they presented exclusively in this case was the fact that . . . Johnson was the shooter, and I will say that I believe I gave a softball to . . . Osborne when I asked him whether or not he would serve a murder warrant on the person once he found out who he was and he did say no, that is tricky because he's a passenger and I would want to find out his involvement in this case before I did that.

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So I think even their own State's witness said we don't have enough to say he's involved or not, and that's why I think the [c]ourt should have declined to read that hand of one/hand of all charge.

The trial court responded:

And while I agree with you that certainly there was a lot of indication of that in this particular case, I truly believe the hand of one/hand of all is most appropriate, especially with the fact that we have -- well, the evidence.

Of course, we have the evidence, if the jury believes it, of course, that . . . Johnson -- in taking instruction that the State has presented that he was intending to go kill him, go shoot him. Whether he died or not, I don't know if that was necessarily it. Probably making him bleed I think was what the typical literal

statement of the vernacular, but that part of it and then getting somebody to assist him, that seems to imply I want to get somebody and maybe he didn't want to do it himself. Maybe he wanted somebody else to be the shooter, but he was going to assist. So I believe all of that really falls into that accomplice part of being participating and so I respect your position, but I think it's appropriate under the evidence of this case.

During deliberations, the jury sent a note that asked: "Does the 'hand of one' apply to the possession of a weapon during the commission of a violent crime?" In response, the trial court provided the jury with the following additional instruction:

If the State has proved beyond a reasonable doubt that the murder has been committed, then in order to have a conviction for the hand of one/hand of all, the State would also have to prove beyond a reasonable doubt that . . . Johnson had possession of a firearm at the time that that murder was committed.

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In other words, hand of -- you can't -- assuming just for the sake that there were two people and three people, whatever, the person -- in order to be convicted, the hand of one doesn't apply to anything but the murder. It does not apply to the -- to the firearm possession. You have to prove actual possession of that in order to return a verdict of guilty.

After returning to deliberations, the jury convicted Johnson of murder but acquitted him of the weapons charge. The trial court sentenced him to thirty-six years' imprisonment, with credit for time served of 2,604 days. Johnson filed a

motion for a new trial, arguing the trial court erred in charging the jury on accomplice liability. Following a hearing, the trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting *State v. Laney*, 367 S.C. 639, 643-44, 627 S.E.2d 726, 729 (2006)).

LAW/ANALYSIS

Johnson argues the trial court violated his due process rights by instructing the jury on the theory of accomplice liability, specifically the hand of one is the hand of all because the State presented no evidence Johnson acted in concert with another.^[9]We agree.

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"Generally, the trial [court] is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "The law to be charged must be determined from the evidence presented at trial." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). If any evidence supports a jury charge, the trial court should grant the request. *Brown*, 362 S.C. at 262, 607 S.E.2d at 95. A charge is correct if it adequately explains the law and contains the correct definition when read as a

whole. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). If jury instructions as a whole "are free from error, any isolated portions [that] may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). "A jury charge [that] is substantially correct and covers the law does not require reversal." *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603.

"To reverse a criminal conviction on the basis of an erroneous jury instruction, we must find the error was a prejudicial error." *State v. Bowers*, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022). "Prejudicial error in a jury instruction is an error that contributed to the jury verdict." *Id.* Should an appellate court find a jury charge erroneous, the court must then decide if the charge affected the jury's deliberations, contributing to the verdict. *See id.* If the appellate court has "any reasonable doubt as to whether the erroneous charge contributed to the verdict," it must reverse the conviction. *Id.* at 647, 875 S.E.2d at 611.

"[S]ome principles of law should not always be charged to the jury." *State v. Perry*, 410 S.C. 191, 202, 763 S.E.2d 603, 608 (Ct. App. 2014); *see also State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019) (stating some matters allowed during jury argument should not be included in the jury charge).

"Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002); *see also id.* at 205, 208 n.1, 573 S.E.2d at 803, 804 n.1 (reversing a conviction even though a jury charge was a correct principle of law because it "was not warranted by the facts adduced at trial").

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"The doctrine of accomplice liability arises from the theory that 'the hand of one is the hand of all.'" *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (quoting 23 S.C. Jur. *Homicide* § 22.1 (2014)). "Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id.* "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 to be guilty under a theory of accomplice liability." *Id.* at 472-73, 758 S.E.2d at 910. "Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct." *Id.* at 473, 758 S.E.2d at 910. "If 'a person was 'present abetting while any act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal-even 'though [that act was] not the whole thing necessary.'" *Id.* (alterations in original) (emphases omitted) (quoting *Rosemond v. United States*, 572 U.S. 65, 72 (2014)).

In *State v. Washington*,^[10] our supreme court determined the trial court erred by instructing the jury on accomplice liability. 431 S.C. 394, 397, 848 S.E.2d 779, 781 (2020). The supreme court provided "an alternate theory of liability may not be charged to a jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" *Id.* at 409, 848 S.E.2d at 787 (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 438). The supreme court explained that "[f]or an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.'" *Id.* at 407, 848 S.E.2d at 786 (second alteration by court) (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 439). The supreme court noted the record in that case contained evidence the defendant was the shooter but also contained evidence he was not the shooter. *Id.* Accordingly, the supreme court held

that "[t]he question becomes whether there was equivocal evidence the shooter, if not [the defendant], was an accomplice of [the defendant]." *Id.*

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The supreme court examined the case of *Wilds v. State*,^[11] in which this court affirmed the finding that the trial court erred by giving an accomplice liability jury charge. *Washington*, 431 S.C. at 409-10, 848 S.E.2d at 787. The supreme court observed that this court in *Wilds* noted no evidence was presented that anyone other than the defendant was the shooter. *Washington*, 431 S.C. at 409, 848 S.E.2d at 787 (citing *Wilds*, 407 S.C. at 439-40, 756 S.E.2d at 390-91). The supreme court in *Washington* posited that the jury, like the jury in *Wilds*, may have doubted the testimony from the only possible accomplice that he did not shoot the victim. *Id.* at 410, 848 S.E.2d at 787. However, the supreme court found to warrant an accomplice liability jury instruction, some evidence must have been presented that the possible accomplice shot the victim. *Id.* The supreme court held because neither party presented such evidence, the trial court erred by giving the accomplice liability jury instruction. *Id.* at 403, 410-11, 848 S.E.2d at 784, 787-88.

Recently, in *State v. Campbell*, this court decided whether an accomplice liability instruction was improperly given.^[12] 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert. granted*, SC Sup. Ct. Order dated Sept. 8, 2022. In that case, this court found the trial court had erred in giving the instruction and reversed the conviction. *Id.* at 541, 868 S.E.2d at 421. This court provided:

Based on the evidence presented at trial, only Richardson could have been [the defendant's] accomplice. On the day of the shooting, Richardson rode with [the defendant] from North Charleston to [the location of the shooting], parked the car for [the defendant], and drove [the defendant] back to North Charleston. Like in *Wilds* and

Washington, the jury could have doubted Richardson's testimony that he was not involved in a common plan or scheme with [the defendant] to carry out the shooting. Nevertheless, neither party presented evidence that Richardson and [the defendant] had joined together in a common plan or scheme to carry out the shooting. Indeed, Richardson testified he did not know [the defendant] was going to drive to [the shooting location] or why [the defendant] asked him to park the car on [a particular s]treet.

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Campbell, 435 S.C. at 540, 868 S.E.2d at 421.

