

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CALHOUN COUNTY  
Court of General Sessions

Diane Schafer Goodstein, Circuit Court Judge

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CASE NO.: 2013-001496

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State of South Carolina, .....Respondent,

v.

David Jamar Benjamin, .....Appellant.

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**BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

**ISSUE ONE** - The Trial Court erred in not granting the 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 where the State:

- A. Failed to prove that but for the actions of Defendant Benjamin, the victim would not have died;
- B. Failed to prove Defendant Benjamin intended to kill the victim;
- C. Failed to prove Defendant Benjamin fired the fatal shot;
- D. Failed to prove Defendant Benjamin fired any of the shots that injured the surviving victims;
- E. Failed to prove Defendant Benjamin joined with another in carrying out a common plan or purpose, to wit, murder and attempted murder, sufficient to find Defendant Benjamin guilty under an accomplice liability theory;
- F. Failed to prove Defendant Benjamin was present at the scene as a result of a prior arrangement to carry out a prior arranged plan or common scheme sufficient to find Defendant Benjamin guilty under an accomplice liability theory in the wounding of Hampton and DeFreitas or the killing of Lawton.

**ISSUE TWO** - 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

### **STATEMENT OF THE CASE**

Defendant David Benjamin was arrested on October 4, 2011, and subsequently indicted by a Grand Jury charged with one count of murder in violation of S.C. Code 16-3-10 and two counts of attempted murder in violation of S.C. Code 16-3-29. Mr. Benjamin entered a plea of not guilty and proceeded to a trial before a jury on March 4, 2013.

Following a four-day trial during which Mr. Benjamin did not testify, a jury found Mr. Benjamin guilty on all counts. Trial Counsel moved for a judgment of acquittal following the verdict arguing the evidence was insufficient to prove Mr. Benjamin's guilt. This motion was denied after a hearing. The motion followed two unsuccessful motions during trial for a directed verdict, the first following the close of the State's case and the second at the close of all the evidence.

The Hon. Diane Schafer Goodstein sentenced Mr. Benjamin to 40 years' imprisonment on Count One – Murder, and 30 years' imprisonment on each of

Counts Two and Three – Attempted Murder, to be served concurrently. Mr. Benjamin was represented in his post-trial motions by Wendy Keifer, Esq., who filed and argued a timely motion for new trial and a timely motion to reconsider the sentence imposed upon Mr. Benjamin. Both motions were denied. Mr. Benjamin, through counsel, filed a Notice of Appeal on July 10, 2013.

Undersigned counsel was substituted as attorney of record. An application on behalf of Mr. Robert L. Sirianni, Jr., has been filed to permit his appearance *Pro Hac Vice*. The transcript of the trial proceedings was received by counsel on January 6, 2014, and this Initial Brief of Appellant follows.

## STATEMENT OF FACTS

### Introduction

Defendant-Appellant David Jamar Benjamin (“Mr. Benjamin”) was at the Pine Terrace Club, nicknamed “Piggy Park” in the late evening and early morning hours of September 18-19, 2011, with two others enjoying music and dancing provided by two disc jockeys. At one point, Mr. Benjamin was bumped on the dance floor by Dominique Lawton, who was present with a group of his friends at the same club. The two stared at each other but there was no physical confrontation.

At approximately 4 a.m., the club raised the lights and indicated it was closing down. A large crowd of people exited the club and was leaving the area. Lawton was intoxicated and confronted one of the people who had come to the club with Mr. Benjamin. All of the parties had weapons but there was no escalation until shots were fired in the air and then multiple shots were fired from all directions.

Several parties were involved in an exchange of gunfire and during the melee, Lawton was shot in the head and died. Two others, James Hampton and Shawn DeFreitas, were struck with bullets but survived. About two weeks after the event, Mr. Benjamin was arrested along with the two people he was with that evening and charged with the murder of Lawton and the attempted murder of

Hampton and DeFreitas.

There were dozens of people in the area at the time of the shootings but no one could say for sure who shot first or where the fatal shot came from. Further, no witnesses could say if the shots fired by Mr. Benjamin, which were described as on a low angle toward the ground similar to military-style “cover fire,” ever hit any of the victims. One witness who saw the fatal shot said Mr. Benjamin was not the person responsible. Another witness admitted that it was his shot, and not that of Mr. Benjamin, that ultimately wounded one of the victims. No one saw how, when, or from where the third victim was shot and wounded.

According to the State, Mr. Benjamin was responsible under a theory known as “the hand of one is the hand of all,” an accomplice liability theory where Mr. Benjamin would be held responsible for all of the shootings even though he never fired any of the shots that injured or killed the victims. The State contended that Benjamin was just as responsible as his co-defendants who actually did fire the shots, each of whom received reduced sentences after pleading guilty to significantly lesser charges.

One co-defendant was allowed to plead guilty to assault and battery and given a concurrent sentence of seven years in exchange for testifying against Mr. Benjamin at trial. The trial covered four days in early March 2013, before a jury of ten (10) women and two (2) men.

*The Parties Arrive at the Club*

Joshua Haggood, an Army veteran of two combat tours in Afghanistan, was stationed at Fort Bragg, North Carolina, in September of 2011. (Transcript p. 260). He was a long-time friend with Kevin Frazier and David Benjamin. He knew Mr. Benjamin “most of my life” and knew Mr. Frazier “since about middle school.” (Transcript p. 261). The men were two of Mr. Haggood’s “best friends.” (Transcript p. 262).

Mr. Haggood would typically travel once or twice a month from Fort Bragg back to Orangeburg, South Carolina, to visit. (Transcript p. 264). His mother lives there as does one of his sons. (Transcript p. 265). On his trips back, he carried with him an XD 40 .40 caliber silver and black semi-automatic pistol he borrowed regularly from a friend in North Carolina, a fellow soldier, Georgio McGarrah. (Transcript p. 264; 265).

Over the weekend of September 16 through September 18, 2011, Mr. Haggood was visiting and had the gun with him. He said normally he “hangs out” with Benjamin and Frazier when he visits when he is not visiting his mother or with his son. (Transcript p. 264). On Saturday night, September 18, 2011, Mr. Haggood met with his friends. He drove over to pick up Mr. Benjamin at his mother’s home and then the two drove to Mr. Frazier’s house to get him. (Transcript p. 266).

The trio was planning to go to a birthday party for Nevadria Miller, someone all had known from high school, at a club in the Elloree area called Pine Terrace but more commonly referred to as "Piggy Park." (Transcript p. 127; 268-269). For about 20 minutes, the trio stayed at Mr. Frazier's house and had a few beers. (Transcript p. 268). Mr. Haggood had not been to the club before and so Mr. Benjamin drove Mr. Haggood's car to the club "because he knew how to get there." (Transcript p. 269-270).

