ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 02 2014
S.C. Supreme Court

May 2, 2014

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Adams Gibson v. State of South Carolina
2013-CP-40-2107

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/ko
Enclosures

cc: Jeremy A. Thompson, Esquire
The Honorable Jeanette W. McBride, Clerk of Court of Richland County
The Honorable Daniel E. Johnson, Fifth Circuit Solicitor
SCCID, Division of Appellate Defense
David M. Tatarsky, Esquire
Trisha Allen, Victims Services

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 02 2014
S.C. Supreme Court

CERTIORARI TO RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable James R. Barber, III, Circuit Court Judge
Case No. 2013-CP-40-2107

ADAMS GIBSON,

Respondent,

v.

STATE OF SOUTH CAROLINA

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order of Dismissal of the Honorable James R. Barber, III, Presiding Judge, dated March 20, 2014, filed March 21, 2014, and received by the State on March 26, 2014, and the Denial of the 59(e), SCRCP, of the Honorable James R. Barber, III, Presiding Judge for the First Judicial Circuit, dated April 23, 2014, filed April 23, 2014, and received by the State on May 1, 2014, in the matter of Adams Gibson v. State of South Carolina, Case No. 2013-CP-40-2107.

Mary S. Williams, Assistant Attorney General
South Carolina Bar No. 76192
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3752

May 2, 2014

RECEIVED
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
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Petitioner.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on May 2, 2014, to Jeremy A. Thompson, Esquire, his attorney of record, to the address below.

Jeremy A. Thompson, Esquire
Law Office of Jeremy A. Thompson, LLC
Post Office Box 12891
Columbia, South Carolina 29211

Mary S. Williams
Assistant Attorney General

SWORN to before me this
2nd day of May, 2014

Notary Public for South Carolina.
My Commission Expires: 5/11/2014

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-2107

Adams Gibson, #322094

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The State's Rule 59(e) motion is denied without oral argument.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2110 **Date** 4/23/14

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of April, 20 14 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter

ATTORNEY(S) FOR THE DEFENDANT(S)

Clerk of Court Jeanette W. McBride

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGME IN A CIVIL CASE

CASE NUMBER: 2013CP4002107

Adams #322094 Gibson

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

JEANETTE W. McBRIDE
CLERK OF COURT
RICHLAND COUNTY
FILED
2014 MAR 21 AM 10:37

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 21 March 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Jeremy Adam Thompson

Megan E. Harrigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCANNED

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
ADAMS GIBSON, #322094,	)	CASE NO.: 2013-CP-40-2107
Applicant,	)	
v.	)	ORDER GRANTING APPLICATION FOR POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

RICHLAND COUNTY FILED
2014 MAR 20 AM 9:52
JEAN

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed April 8, 2013. The State made its Return on July 31, 2013. An evidentiary hearing into this matter was convened on October 1, 2013. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The Respondent was represented by Mary S. Williams, Assistant Attorney General.

I.
PROCEDURAL HISTORY

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. At the October 19, 2005, term of General Sessions, the Richland County Grand Jury indicted the Applicant for murder (2005-GS-40-9085). The Applicant's co-defendant Jacques Gibson ("Jacques") was also indicted for murder and for unlawful possession of a firearm by an individual under the age of 21. On May 21-24, 2007, the Applicant and Jacques proceeded to a joint trial by jury. Nathaniel Roberson, Esquire, represented the Applicant at this proceeding. At the conclusion of the trial, the jury convicted both defendants as charged. The Honorable Steven H. John, presiding circuit court judge, sentenced the Applicant to thirty years' imprisonment.

SCANNED

The Applicant pursued a direct appeal to the South Carolina Court of Appeals, and was represented in this proceeding by Robert M. Dudek, Appellate Defender. On September 29, 2010, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence in a published opinion. State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010). Although the Supreme Court of South Carolina initially granted certiorari to review the Court of Appeals' decision, the Supreme Court ultimately dismissed the petition as improvidently granted. State v. Gibson, 401 S.C. 569, 737 S.E.2d 853 (2013).

II.
ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel;

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial, as well as during his direct appeal.

In an Amended Application for Post-Conviction Relief filed September 27, 2013, the Applicant submitted the following specific allegations of trial and appellate counsel:

1. Trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of voluntary manslaughter;
2. Trial counsel was ineffective for failing to object to the introduction of Jacques Gibson's statement on Confrontation Clause grounds;
3. Trial counsel was ineffective for failing to request a jury instruction that Jacques Gibson's statements could only be considered as evidence against Jacques Gibson;

4. Trial counsel was ineffective for failing to move to sever and for failing to request a separate trial from Jacques Gibson;
5. Trial counsel was ineffective for failing to request that the jury be reinstructed regarding reasonable doubt following the jury's note to the Court marked as Court's Exhibit #4;
6. Trial counsel was ineffective for failing to object to the implied malice instructions inasmuch as the implied malice instructions did not contain explicit instructions to the jury that they could accept or reject the implication of malice;
7. Trial counsel was ineffective for failing to preserve his argument that the jury should be instructed that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment;
8. Appellate counsel was ineffective for failing to argue on appeal that the trial court erred in failing to instruct the jury that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence not simply as evidence of impeachment.

At the evidentiary hearing in this matter, the Applicant proceeded on these allegations. During that hearing, and in the parties' memoranda on the issue submitted following after the hearing, the parties clarified that the implied malice issue includes two separate claims for relief:

1. Trial counsel was ineffective for failing to object to the implied malice instruction because the instruction was burden-shifting; and
2. Trial counsel was ineffective for failing to object to the implied malice instruction because the instruction did not substantively convey the common law of implied malice in South Carolina.