This court further explained:

Even if Richardson's involvement was equivocal evidence he and [the defendant] worked together to carry out the shooting, the Record must have also contained some evidence Richardson was the shooter for the accomplice liability instruction to be proper; it did not. Again, the jury could have doubted Richardson's testimony that he was not the shooter. Still, while security footage showed Richardson walking in [the shooting location] around the time of the shooting, it also showed him walking without a rifle, wearing a white T-shirt and ball cap rather than a hoodie, and getting into the gold Buick rather than a lime green car.

Consequently, Richardson does not meet the description of the man seen by [a witness].

Id. at 541, 868 S.E.2d at 421.

This court determined because "neither party presented evidence that either [the defendant] was working with the man seen by [the witness] or that Richardson was the shooter," the trial court erred by giving an accomplice liability jury instruction. *Id.*

"Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (omission by court) (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)).

The trial court here erred in giving the accomplice liability jury charge. The State's theory of the case was that Johnson and the passenger in his car killed the Victim. No eyewitness testified that he or she saw the Victim being shot. Johnson provided in his statement to the police that he saw one person shoot Victim, and he identified Bumcum as that shooter when law enforcement showed him a photo of Bumcum. The record shows a car with two men in it backed into a parking space, which Osborne suggested the individuals were "trying to get out in a hurry." The two individuals walked together toward the crime scene, remained for a few

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seconds, and quickly ran back to the car together and fled the complex. Osborne opined Johnson and another male were the individuals in the vehicle seen in the video. The car seen in the video is consistent with the car Johnson was known to be driving that night. From the video, the clothing of the driver of the car matched the clothing Johnson was wearing that night. Johnson admitted in his statement that he was at the apartment complex and present at the shooting. Cell phone data also placed Johnson at the complex. Further, Johnson admitted Creep was with him at the time of the crime. The State's entire theory of the case was that Johnson was the shooter.

The State presented evidence Victim owed Johnson a debt. The State also introduced text messages that Johnson was going to wet someone up, which meant to shoot or kill a person. The Record contains no evidence that Johnson recruited anyone to actually shoot Victim; any evidence of recruiting as shown in the text messages is to assist or accompany Johnson.

An accomplice liability charge was not proper because the evidence is *not* equivocal as to whether Johnson or Creep was the shooter—all the evidence presented only went to Johnson being the shooter; no evidence was presented of Creep being the shooter. *See Barber*, 393 S.C. at 236, 712 S.E.2d at 439 ("Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted."). Additionally, although the record contains little evidence Bumcum was the shooter, to the extent that Bumcum could have been the principal, the State presented no evidence Johnson was working with him.

The weapons charge of which the jury acquitted Johnson states it applies when "a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime." S.C. Code Ann. § 16-23-490(A) (2015). The record establishes Victim died from being shot with a firearm. For the jury to acquit Johnson of the weapons charge, it must have found the State did not meet its burden of proving Johnson actually shot Victim and therefore, only found him guilty of murder due to the theory of accomplice liability. Therefore, the charge prejudiced Johnson.

CONCLUSION

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The trial court erred by charging the jury on accomplice liability and that error prejudiced Johnson.^[13] Accordingly, Johnson's conviction of murder is

REVERSED.

WILLIAMS, C.J., and VINSON, J., concur.

Notes:

[1] Sharmaine is also referred to as Shay in the record.

[2] Johnson told the officers he did not know Creep's last name or contact information but described a tattoo he had. He gave the officers the name of another person who knew Creep and through that person officers located a person known as Creep. However, officers did not believe this was the person Johnson claimed was with him when Victim was shot.

[3] Johnson also argued "the trial court erred in (1) admitting text messages and historical cell service location information obtained from his cellular service provider by a search warrant" and (2) admitting his statement to investigators. *Johnson*, 418 S.C. at 588, 795 S.E.2d at 171.

[4] In between the time this court issued the remittitur following the first appeal and beginning of this trial in April 2019, a second trial began. At oral argument, both parties were unclear as to what transpired at the second trial other than the State believed it ended in a mistrial.

[5] 378 U.S. 368 (1964).

[6] Osborne was a detective for the Charleston Police Department at the time of Victim's killing and investigated the case, which included interrogating Johnson. At the time of trial, he was no longer a detective; he was an assistant solicitor.

[7] The officers referred to the shirt shown in the video as a white tank top or "wife beater."

[8] The juror knew the witness by a different last name than the one the trial court listed during voir dire.

[9] As a threshold matter, the State submits that Johnson's assertion of a due process violation misunderstands the function of the Due Process Clause because the appropriate inquiry is whether the trial court abused its discretion in giving an accomplice liability instruction because this instruction is not required by the Due Process Clause. The fact that Johnson mentioned that his due process rights were violated by the jury charge is of no matter. Johnson provides that the standard of review applicable here is that of reviewing a jury charge and is for the abuse of discretion. He does not mention due process again.

[10] Johnson's brief mentions this court's *Washington* opinion and noted that the supreme court had granted the petition for certiorari and heard arguments. No opinion had been issued at the time of the filing of the briefs. Johnson provided the supreme court's opinion to this court as a supplemental authority.

[11] 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).

[12] Johnson has provided this opinion as a supplemental authority.

[13] Because this issue is dispositive, we need not reach Johnson's issues regarding the voluntariness of his statement and the juror disqualification. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

431 S.C. 394
848 S.E.2d 779

The STATE, Respondent,
v.
Sha'quille WASHINGTON, Petitioner.

Appellate Case No. 2018-001878
Opinion No. 27992

Supreme Court of South Carolina.

Heard March 11, 2020
Filed September 2, 2020

Jack B. Swerling, of Columbia, and Katherine Carruth Goode, of Winnsboro, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

JUSTICE JAMES :

[848 S.E.2d 781]

[431 S.C. 397]

Sha'quille Washington ("Petitioner") was indicted for the murder of Herman Manigault and was convicted of the lesser included offense of voluntary manslaughter. The court of appeals affirmed Petitioner's conviction. *State v. Washington*, 424 S.C. 374, 818 S.E.2d 459 (Ct. App. 2018). We granted Petitioner's petition for a writ of certiorari to review the court of appeals' decision. We hold the trial court erred in giving an accomplice liability instruction, and we hold Petitioner was prejudiced by this error. Therefore, we affirm in part, vacate in part, and reverse in part, and we remand to the circuit court for a new trial on the charge of voluntary manslaughter.

[431 S.C. 398]

I. Factual and Procedural History

On August 25, 2013, a large crowd gathered at "A Place in the Woods," a nightclub in Huger, South

Carolina. Herman "Trey" Manigault (the victim in this case) and his cousin, Larry Jenkins, were among those present. According to trial testimony, Manigault told multiple people that Petitioner and Larry Kinloch, Petitioner's uncle, were following him around the establishment and staring him down. Arianna Coakley, Manigault's girlfriend, testified Manigault told her he was about to "snap" because Petitioner kept looking at him. Aja Williams, the bartender, testified Manigault said to her, "[Kinloch] going to shoot me, they going to kill me."

At closing time, a multitude of club patrons, including Manigault, Jenkins, Kinloch, and Petitioner, exited the building to the parking lot. A fight ensued in the parking lot. Testimony as to the participants in the fight, the specifics of the fight, and the shooting of Manigault varied greatly between the State's witnesses, Petitioner's witnesses, and Petitioner's statement to law enforcement.