The three arrived between 12 a.m. and 1 a.m. (Transcript p. 270). Mr. Haggood's brother William was in another car with his cousin and arrived around the same time. (Id.) They backed in and parked near the corner of the club. (Transcript p. 271). There was a van already parked there so William backed in first and then Mr. Benjamin parked next to him. (Id.)

All three friends – Mr. Haggood, Mr. Frazier and Mr. Benjamin – had weapons with them. Mr. Haggood had placed his .40 caliber in the glove box, Mr. Frazier had a .32 caliber revolver and he believed Mr. Benjamin had a .45 caliber pistol. (Transcript p. 272). Mr. Haggood locked his gun in the glove box and Mr. Benjamin and Mr. Frazier placed their weapons in the trunk. (Id.) None took weapons into the club.

When they arrived, there were not that many cars there and not many people inside. (Transcript p. 272-273). Inside, there were people on the dance floor but

“nothing major.” (Transcript p. 273). There was an open liquor bar (free to patrons) but people had to pay for beers. (Id.). Mr. Haggood said he believed Mr. Frazier was drinking the free liquor but was unsure if Mr. Benjamin was drinking. (Id.) Mr. Haggood was drinking beer. (Transcript p. 274).

### *The Incident Inside the Club*

The club eventually started to fill up as more people arrived and the three were basically “hanging out” together. (Transcript p. 274). Andrew Haynes (called “Bubba”) was one of the DJs working at the club that evening along with “DJ Mike” (Michael Bullock). (Transcript p. 127-128). Mr. Haynes said he arrived between 11 p.m. and 11:30 p.m. and “brought a crowd with me” when he arrived. (Transcript p. 131).

Already at the club was Dominique Lawton. At some point, Mr. Haynes observed that Mr. Lawton “bumped” Mr. Benjamin on the dance floor and there were words exchanged and “a little shoving” but no punches were thrown and no weapons were displayed. (Transcript p. 132). Mr. Haynes said he intervened and stopped the episode from escalating. (Transcript p. 131). He said Mr. Lawton appeared intoxicated. (Transcript p. 132).

Mr. Haynes talked to both parties and calmed everyone down. (Transcript p. 133). Antonio Gidron was also in the club at the time of the incident. He did not describe it as an altercation. (Transcript p. 558). He spoke with Mr. Benjamin after

the incident and said Mr. Benjamin told him “you are down here, you know, to have fun. We don’t want no problems.” (Transcript p. 572). Mr. Gidron said he knew Mr. Lawton and told Mr. Benjamin, “I’ll handle it.” (Id.) Mr. Gidron then went over to talk with Mr. Lawton, asked what was going on, and Mr. Lawton told him “it ain’t nothing.” (Transcript p. 558) Mr. Gidron told Mr. Lawton that Mr. Benjamin was one of his friends and that “they don’t want no problem” and that Mr. Lawton calmed down and “thought nothing of it. He let it be.” (Id.)

Inside the club, Mr. Haggood said Mr. Benjamin pointed at presumably Mr. Lawton and another that had been involved and said that he thought one of them had a gun. (Transcript p. 275). Mr. Haggood asked Mr. Benjamin what he wanted to do and Mr. Benjamin replied that he did not want to get caught “slipping.” (Transcript p. 276). Mr. Haggood testified he believed that to mean that Mr. Benjamin wanted to get his gun. (Id.) Mr. Frazier was on the dance floor and so the three went out to Mr. Haggood’s car and retrieved their weapons. (Transcript p. 277).

Mr. Gidron said he had seen people with guns at the club “all the time” prior to this incident. (Transcript p. 560). Mr. Haynes had noticed the three leave the club and so followed them to continue to talk to them and keep everyone calm. (Id.) He knew Mr. Frazier from high school because he had played basketball against him. (Id.) He said he met them as they were coming back into the club.

(Transcript p. 134). He speculated that it appeared the three were coming from the area where cars are normally parked but could not say for sure. (Transcript p. 134-135).

Mr. Haynes had a brief conversation with Mr. Benjamin and suggested that he should not bother getting involved with Mr. Lawton (whose nickname is "Killa") because "he's young, drunk, you know how they get." (Transcript p. 135). He said Mr. Benjamin replied "I'm killa" and they walked back into the club. (Transcript p. 136). Mr. Haynes also spoke to Mr. Lawton and told him to calm down as well "because it's not called for." (Transcript p. 135). Mr. Haynes said he did not see any of the three with weapons as they went back inside and he went in behind them.

Mr. James Hampton, one of the injured victims, arrived at the club between 12:30 a.m. and 1 a.m. and learned after arriving that there had been a confrontation involving Mr. Lawton. (Transcript p. 204, 205). He went to speak with Mr. Lawton and told him to "chill." (Transcript p. 205). He said Mr. Lawton was calm at that point. (Id.) Mr. Hampton did not know Mr. Benjamin or Mr. Haggood but knew Mr. Frazier. (Transcript p. 203). He said someone pointed out Mr. Benjamin as the person involved in the confrontation with Mr. Lawton. (Transcript p. 205).

After that, there were no problems during the more than two hours from the time of the incident until the club closed down. (Transcript p. 137). It was, as Mr. Haggood described it, “a normal club environment. Nothing going on really other than music, dancing and just people talking and everything. Nothing negative was going on.” (Transcript p. 278). People continued to drink. (Id.) Mr. Haynes said it was about 2 a.m. or 2:30 a.m. when “the crowd was getting kind of iffy” and so he suggested to the club manager to begin shutting the party down. (Transcript p. 137).

It was sometime later that the DJs stopped playing music and the lights came up indicating the party was shutting down. (Transcript p. 279). Shawn DeFreitas, also known as Shawn Cooper, testified he arrived at the club around 3 a.m. and paid and went inside, spending some time talking to some people. (Transcript p. 317-318). He said about an hour later, the club was closing down so he left. (Id.)

When the lights came up and the music stopped playing, Mr. Haggood, who was near the pool table by the front door, simply left and went outside. (Transcript p. 279). He said Mr. Frazier and Mr. Benjamin were both near the dance floor area. (Id.) He was outside talking with a female friend he knew from high school and saw Mr. Benjamin and Mr. Frazier exit the club. (Transcript p. 280).

### *Shots Are Fired*

“As soon as they got outside the door, somebody (later identified as the victim Mr. Lawton) pulled out a gun and discharged a round,” Mr. Haggood said. (Transcript p. 280). Mr. Lawton was the aggressor outside, according to Mr. Haggood. (Transcript p. 304). “I guess you could say [it was] like an ambush type thing. He (Mr. Lawton) came out of nowhere. It wasn’t provoked or anything. Once he walked up, he pulled out his gun, it wasn’t anything said before he pulled out his gun.” (Id.)