Jenkins testified he joined the fight after at least two people hit Manigault. He could not identify who those two people were, but he testified Petitioner was "out there" during the fight. Jenkins testified he heard gunshots near the end of the fight. He checked himself for wounds and saw Manigault on the ground. Jenkins testified he saw Petitioner holding a small silver revolver in his right hand and firing towards Manigault. He testified he was 100% sure Petitioner shot Manigault.

Ms. Coakley testified that moments before the shooting, Petitioner said something to Manigault. Coakley testified Manigault responded by asking Petitioner, "what's up" and Petitioner struck Manigault with his left hand. Coakley testified Manigault slid towards the ground and Petitioner continued to hit him. Coakley said she raised a glass beer bottle to hit Petitioner but backed down when Petitioner held a gun to her face and said, "I ain't playing, I ain't playing." Coakley testified Petitioner turned and ran, and then she heard four gunshots.

Petitioner's written statement to the police was read to the jury. Petitioner stated he arrived at the club around 2:00 a.m. and spoke to "a few ladies." He stated he walked outside, heard a commotion, and saw three people fighting. According

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to Petitioner, "the victim" (presumably Manigault) walked off, and an unknown person Petitioner termed "the suspect" fired a shot from a revolver at Manigault. Petitioner said he was four to five feet away from them at this point. Petitioner stated he was several feet further away from them when he heard two more shots. Petitioner stated he called the police the next morning to give a statement and clear his name after his grandmother informed him people accused him of shooting Manigault.

Kinloch testified for the State and initially denied any participation in the fight, but he eventually described his involvement as holding onto Larry Jenkins without throwing any punches. During its questioning of Kinloch, the State played a nine-minute post-shooting recorded phone conversation between Kinloch and his incarcerated brother Patrick. The solicitor quoted portions of the call while questioning Kinloch, but neither the recording nor a transcript of it was introduced into evidence. Kinloch, clearly a reluctant witness, testified he did not remember the phone call, and he did not respond to many of the solicitor's questions about the call. Apparently, Kinloch told his brother he initially fought a big, "light-skinned dude" (probably Jenkins) and then "got [Manigault] on the car. Me and

[848 S.E.2d 782]

him going back and forth. Dow, dow, dow [referring to three gunshots]." Kinloch also apparently told his brother he saw Petitioner shoot Manigault.

During cross-examination, Petitioner pressed Kinloch to admit he was the one who shot Manigault. Kinloch denied he shot Manigault.

Petitioner asked Kinloch if he told Kenneth Quinton Grant and Darlene Washington (presumably Petitioner's grandmother) he shot Manigault. Kinloch denied this as well.

Petitioner called Erin Presnell, M.D., the forensic pathologist who conducted Manigault's autopsy, to testify as to Manigault's blood alcohol content at the time of autopsy. Before the jury, Petitioner asked Dr. Presnell, "What was the alcohol level --," and the State interjected, "Objection, Your Honor. 404," obviously a reference to Rule 404 of the South Carolina Rules of Evidence. The trial court then held an off-the-record bench conference¹ to discuss the issue. The trial court then

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excused the jury and sustained the State's objection, explaining, "There has been abundant testimony as to the fact that there was drinking or not drinking by the victim, and so I have excluded this testimony, but you may continue [with a proffer of the testimony]." During the proffer, Dr. Presnell testified Manigault "had a blood-alcohol level of .235," which she categorized as "high." She testified that while she "imagined" Manigault "acted intoxicated," she could not give an opinion as to "whether he was aggressive or subdued or what his actual mannerisms were." She testified such a high blood alcohol level could have resulted in impaired judgment. The record contains no argument from the parties as to why the testimony was or was not admissible, and the trial court did not further explain its ruling. The State argued to the court of appeals that the context of the trial court's ruling made it clear the trial court excluded the testimony as irrelevant under Rule 402, SCRE. The court of appeals held the testimony was irrelevant and further held that even if it was relevant, any probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. *Washington*, 424 S.C. at 406-07, 818 S.E.2d at 476. The court of appeals also held that even if the trial court erred in excluding the testimony, Petitioner suffered no prejudice because the jury found Petitioner guilty of only voluntary manslaughter,

which carried with it a finding Petitioner acted with sufficient legal provocation. *Id.* at 407, 818 S.E.2d at 476.

Petitioner called Kevin Watson to testify, but the trial court refused to allow him to testify after concluding he disobeyed a pre-trial sequestration order. Three other witnesses called by Petitioner were Robin Williams, Tyson Singleton, and Kenneth Quinton Grant. Robin Williams testified she was talking to her cousin as they walked out of the club at closing time when she heard "a lot of fussing" and saw a young lady holding a glass bottle in Petitioner's face. According to Robin Williams, there was a van parked nearby. She testified there was a fight taking place on one side of the van, and Petitioner and the young lady were on the other side of the van. She testified Petitioner "never had a gun." She also testified she heard two gunshots about five seconds after she saw the lady

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holding the bottle in Petitioner's face and Petitioner "ran on the second shot." She testified she then heard two more shots about three seconds apart but Petitioner was not anywhere near where those two shots were fired.

Tyson Singleton testified he was talking to Robin Williams in the parking lot when he heard three shots fired in the parking lot. He testified he did not see who fired the shots because a van blocked his view. He testified he saw Petitioner "in the road" next to some woods before the first shot was fired and Petitioner was nowhere near where any of the shots were fired. He also testified he saw Kinloch inside the club before closing time but did not see him in the parking lot after closing.

Petitioner called Kenneth Quinton Grant, Petitioner's second cousin and—according to Grant—Kinloch's best friend, to

[848 S.E.2d 783]

testify about a conversation Grant claimed he had with Kinloch after the shooting. Grant testified he was not present at the club when the shooting occurred; however, he testified he saw Kinloch at Kinloch's house twenty to twenty-five minutes after the shooting, and Kinloch admitted to him he shot Manigault. The State objected on hearsay grounds, and the trial court asked Petitioner if there was an exception to the hearsay rule that would allow the testimony. Petitioner responded, "[Kinloch] already testified. My God." Petitioner also argued Kinloch's statement to Grant qualified as a present sense impression under Rule 803(1), SCRE. The trial court sustained the State's hearsay objection and instructed the jury to disregard Grant's statement. Despite this ruling, Petitioner again asked Grant whether Kinloch admitted to shooting Manigault, and Grant confirmed. The State again objected, and the trial court again sustained the objection and instructed the jury to disregard the testimony.² Before the court of

[431 S.C. 402]

appeals, Petitioner argued Kinloch's admission to Grant was a prior inconsistent statement and therefore admissible as non-hearsay under Rule 801(d)(1)(A), SCRE.

During the charge conference, the State first argued it was entitled to an accomplice liability instruction because the defense tried to suggest Kinloch shot Manigault. The State argued to the trial court, "I don't believe there's any evidence in the record that Larry Kinloch was the shooter, but there's certainly been multiple indications from the defense during this trial that he was." The "multiple indications" referred to by the State presumably consisted of (1) Petitioner's unsuccessful attempts to introduce Grant's testimony that Kinloch told Grant he shot Manigault and (2) Petitioner's cross-examination of Kinloch during which Petitioner pressed Kinloch (a) to admit he told Grant and Darlene Washington he shot Manigault and (b) to admit he was known on the streets as the shooter. The State also argued that if a person is involved in an altercation, a defendant who participates in the

altercation is criminally responsible for the end result. On this point, the State argued, "even if it was Larry Kinloch that ultimately did shoot the victim in this case, the defendant was part of the assault." Petitioner acknowledged he tried to introduce Grant's testimony that Kinloch told him he was the shooter, but Petitioner noted the trial court sustained the State's objections and instructed the jury to disregard Grant's testimony on that issue.