There was chatter going back and forth between Mr. Frazier and some people with him and Mr. Lawton and his friends. (Transcript p. 211-212). Mr. Gidron said he saw something “like a pep rally or something” and “everybody just swarmed in.” (Transcript p. 560). He said he saw Mr. Lawton with a gun in his waistband. (Id.)

At one point, Mr. Gidron heard someone say “he got a gun” but did not recognize the voice and did not know to whom the voice was referring. Shortly thereafter, Gidron saw Mr. Frazier with his gun out. (Transcript, p. 561). Mr. Frazier’s gun at that point was not in the air but rather pointed downward near his waist. (Transcript p. 212). After that, Mr. Haggood said, “it was just like everything became chaotic, like people arguing and everything and people trying to separate everything.” (Transcript p. 282). Mr. Haynes said somebody ran back

into the club and told him there was a commotion outside the club. Haynes went to investigate and saw 25 to 30 people outside by the door and saw Mr. Frazier holding a silver revolver in the air. (Transcript p. 138-139).

Mr. Hampton was also outside and saw Mr. Frazier holding his gun in the air and heard him saying, "All we want to do is go home!" (Transcript p. 207). He said there was "a lot of chatter." (Transcript p. 209). Mr. Haggood heard the same thing: "I'm just trying to get home. I'm just trying to get home. I don't want any trouble." (Transcript p. 282). Mr. Gidron said he heard Mr. Frazier say, "man, please, we just want to go home ... we don't want no problem." (Transcript p. 561). Mr. DeFreitas said he saw an altercation breakout "with some of the people I knew" and so he went back from his car to try to break it up. (Transcript p. 318). He saw Mr. Frazier and Mr. Lawton right at the door with perhaps a dozen people around. (Transcript p. 318-319).

Mr. Haynes had stepped in to try to break up the confrontation as well and he and Mr. Benjamin and Mr. Haggood were trying to "usher" Mr. Frazier toward Mr. Haggood's car. (Transcript p. 139; 283). Mr. Haggood had tried to step in but Mr. Benjamin interceded and touched him on the shoulder and said "just fall back. Chill out." (Transcript p. 282). Mr. Haynes said he was focused on Mr. Frazier and was not paying much attention to anything else. (Transcript p. 139). Mr.

DeFreitas was also with this group trying to get Mr. Frazier back to Mr. Haggood's car. (Transcript p. 319).

The group finally got back to Mr. Haggood's car and Mr. Haynes said this was the point where Mr. Frazier fired his revolver into the air. (Transcript p. 139; 212-213). Mr. DeFreitas said "shots just started firing" after that and he got hit in the leg and "went down." (Transcript p. 321). He had no idea who fired the first shots. (Transcript p. 329). Mr. Haynes ran after the shots started and took cover by the door to the club near the van and ultimately retreated inside. (Transcript p. 144). Mr. Haggood said he heard the first shots before Mr. Frazier fired and in fact it was even before they reached his car. (Transcript p. 284).

"They started shooting," he said, "and then it was like everybody was scattering." (Transcript p. 284). He said he could not tell where the initial shots came from but believed they came from an area near the road. (Id.) It was after that point when Mr. Benjamin pulled out his gun "and let off about two shots." (Transcript p. 285). He said Mr. Benjamin's shots were fired "like [in] the direction of the car that was in front of mine." (Id.) Mr. Benjamin was still moving when that was happening. (Id.)

Mr. Haggood said somebody was firing from behind the van (which was parked near the club) and that it seemed people were "shooting like from different directions" so he took cover towards the rear of his car. (Transcript p. 287). He

pulled out his .40 caliber and shot back. (Id.) Haggood said he shot “three or four shots” back in the direction of the van. (Transcript p. 288).

Mr. Haggood described the gunfire as “enemy fire” based on his experience as a combat soldier. (Transcript p. 303). He said the first shot was not fired by Mr. Frazier or Mr. Benjamin. (Transcript p. 306). “Once the first shot came out it was like shots from everywhere.” (Id.) “Like I guess you could say people already had their guns on them in the parking lot” before Mr. Frazier fired his weapon into the air. (Id.)

When Mr. Benjamin was initially moving from one location seeking cover near Mr. Haggood’s car, his shots were fired with his arm extended at a downward angle equivalent to “cover fire” used to provide a chance to rally a group of people into a safe place. (Transcript p. 307). Mr. Haggood never saw Mr. Benjamin shoot anyone and was “on the move” when the rounds were discharged. (Transcript p. 308).

When Mr. Hampton saw Mr. Frazier fire into the air, he turned and walked away back towards the road. He said then more shots were fired and he could “feel the bullet coming past my own head” so he ducked for cover behind the van and went the other way. (Transcript p. 213). He said the shots he believed came from behind him. He never saw Mr. Benjamin shooting. (Transcript p. 214).

He said once he ducked behind the van and heading in the opposite direction he started hearing yelling and someone saying, "Killa get up!" (Transcript p. 214). He ran over to where it was coming from and saw Mr. Lawton on the ground and that he had been shot in the head. (Transcript p. 215-216). He said he then ran back to the club, picked up a pole out of the ground and threw it at a car. (Transcript p. 216). Mr. DeFreitas said he had no idea who fired the shots that killed Mr. Lawton. (Transcript p. 332).

Daniel Saxon arrived at the club about 3:15 a.m. and said he could not hear any gunfire when he got there but also said he had his music on in the car with the windows up. (Transcript p. 343). He was in his car and saw Mr. Lawton at one point come around to the front of his vehicle on the driver's side. He said Mr. Lawton was "kind of agitated." (Id.) Mr. Saxon got out of his vehicle and tried to calm him down. (Id.)

After this, Mr. Saxon said he heard gunshots and so he ducked down. The only person he saw shooting was "a guy shooting in the air – not aiming." (Transcript p. 345). After kneeling down, he turned and looked at the rear of his car and saw Mr. Lawton lying there with a wound to his head. (Id.) He walked around to the front of his car and got one of Mr. Lawton's cousins and told him he thought Mr. Lawton was dead. (Transcript p. 345-346).

Mr. Gidron said he was “99 percent sure” that he saw the point at which Mr. Lawton was shot and that Mr. Benjamin did not fire that shot or even aim a gun at him. (Transcript p. 563, 564). He said Mr. Haggood was shooting toward the van because “somebody was on the back of the van firing shots.” (Id.) “Josh was saying, ‘Don’t come --- don’t come from around the van. Don’t come around the van.’” (Transcript p. 578).

Mr. Hampton said that after he had thrown the post he started moving back towards an area behind the DJ’s van that was backed up to a door at the club and heard some more shots go off and it was at that point he realized he had been hit in his arm. (Transcript p. 218). He said he yelled out, “I’m hit” and “then some girl came over and wrapped my arm up and they sat me down in Andrew Haynes’ car.” (Transcript p. 219).

Mr. Haggood said Mr. Frazier was in the backseat of his car and he and Mr. Benjamin got into the front seat about the same time. He said Mr. Benjamin was driving and had put the car into gear and “hit the horn a couple of times” because there was a car in front of them and that car, he said, eventually started moving backwards. (Transcript p. 289-290). He said Mr. Frazier was yelling and that it was difficult at first to hear. (Transcript p. 291).

Mr. Frazier asked Mr. Benjamin and Mr. Haggood if either of them “had to shoot.” (Transcript p. 291). Mr. Benjamin, according to Mr. Haggood, said there

was no reason to do so because Mr. Frazier had “let off a few shots in the air to let them know what time it was.” (Id.) Mr. Haggood did not initially respond, he said, because he was on his cell phone trying to call his brother to find out what happened. (Transcript p. 290, 291).

Mr. Frazier, later on, opened the rear window and tossed out some shell casings from his weapon, according to Mr. Haggood. (Transcript p. 291). Mr. Benjamin drove and they dropped off Mr. Frazier at another club and then Mr. Haggood took Mr. Benjamin back to his mother’s house. Mr. Haggood then went home to his mother’s house for a few hours before getting into his car and heading back to Fort Bragg, North Carolina. (Transcript p. 292-293).

### **The Investigation**

Calhoun County Sheriff’s Deputy Terry Snead was on duty on the night and early morning of September 17-18, 2011. (Transcript p. 109). He was dispatched to the incident and headed there with others with lights and sirens on. (Transcript p. 110). He said the first call from the scene came in around 4 a.m. (Transcript p. 123).

It took Deputy Snead approximately 26-27 minutes to arrive on scene. (Transcript p. 123). While en route, one of his fellow deputies, Sgt. Phil Rice, was told to respond to a convenience store in Cameron because it was reported that a

victim was there. (Transcript p. 111-112). Deputy Snead and fellow Deputy Sgt. Earl Kinley arrived on the scene of the incident about the same time.

Deputy Snead described it as “chaotic” and that they spent their time trying to find out what had happened. (Transcript p. 112; 124). One person was found on the ground and another was sitting in a small gray car. (Id.). The person on the ground was the victim Dominique Lawton and Deputy Snead could not remember the identity of the other victim he saw. (Transcript p. 120). As to Mr. Lawton, Dr. Janice Ross, M.D., a forensic pathologist, could not determine what caliber bullet was the actual bullet that killed Mr. Lawton. (Transcript pp. 530, 531).

The scene of the shooting had not been secured prior to his arrival and he said there was no way to know if, in the 25 to 30 minutes prior to his arrival, anything was moved or the scene was otherwise compromised. (Transcript p. 124). He said when he first arrived on scene, his first concern was securing the scene, meaning making sure that there were no active shooters and then to render what emergency aid he could. (Transcript p. 120).

The first 911 call came in “right around 4 a.m.,” according to Deputy Snead. (Transcript p. 123). He said once it was determined there were no other “active shooters” and the victims had been tended to, he and other deputies secured the scene “and try not to let anything move or be disturbed until we could call other investigators in.” (Transcript p. 121). This meant roping off the scene “to keep it

as sterile as possible.” (Id.) To his knowledge, “other than people scattering” the scene was not disturbed or tampered with. (Id.)

Calhoun County Sheriff’s Lieutenant Henry Dukes, Jr., was the lead investigator in the case. This was his first homicide investigation in that capacity. (Transcript p. 409). Assisting him was Deputy Matthew Trentham, a criminal investigator. Investigator Trentham received the first call from dispatch at 4:08 a.m. (Transcript p. 424). He was the “on-call” investigator that evening. (Transcript p. 423).

Investigator Trentham arrived on the scene “right before 5 o’clock” and said the scene was secure at that point. (Transcript p. 424). Lt. Dukes arrived on the scene within a few minutes of Investigator Trentham and the two then began coordinating “who was going to do what and who was going to respond back to the hospital.” (Transcript p. 425). All of the victims had been transported at that point. (Id.) Investigator Trentham went to the hospital and Lt. Dukes remained on scene. (Id.)

Lt. Dukes said upon his arrival he saw that statements were being obtained from some witnesses (the DJs were still there, according to Trentham (Transcript p. 424)) and law enforcement had “started doing [an] initial report.” (Transcript p. 370). Ultimately, Lt. Dukes began processing the scene that had been roped off previously by Deputy Snead. (Id.) He said he recovered an unspent shell cartridge

near the front door; one spent shell casing in the area behind the van; five .45 caliber shell casings and three .40 caliber shell casings in the area near the corner of the club; and five 9-millimeter shell casings in a general area scattered about fifteen feet from where the body of Mr. Lawton had been. (Transcript pgs. 371-378).

As far as suspects, Lt. Dukes said initially Mr. Frazier was identified as a result of his name being provided when the 911 call came into dispatch and he was arrested about two o'clock in the afternoon of September 19, 2011. (Transcript pgs. 386-387). A gunshot residue kit was collected at the time of his arrest, Lt. Dukes said. (Id.) He said he also received information about Benjamin and Haggood as possibly involved. (Transcript p. 389).

Investigator Trentham arrived at the hospital in the hopes of speaking with the victims and, based on rumors that this was a "family-type function" and that family members might be present, that potentially other witnesses might be present as well from whom he could take statements. (Transcript pgs. 425-426). Two of the victims, Mr. Hampton and Mr. DeFreitas, were stable and had been treated while Mr. Lawton had been airlifted to Palmetto-Richland. (Transcript p. 426).

Gunshot residue kits were collected from Mrrs. Hampton and DeFreitas. He said as a result of his conversations with the witnesses, the focus of the investigation was on Mr. Benjamin, Mr. Frazier and Nayrone Shivers "as possible

suspects.” (Transcript p. 429. He reported back to Lt. Dukes with these names. (Transcript p. 430). There were no other leads or any other suspects. (Transcript p. 432).

Mr. Shivers was dismissed as a suspect shortly after this when it was learned that although he had a weapon that evening “it was after the fact, after Mr. Lawton was already struck.” (Transcript p. 431-432). Lt. Dukes said an arrest warrant was issued for Mr. Shivers but never executed and investigators never met with Mr. Shivers to speak with him about the incident. (Transcript p. 410). No one was ever identified as being responsible for the 9-millimeter shell casings and there is “no proof at this time” that Mr. Shivers was the shooter. (Transcript pgs. 410-411).

Several days after the incident, and after the crime scene tape had been removed, Lt. Dukes said he returned to the scene with a metal detector to continue to look for any evidence. A full week following the shooting, Lt. Dukes executed a search warrant at the home of Mr. Benjamin but recovered no evidence. (Transcript p. 414). No firearms were recovered and specifically there was no .45 caliber located. (Transcript p. 405). Additionally, there was a search conducted at Mr. Frazier’s home where a revolver was recovered. (Transcript p. 397). Lt. Dukes said that to date, there has been no .45 caliber or 9-millimeter recovered. (Id.)