Over Petitioner's objection, the trial court charged the jury on accomplice liability. Two hours into deliberations, the jury asked the trial court for clarification of the law on reasonable doubt, accomplice liability, and voluntary manslaughter. A copy of the question is in the record, but the record does not reflect whether the trial court responded. Three hours later, the jury sent a note to the trial court stating it was deadlocked. The trial court gave the jury an *Allen* charge³ and adjourned for the evening. Three hours into deliberations the next morning, the jury asked the trial court its second question, "Can we use [accomplice liability] to support legal provocation

[431 S.C. 403]

for parties acting in concert with victim? Would parties acting in concert with the victim constitute sufficient legal provocation towards actions against victim?" The trial court responded in writing, "You have been given all instructions on the law in my charge to you. Please continue your deliberations." Approximately two hours after its second question, the jury found Washington not guilty of murder but guilty of the lesser included offense of voluntary manslaughter.

Petitioner appealed and presented six arguments to the court of appeals: (1) the trial court erred in excluding Kenneth Quinton

[848 S.E.2d 784]

Grant's testimony on hearsay grounds; (2) the trial court erred in excluding Dr. Presnell's testimony; (3) the trial court erred in excluding the testimony of Kevin Watson; (4) the trial court

erred in refusing to charge self-defense; (5) the trial court erred in instructing the jury on the theory of accomplice liability; and (6) the trial court erred in giving the jury an *Allen* charge. The court of appeals affirmed. *State v. Washington*, 424 S.C. 374, 818 S.E.2d 459 (Ct. App. 2018). This Court granted Petitioner a writ of certiorari on all issues except for the propriety of the *Allen* charge. As we will explain, the trial court erred in instructing the jury on accomplice liability, and Petitioner was prejudiced by this error. We therefore reverse Petitioner's conviction for voluntary manslaughter and remand to the circuit court for a new trial on that charge.

II. Discussion

A. Exclusion of Grant's Testimony

To give clear context to our holding that the trial court erred in instructing the jury on accomplice liability, we must first review the trial court's exclusion of the testimony of defense witness Kenneth Quinton Grant. Petitioner sought to elicit Grant's testimony that twenty to twenty-five minutes after the shooting, Kinloch told Grant he shot Manigault. However, the trial court excluded the testimony as inadmissible hearsay. Petitioner argues Kinloch's alleged statement to Grant that he shot Manigault was admissible as a prior inconsistent statement under Rule 801(d)(1)(A), SCRE. Petitioner also argues Kinloch's alleged statement to Grant satisfies both the present sense impression (Rule 803(1), SCRE)

[431 S.C. 404]

and excited utterance (Rule 803(2), SCRE) exceptions to the rule against hearsay.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Under Rule 801(d)(1)(A), a prior inconsistent statement of a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is [] inconsistent with the

declarant's testimony." Here, Kinloch was the "witness" and the "declarant" referenced in Rule 801.

When the State objected on hearsay grounds to Grant's testimony about Kinloch's statement to him, the trial court asked defense counsel, "Is there an exception?" Defense counsel responded, "[Kinloch] already testified. My God." The trial court sustained the objection but suggested defense counsel might be able to ask the question without eliciting hearsay. Defense counsel then asked Grant, "[Kinloch] said he did it?" The State again objected on hearsay grounds, and the trial court held an off-the-record bench conference, sustained the objection, and instructed the jury to disregard Grant's testimony on the point. Immediately afterwards, there was another bench conference. Then, defense counsel resumed questioning and again asked Grant if Kinloch told him he shot Manigault. After Grant answered in the affirmative, the trial court again sustained the State's hearsay objection and again instructed the jury to disregard the testimony. There is no record of the substance of the arguments or rulings that took place during these conferences.

The court of appeals questioned whether Petitioner's prior inconsistent statement argument is preserved for appellate review. *Washington*, 424 S.C. at 396-97, 818 S.E.2d at 471. The court of appeals correctly noted the importance of parties placing their arguments on the record to preserve them for appellate review and then concluded that even if the Rule 801(d)(1)(A) issue was preserved, the trial court did not abuse its discretion in excluding Grant's testimony because Petitioner had not laid a proper foundation under Rule 613(b), SCRE, while questioning Kinloch. *Id.* at 397-98, 818 S.E.2d at 471-72. We hold defense counsel's statement to the trial court that

[431 S.C. 405]

"[Kinloch] already testified. My God" did not preserve for appellate review the argument Kinloch's alleged statement was a prior inconsistent statement and therefore not hearsay

under Rule 801(d)(1)(A). *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court

[848 S.E.2d 785]

will not be considered on appeal."). Consequently, we do not reach the issue of whether Petitioner laid a proper foundation under Rule 613(b) for the admissibility of Kinloch's prior inconsistent statement to Grant, and we vacate the portion of the court of appeals' opinion addressing the Rule 613(b) foundational issue.⁴ Our holding on this issue shall not preclude Petitioner, during retrial, from seeking admission of Kinloch's alleged statement to Grant under Rule 801(d)(1)(A) and Rule 613(b).

Petitioner also contends the court of appeals erred in affirming the trial court's ruling that Kinloch's alleged statement to Grant was not admissible under the present sense impression exception to the rule against hearsay. We agree with the court of appeals' analysis of this issue⁵ and therefore affirm. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an

[431 S.C. 406]

error of law[.]" *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

Likewise, we agree with the court of appeals' rejection of Petitioner's argument that Kinloch's alleged statement to Grant was admissible under the excited utterance exception to the rule against hearsay. *Washington*, 424 S.C. at 401-04, 818 S.E.2d at 473-74.

B. Accomplice Liability Jury Instruction

Over Petitioner's objection, the trial court instructed the jury on the theory of accomplice liability, also known as the theory of "the hand of one is the hand of all." The instruction consisted of the following points: a person who joins with another to commit a crime is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act; if two or more are together, acting together, and assisting each other in committing the offense, all are guilty; a finding of a prior arranged plan or scheme is necessary for criminal liability to attach to the accomplice who does not directly commit the criminal act; when an act is done in the presence of and with the assistance of others, the act is done by all. The foregoing is not the complete instruction given by the trial court, but it conveys the gist of the accomplice liability theory. Assuming an accomplice liability instruction was appropriate in this case, the instruction given by the trial court was correct.

The court of appeals held the trial court did not err in giving the accomplice liability instruction because "there was evidence presented at trial that could support a finding that Washington had an accomplice who was the shooter." *Washington*, 424 S.C. at 420, 818 S.E.2d at 483. The court of appeals observed that aside from evidence both Petitioner and Kinloch joined together to assault Manigault, there was evidence both Petitioner and Kinloch followed Manigault around the club that night. The court of appeals also cited witness testimony that Manigault and Kinloch were "fussing," and witness testimony that Petitioner was not anywhere near the fight when the shots were fired. Thus, according to the court of appeals, "there was equivocal evidence as to who shot

and from which the jury could have found [Petitioner]'s accomplice was the shooter." *Id.* at 421, 818 S.E.2d at 484.