John Roberts is a forensic investigator with the South Carolina Law Enforcement Division, commonly called SLED. (Transcript p. 448). Specifically, his testimony related to his gunshot residue analysis. (Id.) He was provided several gunshot residue kits that had been collected by Investigator Trentham as part of his investigation at the regional medical center. Agent Roberts said the kits taken from Mr. DeFreitas and Mr. Hampton were both negative for evidence of gunshot residue. (Transcript pgs. 456-457).

He also testified that he received a gunshot residue kit taken from Mr. Frazier but no test was conducted because its collection took place more than six hours after the shooting, something he said was the cut-off when effective analysis could not be done. (Transcript p. 457, 454-455). There was no analysis performed, for the same reason, on a kit taken from Mr. Shivers and on a kit taken from Mr. Lawton.<sup>1</sup> Analysis was also conducted on the vehicle belonging to Mr. Haggood and it was determined that a “single round gunshot residue particle” was detected on a test strip taken from the driver’s side rear of the vehicle, indicating a weapon was fired near the vehicle. (Transcript p. 464).

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<sup>1</sup> Investigators did not travel to Palmetto-Richland prior to Mr. Lawton’s death to collect any evidence and Agent Roberts testified that because Mr. Lawton remained alive, albeit on life support, for a period of time exceeding six hours from the time of the shooting, no test would be conducted because it was too late. (Transcript p. 459). As to Mr. Shivers, there was no testimony from any investigator identifying the circumstances of when or how this kit was collected or whether or not Mr. Shivers was ever interviewed. This reference from Agent Roberts is the first reference to any evidence collection involving Mr. Shivers.

To put the size in perspective, Agent Roberts testified that the particles are actually “submicroscopic” detected utilizing a beam of electrons fired through a vacuum. (Transcript p. 468). “They are not quite nanometers, but micrometers.” (Id.) He said two of these particles were found. (Id.) Additional testing was conducted on the t-shirt belonging to Mr. Shivers and it revealed evidence of gunshot residue. (See Note n.1 below) (Transcript p. 465). “It was near a gun when it went off.” (Transcript p. 466). There was no gunshot residue kit collected from Mr. Benjamin. (Transcript p. 467).

SLED Agent James Green is a firearms and ballistics examiner. (Transcript p. 476). He examined three firearms: a Highpoint Model CF-380 .380 caliber semi-automatic pistol; an Armenius Model HW3-32 Smith and Wesson long caliber revolver; and a Springfield Armory Model XD-40 .40 caliber Smith and Wesson semi-automatic pistol. (Transcript pp. 479, 484). No other weapons were received from law enforcement for testing. (Transcript p. 485). He also compared several shell casings recovered from the scene and attempted to match them to the various weapons presented for review.

Agent Green testified he could not determine if the three .40 caliber casings were fired by the .40 caliber Springfield that was recovered. (Transcript p. 490). As to the bullet recovered from Mr. Hampton, Agent Green said it was “consistent” with having been fired by *some* .40 caliber Smith and Wesson but

could not say it came from *the* .40 caliber introduced into evidence. (Transcript p. 492)(emphasis added). He said the .45 caliber cartridge casings were all fired from the same weapon but the weapon was never recovered and could not be tested. (Transcript p. 494). Finally, the five 9-millimeter casings were consistent with a Luger 9-millimeter and were all fired from the same weapon but no 9-millimeter was ever recovered. (Transcript p. 498).

Agent Green conceded that the three fired .40 caliber cartridge cases all were fired by the same pistol but that it could have been a pistol other than the .40 caliber entered into evidence. (Transcript p. 500). One of the fired bullets examined was fired either from a Smith and Wesson .40 caliber or possibly a 10-millimeter. (Transcript p. 501). Additionally, the .45 caliber casings could have been fired by more than one weapon and the testing was inconclusive. (Transcript pp. 502-503).

Investigator Trentham said, "We worked diligently to identify all – anybody that had a firearm that night and anybody involved" but came up with no one. (Transcript p. 432). Agent Green concluded there could have been at least eight and as many as nine different firearms involved in the shooting that evening. (Transcript pp. 504-505).

### *The Defense Motion for Directed Verdict*

Following the testimony from Dr. Ross, the forensic pathologist who conducted the autopsy on Mr. Lawton (and who could not determine what caliber bullet killed him), the State rested its case. Mr. Benjamin, through trial counsel, moved for a directed verdict of not guilty on all counts. (Transcript p. 534). The Court asked the Assistant Solicitor to lay out the evidence supporting the elements of the crimes including which witnesses “[put] the gun in the hand of the defendant and then pointing the gun in the area where the victims were.” (Transcript p. 535).

In response the Assistant Solicitor responded that Mr. Haggood testified that Mr. Benjamin possessed a .45 caliber semi-automatic and saw Mr. Benjamin firing it “essentially out in the direction that I would submit the victim was ultimately hit, the victim being Mr. Lawton was struck.” (Transcript p. 536). He also noted Mr. Hampton “basically saw all three defendants with guns.” (Transcript pp. 535-536). “Other testimony would have Mr. Frazier shooting in the air and this defendant then being the only person shooting in that direction at that time, which would then kind of fall into – it’s my position that he was shot basically around the same time that Mr. Lawton was shot.” (Transcript p. 537).

The Assistant Solicitor also relied upon the discovery, several days later with a metal detector, of three .45 caliber rounds, two of which are matched to each other and a third was “too damaged” as a result, he suggested, of striking Mr.

Saxon's vehicle. "I submit to you one of those other two went through Mr. Lawton's head." (recalling Dr. Ross could not say what caliber bullet inflicted the fatal wound to Mr. Lawton)(Transcript p. 537). He conceded the injury to Mr. Hampton was inflicted from Mr. Haggood's weapon "so I think our argument with regards to him is more of an accomplice liability theory." (Id.)

"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," the Assistant Solicitor opined. "I agree it's chaos out there but I submit to you the three of them were part of that chaos." (Transcript pp. 537-538).

No further evidence was presented by the Assistant Solicitor in support of his theory of the case. It rests exclusively on an accomplice liability theory based upon speculation as to who and what killed Mr. Lawton and the fact that Mr. Benjamin was seen with a .45 caliber semi-automatic. There was no explanation as to the common plan or scheme to commit a crime that involved Benjamin, Haggood, and Frazier, no intent to commit a crime at all against any of those injured, and no explanation or evidence supporting that the three defendants met up with the purpose of committing a crime as a result of a prior agreement to do so.