For an accomplice liability instruction to be warranted, the evidence must be "equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In this case, there was evidence Petitioner was the shooter. There was also evidence Petitioner was not the shooter. The question becomes whether there was equivocal evidence the shooter, if not Petitioner, was an accomplice of Petitioner. Based on the evidence presented in this case, Kinloch is the only possible person who could fall into the category of Petitioner's accomplice. Therefore, if the record contains no evidence Kinloch was the shooter, then the accomplice liability instruction should not have been given.

The State argues Arianna Coakley's testimony that Manigault told her, "[Kinloch] going to shoot me, they going to kill me" was evidence from which a jury could conclude Kinloch was the shooter. We disagree, as this statement was not evidence Kinloch ultimately did shoot Manigault.

The State contends the testimony of Robin Williams and Tyson Singleton that they saw Petitioner running unarmed from the scene as shots were fired elsewhere creates an inference that someone other than Petitioner was the shooter. That is certainly true, but their testimony does not create any inference Kinloch—again, the only possible accomplice of Petitioner—was the shooter.

The State argues Kinloch admitted to his brother during the jailhouse telephone conversation that he was "strapped"—armed with a firearm—while at the club. We disagree with the State's characterization of the conversation. First, there is nothing in the record defining the term "strapped." Even if the term means "armed," all we can glean from the record is that Kinloch told his brother Petitioner was strapped, and then said

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[Manigault],

[848 S.E.2d 786]

to his brother, "[y]ou know how we do." There is no evidence Kinloch told his brother he was armed the night of the shooting.

[431 S.C. 408]

The State also contends Petitioner's aggressive cross-examination of Kinloch constituted evidence Kinloch could have been the shooter. The State points to Petitioner asking Kinloch on cross-examination to admit he—Kinloch—told Grant and Darlene Washington he was armed with a .357 Magnum and that he told both of them he shot Manigault. Kinloch denied these assertions. Similarly, Petitioner asked Kinloch to admit he—Kinloch—had been described "in the streets" as the shooter. Kinloch denied that assertion as well. While Petitioner very aggressively cross-examined Kinloch, the fact remains that counsel's questions and accusations were not evidence. Kinloch's refusal to admit to the statements and conduct attributed to him does not constitute evidence upon which the jury could rely to determine Kinloch was armed or that he was the shooter. Otherwise, the jury would be allowed to engage in speculation.

The State contends our reasoning in *Barber v. State*, 393 S.C. 232, 712 S.E.2d 436 (2011), supports its position that an accomplice liability instruction was proper in this case. We disagree. In *Barber*, the State presented evidence that Barber and three accomplices (Kimbrell, Walker, and Kiser) conspired to rob a drug dealer. The three accomplices testified Kimbrell remained outside the dealer's house while Barber, Kiser, and Walker went inside to do the deed. The accomplices testified Barber was armed with a .380 handgun, Kiser was armed with a rifle, and Walker was unarmed. The State also presented testimony that Kiser was the shortest of the three men who entered the dwelling. One of the robbers shot and killed the dealer and shot and wounded another man. Expert testimony established the shots fired inside the dwelling were from a .380 handgun. Two eyewitnesses inside the dwelling testified they could not identify the three intruders because the intruders' faces were covered. However, Barber elicited testimony that

the shortest intruder (inferably Kiser) was armed with a rifle and that *both* of the other two intruders were armed with .380 handguns. *Id.* at 237, 712 S.E.2d at 439. This testimony placed a .380 handgun in Walker's hands, thus supporting the conclusion

[848 S.E.2d 787]

that either Walker or Barber was the shooter.

In *Barber*, we noted the propriety of an accomplice liability charge depended upon "whether there is any evidence that another co-conspirator was the shooter and Barber was acting

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with him when the robbery took place." *Id.* We held an accomplice liability instruction was warranted because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439.

On the record before us, Kinloch was the only person who could have been Petitioner's accomplice. There was evidence Kinloch and Petitioner acted in concert in following Manigault around the club and giving him dirty looks, there was evidence Petitioner and Kinloch (and others) fought with Manigault and Jenkins, and there was evidence Petitioner shot Manigault. However, for an accomplice liability instruction to have been warranted, there must be some evidence in the record that Kinloch shot Manigault. In *Barber*, there was evidence Barber shot the victims, and there was evidence Barber's accomplice, Walker, shot the victims. Here, there was no evidence Kinloch was armed with a firearm, and there was no evidence Kinloch shot Manigault. Kinloch was aggressively questioned as to whether he was armed and whether he shot Manigault. He denied both assertions. Was Kinloch telling the truth? Perhaps not. However, as we observed in *Barber*, an alternate theory of liability may not be charged to a jury "merely on the theory the jury may

believe some of the evidence and disbelieve other evidence." 393 S.C. at 236, 712 S.E.2d at 438.

Wilds v. State, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014), supports Petitioner's contention that an accomplice liability instruction was not proper. In *Wilds*, evidence was presented that Wilds and two confederates were walking down a street when Wilds spotted the victim and told his confederates he was going to rob the victim. The two confederates testified Wilds stopped to talk to the victim while they kept walking. They testified Wilds pulled a gun on the victim and demanded his wallet. Wilds then ordered his two confederates to beat the victim. They proceeded to do so, and Wilds shot the victim in the chest. *Id.* at 435-36, 756 S.E.2d at 388-89. In holding an accomplice liability instruction was improper, the court of appeals noted there was no evidence presented that anyone other than Wilds was the shooter and that his two confederates did not join in the robbery until after Wilds pulled a gun on the victim. *Id.* at 439-40, 756 S.E.2d at 390-91. The court of appeals observed, "Although the jury may have

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had doubts about [the two confederates'] testimony, an alternate theory of liability, such as accomplice liability, 'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.' " *Id.* at 439, 756 S.E.2d at 390 (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 438).

Here, as in *Wilds*, the jury certainly may have doubted Kinloch's testimony that he did not shoot Manigault. However, since Kinloch was the only possible accomplice of Petitioner whose actions could result in criminal liability for Petitioner, there must be some evidence Kinloch shot Manigault. There was none.

The State also maintains the accomplice liability instruction was a proper "remedial instruction" in response to Petitioner's efforts to introduce inadmissible hearsay evidence from Grant that Kinloch told him he shot Manigault. There is no

authority for the proposition that a "remedial" jury instruction may be given just in case a jury might consider evidence it has been specifically instructed by the trial court to disregard. Each time Grant testified Kinloch told Grant he shot Manigault, the trial court sustained the State's objection, ordered the testimony stricken, and instructed the jury to disregard it. Subsequently, the trial court began its instructions to the jury with this admonition:

You are to consider only the evidence before you. If there was any testimony ordered stricken from the record, you must disregard that testimony. Mr. Foreperson, as I instructed you, you are not to allow any testimony that was stricken from the record to even be discussed in deliberations.

In a slightly different context, we have held that "[i]f the trial judge sustains a

[848 S.E.2d 788]

timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). Similarly, we have observed, "[a]n instruction to disregard incompetent evidence is usually deemed to have cured the error. Moreover, jurors are presumed to follow the law as instructed to them." *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (internal citations omitted). In this case, the jury was

[431 S.C. 411]

presumed to have followed the trial court's instruction to disregard Grant's testimony. We therefore reject the State's argument that the accomplice liability instruction was a proper "remedial instruction."

We also hold the trial court's accomplice liability instruction prejudiced Petitioner. The evidence that Petitioner shot Manigault was not

overwhelming, as several witnesses testified Petitioner was not armed and was not in the immediate area where the shooting occurred. The insertion of the accomplice liability charge into the case invited the jury to speculate whether Kinloch—the only possible accomplice of Petitioner—shot Manigault, when there was no evidence Kinloch was the shooter.⁴

C. Remaining Issues

The court of appeals affirmed the trial court's refusal to give a self-defense instruction. *Washington*, 424 S.C. at 410-15, 818 S.E.2d at 478-81. We affirm the court of appeals. Of course, if the evidentiary landscape changes during re-trial, the trial court shall follow the settled principle that "[t]he law to be charged to the jury is determined by the evidence presented at trial." *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008).

The court of appeals affirmed the trial court's exclusion of Dr. Presnell's testimony regarding Manigault's blood alcohol level. *Washington*, 424 S.C. at 404-07, 818 S.E.2d at 474-76. Based upon the record before us, we affirm the court of appeals on this issue. However, on remand, the trial court

[431 S.C. 412]

shall consider the evidence as presented at that time and shall rule accordingly.

The court of appeals also affirmed the trial court's exclusion of the testimony of Kevin Watson. *Id.* at 407-10, 818 S.E.2d at 476-78. We find no error in the trial court's ruling and therefore affirm the court of appeals on this issue.

III. Conclusion

For the foregoing reasons, we reverse Petitioner's conviction for voluntary manslaughter and remand for a new trial on that charge.

**AFFIRMED IN PART, VACATED IN PART,
REVERSED IN PART, AND REMANDED.**

BEATTY, C.J., KITTREDGE, HEARN, JJ., and
Acting Justice D. Garrison Hill, concur.

Notes:

¹ During this trial, the trial court held over twenty off-the-record bench conferences after evidentiary objections had been made. After most of these conferences, neither the arguments of counsel nor the bases for the trial court's rulings were put on the record.

² While this is not an issue in this appeal, during his cross-examination of Grant, the solicitor repeatedly challenged the veracity of Grant's testimony by referring to pre-trial conversations the two had about Grant's account. Since we remand this case for a new trial, we are compelled to note the court of appeals' well-reasoned holding in *State v. Sierra*, 337 S.C. 368, 379, 523 S.E.2d 187, 192 (Ct. App. 1999), that it is generally improper for the prosecutor to impeach a witness by referring to out-of-court statements allegedly made by that witness to the prosecutor.

³ *Allen v. United States*, 164 U.S. 492, 501-02, 17 S.Ct. 154, 41 L.Ed. 528 (1896) (allowing a supplemental jury instruction given by the trial judge to encourage a deadlocked jury to reach an agreement).

⁴ In many instances, bench conferences are necessary, and here, the trial court was attempting to maintain the flow of the trial by holding bench conferences instead of repeatedly sending the jury out of the courtroom. Even so, we stress the importance of placing on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers. As the court of appeals noted, "When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record." *Washington*, 424 S.C. at 397, 818 S.E.2d at 471 (quoting *Smalls v. State*, 422 S.C. 174, 182 n.3, 810 S.E.2d 836, 840 n.3 (2018)). We also note that on remand, it is possible Rule 801(d)(1)(A) and Rule 613(b) can be

properly employed to warrant the introduction of Kinloch's alleged statements to Grant and Darlene Washington. Ironically, if extrinsic evidence of Kinloch's alleged statement is introduced, it could render moot the dispute over the accomplice liability instruction.

⁵ See *Washington* , 424 S.C. at 399-401, 818 S.E.2d at 472-73.

⁶ Our determination of prejudice does not turn upon the fact that the jury asked two questions about accomplice liability. However, the questions merit mention. In its first question, the jury asked the trial court for clarification of the law of reasonable doubt, accomplice liability, and voluntary manslaughter. The record does not reflect the trial court's response, if any. In its second question, the jury asked the trial court if it could apply the theory of accomplice liability to parties acting in concert with Manigault, the victim. The trial court advised the jury it had been fully instructed on the law. The second question indicates the jury did not fully understand the accomplice liability theory, which has no application to those acting in concert with a victim.

393 S.C. 232
712 S.E.2d 436

Sammyeil B. BARBER,
Respondent/Petitioner,

v.

STATE of South Carolina,
Petitioner/Respondent.

No. 26992.

Supreme Court of South Carolina.

Heard May 3, 2011. Decided June 27,
2011. Rehearing Denied Aug. 5, 2011.

[712 S.E.2d 437]

Tara Dawn Shurling, of Columbia, for Respondent–Petitioner. Alan M. Wilson, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Salley W. Elliott, Assistant Deputy Attorney General, and Ashley A. McMahan, Assistant Attorney General, all of Columbia, for Petitioner–Respondent. **Chief Justice TOAL.**

In this post-conviction relief (PCR) case, we granted a writ of certiorari to provide Sammyeil B. Barber, the criminal defendant, with a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).¹ The direct appeal concerns the circuit court judge's jury charge on accomplice liability. Sammyeil B. Barber, the criminal defendant, argues the charge was improper because it was unsupported by the evidence presented at trial. We agree with the State that the charge was properly supported by the evidence presented at trial.

Facts/Procedural Background

The State alleged Barber and three others (Blake Kimbrell, Kenneth Walker, and Marcus Kiser) conspired to rob a minor drug dealer, Alan Heintz. The men gathered together and discussed the plans for the robbery, procured a semi-automatic handgun, and then drove to Heintz's house. Upon discovering more people than

expected at the house, they left to procure a second firearm, a rifle. The men returned to Heintz's house and Kimbrell waited in the car while Barber, Walker, and Kiser went in to rob Heintz.

After entering the house and waking the occupants, the men demanded money and drugs. Heintz was dragged from the bedroom

[712 S.E.2d 438]

and ultimately drew a shotgun on the robbers. One of the suspects armed with a semiautomatic handgun shot and killed Heintz, and shot and wounded another man who was sleeping on the couch. The three men fled the premises, stealing only \$30 and leaving their rifle behind.

Eventually, police located the four men in connection with the crime. Kimbrell, Walker, and Kiser all implicated Barber in the planning and execution of the robbery, and said he was the gunman who shot Heintz. They pled guilty and testified against Barber, each receiving 15–30 years. At Barber's trial, Kimbrell, Walker, and Kiser all testified Barber was armed with the semi-automatic handgun and had shot both victims. The State presented testimony that only two weapons were brought to the robbery—the semi-automatic handgun allegedly carried by Barber, who was described as the robber of middle height, and a rifle, carried by Kiser, the shortest. Barber did not testify at trial, but his defense counsel elicited testimony on cross-examination that Walker, the tallest of the three men and the first to enter the house, was also in possession of a semi-automatic handgun. Barber primarily asserted in his defense that he did not participate in the crime and that the other three men lied to the police, framing him for the murder, to obtain lessened sentences. Barber claimed Walker was the gunman.

The circuit court judge instructed the jury on accomplice liability over defense counsel's objection. Defense counsel argued the charge was improper because the evidence presented at trial did not support the charge, the State did not base

its prosecution on a theory of accomplice liability, and the indictment alleged Barber was the gunman. The judge noted the objection and stated on the record:

... I think that the charge is correct in this case. Even if the intimation of the defense that these persons are basically conspiring to make [Barber] the shooter, if [the jury] believe[s] that, but they also believe he was present, someone else did the shooting, but they're not sure who did the shooting, but it was done when all four were present, there with that intended purpose of robbery, he would still be liable under the theory of the hand of one is the hand of all in the case or accomplice liability, whatever you want to call it.