The Court conceded a least a portion of the State's prosecution rested on circumstantial evidence. (Transcript p. 541). Additionally, the Court concluded

that “taking the evidence in its entirety and the inferences which could be drawn” there was sufficient evidence on “every element of each of these offenses” that a jury could find guilt beyond a reasonable doubt. The motion was denied. (Id.)

Mr. Benjamin did not testify. (Transcript p. 583). His defense included the testimony of Mr. Gidron, who specifically said he did not see Mr. Benjamin aim at or shoot Mr. Lawton, and Kelly Fite, a firearms expert. Following this testimony, the Defense rested its case again moved for a directed verdict of not guilty. (Transcript pp. 584-585). The motion was, again, denied. “There is evidence both ways, without question.” (Id.)

### ARGUMENT

#### **ISSUE ONE - 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.**

“In criminal cases an appellate court sits to review errors of law only.” *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences in the light most favorable to the State. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001). A defendant is entitled to a directed verdict where the State fails to produce evidence of the offense charged. *State v. Odems*, 395 S.C. 582, 586, 720

S.E.2d 48, 50 (2011) *citing State v. McHoney*, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001).

“If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court] must find the case was properly submitted to the jury.” *Id.* at 293–93, 625 S.E.2d at 648; *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Direct evidence “is based on personal knowledge or observation and ... *if true*, proves a fact without inference or presumption.” *Black's Law Dictionary* 636 (9th ed.2009) (emphasis added). The presentation of direct evidence “immediately establishes the main fact to be proved.” *State v. Salisbury*, 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n. 1 (2001). Circumstantial evidence is “based on inference and not on personal knowledge or observation,” *Black's Law Dictionary* 636 (9th ed.2009), and establishes “collateral facts from which the main fact may be inferred.” *Id.* Circumstantial evidence is “proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred.” *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004).

Mr. Benjamin was charged by indictment with murder, in violation of S.C. Code 16-3-10, and two counts of attempted murder in violation of S.C. Code 16-3-29. The Court instructed the jury that to prove murder, the State was required to prove beyond a reasonable doubt that Mr. Benjamin killed Mr. Lawton with malice

aforethought, defined as an intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury, and as a result, the intended victim actually died. “But for the acts of this defendant, the victim would not have died.” (Transcript p. 682). There must have been “previous evil intent and malice must have existed in the mind of the defendant just before and at the time the act is committed.” (Transcript p. 683).

Attempted murder, the Court instructed, required the State to prove beyond a reasonable doubt that Mr. Benjamin, with malice aforethought and with the intent to kill, shoot and wound the two surviving victims, Mr. Hampton and Mr. DeFreitas. (Transcript p. 687). The State “must show more than mere preparation and an intent.” (Transcript p. 688).

Here, the State conceded it could not prove Mr. Benjamin, and in fact was not arguing, that he was responsible for the injury to Mr. Hampton or Mr. DeFreitas and was relying on a theory of accomplice liability. (Transcript p. 538). There was also no direct evidence that Mr. Benjamin actually killed Mr. Lawton and no evidence that he intended to kill Mr. Lawton with malice aforethought.

The State in the instant matter all but conceded that there was no direct evidence linking Mr. Benjamin to any of the crimes charged. “Obviously I can’t be positive who shot – I mean really it could be either one of the other two ...” (Transcript p. 538). There was no eyewitness who saw Mr. Benjamin fire the fatal

shot that killed Mr. Lawton and in fact, there was uncontroverted direct evidence to the contrary where Mr. Gidron, an eyewitness to the exact moment when Mr. Lawton was struck, testified he did not see Mr. Benjamin shoot at or even aim at Mr. Lawton.

The only connection is an unsupported, speculative conclusion from the Assistant Solicitor that is contrary to the state's own forensic expert, Dr. Ross, that one of two .45 caliber bullets recovered several days after the shooting must have hit Mr. Lawton in the head.

The State also conceded that it was not Mr. Benjamin who fired any of the shots that wounded Mr. Hampton or Mr. DeFreitas. There was direct testimony from the State's own witness, Mr. Haggood, who took a very favorable plea deal in exchange for his testimony, that it was likely his weapon that injured Mr. Hampton. There was no evidence to indicate who shot Mr. DeFreitas other than he was shot sometime during the hail of gunfire that every witness testified was coming from all directions.

Mr. Benjamin's guilt is based upon mere speculation and only marginal circumstantial evidence. Here, the only testimony offered that connected Mr. Benjamin to any gunfire was that of Mr. Haggood, testifying under a very favorable plea deal. Mr. Benjamin fired his weapon perhaps two or three times while moving toward cover from the other gunfire. It was described as "cover

fire” used to permit a group of people to rally in a safe place. According to Haggood, Benjamin was not aiming his weapon and was not shooting at anyone, but rather was holding his weapon at a downward angle.

The evidence presented by the State was that Mr. Benjamin had possession of a .45 caliber semi-automatic several hours prior to the incident outside “Piggy Park” that ultimately led to Mr. Lawton’s death. There was an incident inside the club shortly after Mr. Benjamin, Mr. Haggood, and Mr. Frazier arrived between 12:30 a.m. and 1 a.m. where Mr. Benjamin and Mr. Lawton “bumped” on the dance floor and it appeared some words were exchanged. There were no punches thrown and no weapons displayed. After a few minutes, both parties were calmed by friends and each side had made it clear neither wanted any problems with the other.

Several hours later, without any further incidents and with the party at the club winding up, “Piggy Park” began closing for the evening. Mr. Benjamin, Mr. Frazier and Mr. Haggood made their way, separately, outside. Once outside, according to Mr. Haggood “someone pulled a gun and discharged a round.” He stated Mr. Lawton was the aggressor and was likely the one who pulled his weapon and fired. He had possession of a .380 semi-automatic and a .380 caliber round was found near the front door consistent with the testimony from witnesses.

“I guess you could say it was an ambush type thing. He (Mr. Lawton) came out of nowhere. It wasn’t provoked or anything. Once he walked up, he pulled out his gun, it wasn’t anything said before he pulled out his gun,” Mr. Haggood testified.

Everything became chaotic and this is when Mr. Frazier pulled his gun and held it in the air or at his side, but had not fired. His concern was echoed by nearly every witness who was present that he and his friends did not want any problems, they just wanted to get home. Mr. Benjamin and others tried to usher Mr. Frazier out of the area toward Mr. Haggood’s car, away from the situation. There were perhaps as many as a dozen people right by the door when Mr. Lawton and his friends confronted Mr. Frazier.

Mr. Haggood tried to step in to protect Mr. Frazier but Mr. Benjamin told him to “fall back.” The goal was to exit from the area and not escalate the situation. “They started shooting,” Mr. Haggood said, referring to unknown others and not to Mr. Benjamin, “and then it was like everyone was scattering.” Faced with gunfire in all directions, Mr. Benjamin began moving toward a place of safety and “pulled out his gun and let off about two shots” of cover fire, according to Mr. Haggood, “in the direction of the car that was in front of mine.”