The jury deliberated for nearly three hours, then asked for an explanation of "the hand of one, the hand of all" charge and to what charges that rule applied. After receiving that instruction again, the jury deliberated further before returning with guilty verdicts on all charges: criminal conspiracy, possession of a pistol by a person under twenty-one, possession of a firearm during the commission of a violent crime, attempted armed robbery, armed robbery, first degree burglary, assault and battery with the intent to kill, and murder.

Issue

Did the circuit court judge err in charging the jury on accomplice liability?

Standard of Review

The trial court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Mattison*, 388 S.C. 469, 478–79, 697 S.E.2d 578, 583 (2010).

Analysis

Barber argues the evidence presented at trial did not support a jury charge on accomplice liability as to the murder charge. We disagree.

In *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976), and other cases, this Court has held that a lesser-included offense may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence. Barber relies upon this reasoning to support his argument that similar speculation is insufficient to warrant a jury charge on an alternate theory of liability. Barber's proposition is correct.

[712 S.E.2d 439]

Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted.

"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 his confederate incidental to the execution of the common design and purpose." *Mattison*, 388 S.C. at 479, 697 S.E.2d at 584. To support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place. See *State v. Dickman*, 341 S.C. 293, 295–96, 534 S.E.2d 268, 269 (2000).

We find evidence to support the conclusion that Barber was acting with the other men during the robbery. Because all of the men clothed themselves all in black and wrapped shirts around their heads so only their eyes were visible, the witnesses could only describe and differentiate

the men based on physical build, height, and the weapon carried. Kimbrell, Kiser, and Walker, however, all testified to substantially the same version of the planning and execution of the robbery—that Barber was involved and was the shooter.

The evidence presented at trial could also support a finding that one of the other robbers was the shooter. The State presented evidence that Kiser was the shortest of the three men and carried the rifle, Barber was of middle height and carried a semi-automatic handgun, and Walker was the tallest and carried no weapon. However, defense counsel elicited testimony that all three robbers were armed—one with a rifle and two with .380 handguns, the type weapon forensic experts testified fired all the shots in Heintz's home that evening. Defense counsel's cross of Coleman Robinson, the witness who had been sleeping on the couch when the robbery began, indicates all three men were armed:

Q: [quoting from Mr. Robinson's statement to the police days after the incident] After the door was open, first they pushed it wide and hit the wall. As soon as that happened, that person turned the lights on.

A: Yes.

Q: Without having to look for the switch. I just laid on the couch until this same person walked up to me and I noticed he was holding a gun in his left hand.

A: Yes.

Q: And that's the truth?

A: Yes.

...

Q: All right. And then later on you talk about the second guy. The second guy was a little shorter and looked younger. He was carrying a rifle.

A: Yes, sir

....

Q: Then you say the third guy was taller, about six feet, 160. He had a bunched up T-shirt around his head, too. He looked to be in his early twenties. He was carrying a pistol also.

A: Yes.

Kyle Robinson, Coleman's brother who was asleep in a bedroom when the robbery began, also testified that the tallest of the three, which would be Walker, was armed:

A: [On direct examination] Well, as I went to the [bedroom] door to see what was going on, my door was like halfway shut, so I looked through the little space and that's when I saw the guy go back there to Alan's room and he had a black pistol in his hand.²

...

A: And then by that time I kind of opened the door and I looked and I

[712 S.E.2d 440]

saw the gun at Coleman's head, my brother, and I saw him give his wallet up....

...

Q: Were you able to tell anything about the other two as far as size goes?

A: I remember seeing the guy that went in the back. He seemed to be the biggest of all of them.

Q: Okay. When you say big—

A: You know, tall. Just the tallest of all of them....

...

Q: [On cross-examination] And you saw a black guy holding a small semi-automatic handgun to [your] brother's head; is that right?

A: Right.

Q: He was a black guy about six feet tall, weighing 150 to 160; is that right?

A: That's what I said, but I was actually kind of wrong about that.

Q: So when you made this statement on the 15th, the day after it happened, you said he was six feet tall?

A: That's what he appeared to be, but the other guy was bigger.

...

Q: There was a shorter black guy pointing a rifle at [you]?

A: Yeah.

Q: And a third black guy went to the other bedroom and pulled Alan out. He was about six feet tall and weighed 180 pounds, and today you said he had a gun also?

A: Yes.

Further, defense counsel outright argued that Walker was armed with a .380, the type of gun that fired the shots at Heintz's house, suggesting that Walker was the shooter. Thus, the testimony offered at trial indicating there may have been two robbers armed with handguns is sufficient to warrant the jury charge.

Conclusion

Therefore, the testimony is equivocal as to whether or not Barber was the only person armed with the type of gun the forensic experts say fired all the shots that night. The circuit court judge did not err in instructing the jury on "the hand of one, the hand of all" theory of accomplice liability. Accordingly, the convictions and sentences are

AFFIRMED.

Notes:

¹—We also granted the State's petition for a writ of certiorari. Because we find there is probative evidence to support the PCR judge's determination that Barber was denied his right to a direct appeal, we dismiss that writ of certiorari as improvidently granted.

²—All the witnesses at trial, through their testimony, corroborated that the tallest of the three robbers went into the bedroom to retrieve Heintz. Walker is the tallest of the three men, and he and Kiser testified that Walker went to get Heintz.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David J. Benjamin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000528

Appeal From Calhoun County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2023-UP-243
Heard May 9, 2023 – Filed June 21, 2023

AFFIRMED

Tricia A. Blanchette, of Law Office of Tricia A.
Blanchette, LLC, of Leesville, for Petitioner.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General William M. Blich,
Jr., and Assistant Attorney General Travis Cruise
Mitchell, all of Columbia, for Respondent.

PER CURIAM: This court granted certiorari to review an order denying David Benjamin's application for post-conviction relief (PCR). Benjamin argues that his trial counsel failed to effectively utilize the services of a lay witness, Antonio

Gidron, and an expert witness, Kelly Fite, and that the PCR court accordingly erred in denying relief. We respectfully disagree and affirm.

Evidence supports the PCR court's decision that trial counsel did not ineffectively utilize Gidron. Even though Gidron was reluctant to be involved in the case, trial counsel successfully secured Gidron as a witness and was able to elicit favorable testimony from him—specifically, that Gidron saw Dominique Lawton get shot and did not see Benjamin with a gun. *Cf. Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998) (finding counsel was deficient for failing to call a witness and elicit her testimony). We do not doubt Gidron's demeanor at trial was subpar. It seems evident trial counsel could have better prepared Gidron had Gidron been willing, and it is conceivable that Gidron would have presented himself with less hostility had he given trial counsel the opportunity to prepare him, but these were byproducts of Gidron's reluctance to cooperate. The PCR court credited trial counsel's testimony that Gidron evaded contact with him and even became physically combative on one occasion when his investigator served the subpoena. *See Lee v. State*, 396 S.C. 314, 319, 721 S.E.2d 442, 445 (Ct. App. 2011) (explaining this court defers to the PCR court's credibility findings). The fact that the State made multiple attempts to contact Gidron but was never successful substantiates trial counsel's claim. Considering how difficult it was to secure Gidron, trial counsel did well to manage two telephone conversations with him.