There is no other testimony that Mr. Benjamin fired any additional rounds from his weapon. There is no evidence he aimed at anyone and no evidence that

any shot he fired actually hit anyone. There was no .45 caliber weapon recovered by police despite searching Mr. Benjamin's home. The Assistant Solicitor simply speculated in his closing argument that Mr. Benjamin must have disposed of the weapon at some point after the shooting.

“This Court has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the Defendant committed a particular crime, the defendant is entitled to a directed verdict.” *Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Having conceded there was no evidence that Mr. Benjamin actually committed the crimes charged, the State rested its prosecution on the theory that Mr. Benjamin is responsible for the actions of his co-defendants, namely Mr. Haggood and Mr. Frazier, as an accomplice. The theory is referred to as “the hand of one is the hand of all.” Under this theory, the State can hold Mr. Benjamin responsible for his co-defendants' actions if it proves Mr. Benjamin joined with them “to accomplish an illegal purpose incidental to the execution of the common design and purpose.” *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

Under this accomplice liability theory, the State utterly failed to prove an essential element: there was no prior agreement to commit a crime and Mr. Benjamin did nothing to aid, abet or assist any of his co-defendants in carrying out

this mystery scheme. “In order to be guilty as an aider and abettor, the participant (Mr. Benjamin) must be chargeable with knowledge of the principal’s criminal conduct.” *Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584, *citing State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987).

First, the State could not prove who the principal was that murdered Mr. Lawton. The State presumed, speculated, and suspected Mr. Benjamin but never proved it. The State never proved Mr. Haggood or Mr. Frazier fired the fatal shot. The State’s own expert witness could not say what caliber bullet killed Mr. Lawton and the firearms and ballistics expert testified that his tests were inconclusive. Absent proof of the “principal” there can be no aiding and abetting sufficient to tie Mr. Benjamin to any crime.

Second, there was no evidence, direct or otherwise, of any common scheme or plan to commit a criminal act. The State suggested in its closing argument that the plan was hatched the minute the three co-defendants exited the club to retrieve their weapons from Mr. Haggood’s car. However, there was no evidence it was done for any criminal purpose. Mr. Benjamin, who had just been bumped on the dance floor, stated he thought Mr. Lawton had a weapon and did not want to get caught unprepared. Erroneously, the State argues this effort of self protection proves a criminal intent to commit a criminal act.

However, the testimony from all of the State's witnesses who were at the club that evening indicated that whatever bad feelings there may have been between Mr. Benjamin and Mr. Lawton had long since evaporated by the time the club closed down. Mr. Frazier and his friends left the club and were "ambushed" by Mr. Lawton. All the State suggested in arguing against a direct verdict was that "it's chaos out there and the three of them are part of that chaos." (Transcript p. 538). So were at least a dozen others, including the victim who pulled his .380 semi-automatic and ambushed Mr. Frazier as he left the club.

Interestingly, the State failed to articulate **any** argument about the necessary elements to meet its burden about accomplice liability. All the State articulated was mere presence at the scene, prior possession of a weapon that was never linked to the murder of Mr. Lawton or the wounding of Mr. DeFreitas or Mr. Hampton, and the fact that Mr. Benjamin fired two shots as he was running for cover to escape the hail of gunfire. There was no evidence of some pre-planned agreement to meet at the front door to kill Mr. Lawton. There was no evidence that Mr. Benjamin aided and abetted anyone because the killer was never identified.

At best, there was only the State's suspicion and speculation that Mr. Benjamin was responsible. The Court instructed the jury that it must find that there was a prior arranged plan or common scheme in order to find guilt.

(Transcript p. 693). Accomplice liability is shown where “a person joins with another to commit an unlawful act in carrying out a common plan or purpose.” (Transcript p. 692-693). Even if the State could prove who the principal was, and even if Mr. Benjamin had prior knowledge that the principal was going to commit a crime, that prior knowledge is insufficient to prove guilt. (Id.)

Neither is mere presence at the scene enough to find guilt. At best the State’s case was one of speculation and conjecture. The murder weapon was never introduced because it could not be determined, according to the State’s own expert witness. At most, the State’s case, and its artful stringing together of inference upon inference to the jury, raised only a suspicion.

“Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)). Under these circumstances, “and settled principles, the trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty.” *State v. Lewis*, 403 S.C. 435, 743 S.E.2d 124 (2013) *citing State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct.App.2005) *citing State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984)).

Here, there was nothing more than speculation and suspicion without any proof of some criminal scheme to commit a criminal act upon the victims in this case. No one can say for sure who fired the fatal shot that killed Mr. Lawton. No one can say who fired the shot that injured Mr. DeFreitas. Mr. Hampton's injury was likely the result of a shot from Mr. Haggood's weapon but even so, there was no evidence Mr. Benjamin did anything to aid, abet or assist Mr. Haggood carry out a criminal act as a result of a pre-planned common plan or scheme. Absent this evidence, the Court should have granted a directed verdict in favor of Mr. Benjamin on all counts and erred in denying the motion and submitting it to the jury. The conviction should be overturned and the indictment dismissed.

**ISSUE TWO - 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.**

“The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion.” *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998); *State v. Smith*, 316 S.C. 53, 447 S.E.2d 175 (1993). “An abuse of discretion occurs when a trial

court's decision is unsupported by the evidence or controlled by an error of law.”

*State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct.App.2001).

Similar to the standard utilized in examining a motion for directed verdict, if there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the appellate court must find the case was properly submitted to the jury. Here, there is no fair and logical reading of the evidence sufficient to sustain the jury's verdict and the Court abused its discretion in not ordering a new trial.

There was no direct evidence supporting Mr. Benjamin's guilt as to the murder of Mr. Lawton and the attempted murders of Mr. Hampton and Mr. DeFreitas. The State conceded that its theory of liability rested upon the “hand of one is the hand of all” accomplice liability where Mr. Benjamin was held responsible for the actions of his co-defendants in furtherance of a pre-arranged common plan or scheme to commit a criminal act. The State could not establish, and admitted as much during its argument against a directed verdict, who fired the fatal shot that killed Mr. Lawton or injured Mr. DeFreitas. Mr. Haggood essentially admitted during his testimony, given in exchange for a favorable plea deal, that it was likely his gun that fired the bullet that hit Mr. Hampton in the arm.