Next, we agree with the PCR court that even if trial counsel ineffectively utilized Fite, any deficiency did not prejudice Benjamin. Neither the expert who testified at the PCR hearing (Ralph Tressel) nor Fite was able to reconstruct the crime scene. And while Tressel presented compelling testimony about the firearms involved in the shooting, accomplice liability precludes a finding of prejudice. Tressel certainly discredited some testimony that was favorable to an accomplice liability theory (specifically, other witness testimony about who was shooting certain firearms and from where), but plenty of other testimony established that Benjamin, Joshua Haggood, and Kevin Frazier were looking to fight and had an agreement to be ready to fight. Multiple witnesses testified the three men went outside together and then reentered the club after Benjamin and Lawton had their initial altercation in the club. Haggood is the only witness who testified that the men left for the purpose of arming themselves, but a different witness testified Benjamin responded "I'm a killer" when he confronted Benjamin to ask him not to "follow around with" Lawton. There was witness testimony that Benjamin and Lawton were eyeballing each other throughout the night after the altercation and that everyone seemed to think something was going to happen. Police found gunshot residue in the area of the car where multiple witnesses placed Benjamin during the shooting, and police found .45 shell casings

in the same general area. And the key point of Tressel's testimony was that the fatal shot likely came from the gun fired by Benjamin's codefendant instead of the gun attributed to Benjamin. Thus, even given Fite's testimony that Benjamin did not fire the fatal shot, this does not discredit the State's theory of murder. *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("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 his confederate incidental to the execution of the common design and purpose."); *id.* at 194, 562 S.E.2d at 325 (explaining the State can use circumstantial evidence and the parties' conduct to establish accomplice liability). Therefore, the PCR court's order is

AFFIRMED.

THOMAS, MCDONALD, and HEWITT, JJ., concur.

RECEIVED

Jun 29 2023

SC Court of Appeals

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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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. Haggood'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 waving 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's¹ 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 this 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, Ins. 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.

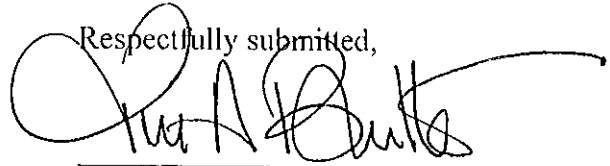
Additionally, Gidron was the most important witness per counsel, and he came off as hostile and his poor performance due to lack of preparation was confirmed by counsel with a juror. Simply put counsel should have properly utilized an expert and his lay witness (Gidron) to go on the attack. He failed 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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This 29 day of June 2023.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Jun 29 2023

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

SC Court of Appeals

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2019-000528

David J. Benjamin,

Petitioner,

vs.

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

The South Carolina Court of Appeals

David J. Benjamin, Petitioner,

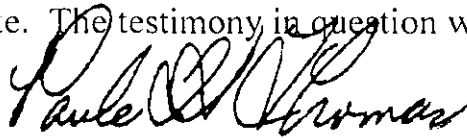
v.

State of South Carolina, Respondent.

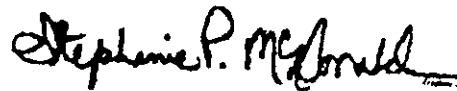
Appellate Case No. 2019-000528

ORDER

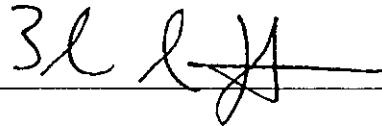
The petition for rehearing is denied. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn. The only modification to the original opinion is the correction on page three of a mistaken reference to Kelly Fite. The testimony in question was provided by Ralph Tressel.



J.



J.



J.

Columbia, South Carolina

cc:

Tricia A. Blanchette, Esquire
Alan McCrory Wilson, Esquire
Travis Cruise Mitchell, Esquire
William M. Blich, Jr., Esquire

FILED
Aug 16 2023

David Jamar Benjamin
The Honorable Robin B. Stilwell

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David J. Benjamin, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000528

Appeal From Calhoun County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2023-UP-243
Heard May 9, 2023 – Filed June 21, 2023
Withdrawn, Substituted, and Refiled August 16, 2023

AFFIRMED

Tricia A. Blanchette, of Law Office of Tricia A.
Blanchette, LLC, of Leesville, for Petitioner.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General William M. Blich,
Jr., and Assistant Attorney General Travis Cruise
Mitchell, all of Columbia, for Respondent.

PER CURIAM: This court granted certiorari to review an order denying David Benjamin's application for post-conviction relief (PCR). Benjamin argues that his

trial counsel failed to effectively utilize the services of a lay witness, Antonio Gidron, and an expert witness, Kelly Fite, and that the PCR court accordingly erred in denying relief. We respectfully disagree and affirm.

Evidence supports the PCR court's decision that trial counsel did not ineffectively utilize Gidron. Even though Gidron was reluctant to be involved in the case, trial counsel successfully secured Gidron as a witness and was able to elicit favorable testimony from him—specifically, that Gidron saw Dominique Lawton get shot and did not see Benjamin with a gun. *Cf. Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998) (finding counsel was deficient for failing to call a witness and elicit her testimony). We do not doubt Gidron's demeanor at trial was subpar. It seems evident trial counsel could have better prepared Gidron had Gidron been willing, and it is conceivable that Gidron would have presented himself with less hostility had he given trial counsel the opportunity to prepare him, but these were byproducts of Gidron's reluctance to cooperate. The PCR court credited trial counsel's testimony that Gidron evaded contact with him and even became physically combative on one occasion when his investigator served the subpoena. *See Lee v. State*, 396 S.C. 314, 319, 721 S.E.2d 442, 445 (Ct. App. 2011) (explaining this court defers to the PCR court's credibility findings). The fact that the State made multiple attempts to contact Gidron but was never successful substantiates trial counsel's claim. Considering how difficult it was to secure Gidron, trial counsel did well to manage two telephone conversations with him.

Next, we agree with the PCR court that even if trial counsel ineffectively utilized Fite, any deficiency did not prejudice Benjamin. Neither the expert who testified at the PCR hearing (Ralph Tressel) nor Fite was able to reconstruct the crime scene. And while Tressel presented compelling testimony about the firearms involved in the shooting, accomplice liability precludes a finding of prejudice. Tressel certainly discredited some testimony that was favorable to an accomplice liability theory (specifically, other witness testimony about who was shooting certain firearms and from where), but plenty of other testimony established that Benjamin, Joshua Haggood, and Kevin Frazier were looking to fight and had an agreement to be ready to fight. Multiple witnesses testified the three men went outside together and then reentered the club after Benjamin and Lawton had their initial altercation in the club. Haggood is the only witness who testified that the men left for the purpose of arming themselves, but a different witness testified Benjamin responded "I'm a killer" when he confronted Benjamin to ask him not to "follow around with" Lawton. There was witness testimony that Benjamin and Lawton were eyeballing each other throughout the night after the altercation and that everyone seemed to think something was going to happen. Police found gunshot residue in the area of the car where multiple

witnesses placed Benjamin during the shooting, and police found .45 shell casings in the same general area. And the key point of Tressel's testimony was that the fatal shot likely came from the gun fired by Benjamin's codefendant 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 murder. *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("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 his confederate incidental to the execution of the common design and purpose."); *id.* at 194, 562 S.E.2d at 325 (explaining the State can use circumstantial evidence and the parties' conduct to establish accomplice liability). Therefore, the PCR court's order is

AFFIRMED.

THOMAS, MCDONALD, and HEWITT, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

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August 16, 2023

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Re: David J. Benjamin v. State
Appellate Case No. 2019-000528

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in cursive script, reading "Jenny A. Kitchings".

CLERK

cc: Alan McCrory Wilson, Esquire
David Jamar Benjamin
The Honorable Robin B. Stilwell