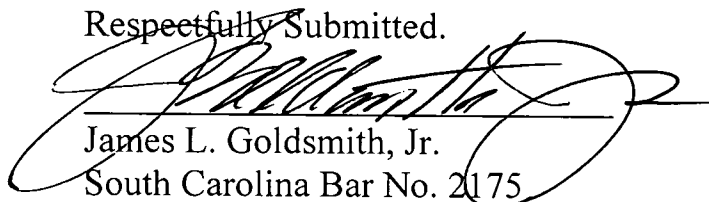
Without identifying the principal in the shooting death of Mr. Lawton or Mr. DeFreitas, the Court erred as a matter of law in not granting Defendant's motion

for new trial on this basis. The Court abused its discretion when it determined, contrary to established case law, the jury's verdict was supported by sufficient evidence when it was clear no such sufficient circumstantial evidence existed. The State's evidence, articulated in Point One, supra., was insufficient to support the jury's verdict and the Court abused its discretion in denying the motion for new trial. The verdict should be vacated and the indictment dismissed.

### CONCLUSION

For all of the foregoing reasons, and in light of the legal authority herein cited, it is respectfully submitted that this Court should vacate Defendant Benjamin's conviction and dismiss the indictment; and to provide such other and further relief as the Court deems just, fair and equitable.

Respectfully Submitted.



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February 6, 2014

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CALHOUN COUNTY  
Court of General Sessions

Diane Schafer Goodstein, Circuit Court Judge

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CASE NO.: 2013-001496

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State of South Carolina, .....Respondent,

v.

David Jamar Benjamin, .....Appellant.

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APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED  
IN THE RECORD ON APPEAL

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**RECEIVED**

MAR 13 2014

**SC Court of Appeals**

**APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED  
IN THE RECORD ON APPEAL**

Appellant, pursuant to Rule 210, hereby designates the following matter to be included in the record on appeal:

**Pleadings**

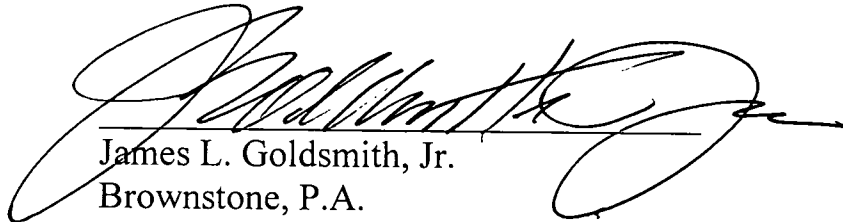
| Document Description               | Date       |
|------------------------------------|------------|
| Arrest Warrant                     | 10/04/2011 |
| Indictment                         | 02/25/2013 |
| Verdict                            | 03/07/2013 |
| Motion for New trial               | 03/15/2013 |
| Motion to Reconsider Sentence      | 03/15/2013 |
| Order Denying Motion to Reconsider | 07/01/2013 |
| Notice of Appeal                   | 07/10/2013 |

**Transcript of Record**

| Document Description        | Date       | Page(s) Cited   |
|-----------------------------|------------|---|
| Trial Transcript – Vol. I   | 03/04/2013 | 109-112; 120-121; 123-124; 127-128;<br>131-135; 137-139; 144  |
| Trial Transcript – Vol. II  | 03/05/2013 | 203-205; 207; 209; 211-216; 218-<br>219; 260-262, 264-266; 268-280;<br>282-285; 287-288; 290-293; 304-304;<br>306-308; 317-319; 332; 343; 345-<br>346; 370-378; 386-387; 389; 397;<br>405; 409-411; 414; 423-426; 429-432 |
| Trial Transcript – Vol. III | 03/06/2013 | 448; 454-457; 459; 464-468; 476;<br>479; 484-485; 490; 494; 498; 500-<br>505; 530-531; 534-538; 541; 558;<br>560-561; 563-564; 572; 578; 583-585  |
| Trial Transcript – Vol. IV  | 03/07/2013 | 682-683; 687-688; 692-693   |

CERTIFICATE OF COMPLIANCE

I, James L. Goldsmith, Jr., counsel for Appellant David Benjamin, hereby certify that the foregoing Designation of Matter to be Included in the Record on Appeal does not contain any matter which is irrelevant to the instant appeal and that this Designation of Matter includes those portions of the transcript, pleadings, orders, exhibits, or other materials which are properly included in the Record on Appeal pursuant to Rule 210(c).



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Winter Park, Florida 32790  
Attorney for Appellant

**RECEIVED**

MAR 13 2014

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CALHOUN COUNTY  
Diane Schafer Goodstein, Circuit Court Judge

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Case No. 2013-001496

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The State of South Carolina.....Respondent,

v.

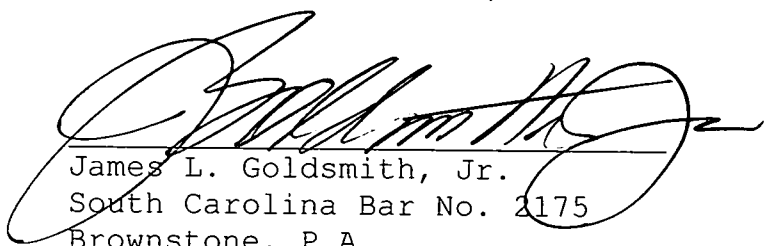
David Jamar Benjamin.....Appellant.

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PROOF OF SERVICE

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I certify that I have served the foregoing Designation of Matter to be Included in the Record on Appeal on the Respondent by depositing a copy of the Brief in the United States Mail, postage prepaid, on March 12, 2014, addressed to Respondent's attorney of record, Donald J. Zelenka, Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.



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**SC Court of Appeals**

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12 March 2014

Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

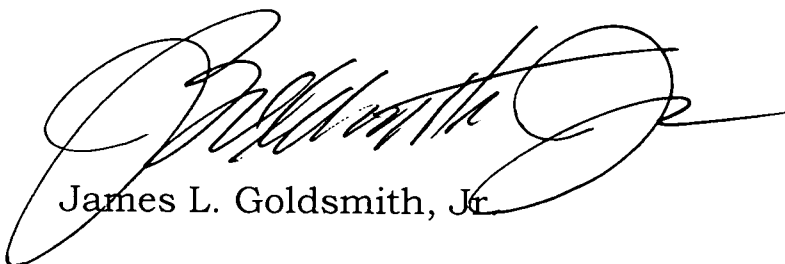
Re: *State of South Carolina v. David Jamar Benjamin*  
Appellate Case No. 2013-001496

Dear Sir or Madam:

In response to your letter of 5 March 2014, I have enclosed Appellant's Designation of Matter to be Included in the Record on Appeal and Proof of Service upon Respondent's attorney, Donald J. Zelenka.

I have also enclosed a signed original of page 40 of Appellant's Brief and a revised cover indicating Donald J. Zelenka as attorney for the Respondent.

Sincerely,



James L. Goldsmith, Jr.

**RECEIVED**

MAR 13 2014

cc: Donald J. Zelenka  
Office of the Attorney General

**SC Court of Appeals**