See Respondent's Memorandum at 1; Applicant's Memorandum at 2. This Court has considered all of these allegations.

III.
EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on October 1, 2013, the Applicant presented testimony from defense counsel Nathaniel Roberson, Esquire, as well as his own testimony. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the briefs filed on direct appeal, a copy of the Court of Appeals' opinion on direct appeal, a copy of the Supreme Court's opinion on direct appeal, a copy of the records of the Richland County Clerk of Court regarding the subject conviction, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits introduced by the parties during the evidentiary hearing. What follows below are findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.*

As a threshold matter, this Court would note that the Applicant was represented by an experienced attorney who is generally regarded for his competence in criminal matters. On the facts of this case, however, this Court finds that the combined effects of defense counsel's errors and omissions was such that the Applicant was denied the effective assistance of counsel at trial. For that reason, this Court finds that defense counsel failed to provide the Applicant reasonable, professional assistance of counsel.

IV.
RELEVANT FACTS

The South Carolina Court of Appeals' decision in this matter provides a good overview of the facts as presented at trial:

> In September 2005, two groups of individuals, one from Ridgeway and one from Winnsboro, met at Chance's Bar in Columbia. Although the groups seemed to be getting along most of the evening, at some point, animosity developed between Demetric

Davis, of Ridgeway, and Torri Boyd, of Winnsboro. Adams testified that shortly after the initial confrontation between Davis and Boyd, he called his brother, Jacques, to request a ride home.

Twenty to thirty minutes later, Jacques and two friends, Stephon and Vernon, arrived at Chance's in Jacques's white Ford sedan to pick up Adams. Jacques went inside to find Adams, while Stephon and Vernon waited in the car. Shortly thereafter, the dispute that had brewed inside Chance's spilled out into the parking lot and erupted into a physical altercation between numerous members of each group. According to several witnesses, neither Adams nor Jacques initially engaged in the fight; however, James Smith [sic] testified he saw Adams swing at someone and when Smith approached Adams in an effort to keep him away from one of the Winnsboro fellows, Jacques brandished a gun and told him "[not to] even think about it." Smith testified he fled at the sight of the gun.

Soon after the fight erupted, witnesses testified to hearing several shots. The witness accounts of the evening provide no clear picture of who fired weapons or how many shots were fired. However, many witnesses testified to seeing either Jacques, Adams, or both, or "someone" in the vicinity of Jacques's white car, firing multiple shots.

One of the State's key witnesses, Shunta Williams [sic], testified that she left the bar and walked out to the parking lot to watch the fight. Most of the witnesses testified that Jacques remained near his white sedan, away from the fight, while Adams may have engaged in the melee. However, Williams testified that Jacques was engaging in the fight and that she saw Adams walk over to the white sedan, sit in the driver seat, reach under it, pull out a gun, and fire what she recognized as a small caliber handgun, either a .22 or .25. When the shots began, she retreated to the doorway of the bar to take cover. Moments later she claimed she heard another set of gunshots in the distance. She identified Adams as wearing jeans and a black tee shirt, although the other witnesses and evidence presented at trial indicated it was Jacques in the black tee shirt, and Adams was wearing a white tee shirt. Many of the accounts point to multiple sources of gunfire, but Williams maintains that Adams was the only shooter. During the melee, Dennis Irby was shot and killed by a single 9mm shot to the back of the left shoulder.

Adams spoke with the police twice. He first stated that he was not in the white Ford sedan with Jacques and did not see who did the

> shooting because he was in Lakisha Davis's car. He later admitted that after the altercation in the parking lot began, he exited Lakisha's car, at her request, to retrieve her cousin, Demetric. Adams denied having or firing a gun that night.
>
> Jacques also gave two statements to the police. First he told the police that after he and his brother exited the bar, Adams went to Lakisha Davis's car and he returned to his white Ford sedan. He said he noticed a man retrieve something from a nearby SUV and place it behind his back, he suspected it was a gun but did not see it. After the fight broke out, Jacques stated Adams drove around in Lakisha's car, got out, and walked over toward the fighting. Although in his first statement Jacques denied he had a gun, Jacques later admitted that upon suspecting Smith was going to hit Adams, he pulled a gun and told Smith to "back off." Jacques said he then heard two shots and in response fired his 9mm three or four times "into the air" as he got in his car and drove away. He later disposed of his gun by tossing it over a bridge.

State v. Gibson, 390 S.C. 347, 351-353, 701 S.E.2d 766, 768-769 (Ct. App. 2010) (footnotes omitted).[1] Additional facts—both as to the evidence presented at trail and before this Court—will be discussed in greater detail below in conjunction with each individual allegation for relief.

V.
STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the Applicant must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standard for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a

[1] This Court believes that the Court of Appeals intended to refer to Antonio Smith as opposed to James Smith, and to Shunta Wilson as opposed to Shunta Williams.

fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In the context of an allegation of ineffective assistance of appellate counsel, the operative question becomes whether but for appellate counsel's errors and omissions, the result on appeal would have been different. Smith v. Murray, 477 U.S. 527 (1986); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) ("[T]he proper standard for evaluating Robbins' claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in Strickland v. Washington"). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

VI.
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant's Application presents numerous allegations for relief. This Court, however, finds that only the issues regarding the implied malice charge are worthy of granting relief. This Court will begin its analysis of the Applicant's allegations by discussing the implied malice charge claims before turning to the claims which are not meritorious.

A. Defense Counsel was Ineffective for Failing to Object to the Implied Malice Charge

During the trial court's charge to the jury, the trial judge instructed the jury regarding murder as follows:

> Both defendants in this case have been charged with the offense of murder. The State has to prove beyond a reasonable doubt that the defendant charged killed another person with malice aforethought. Malice: that's hatred, ill will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or

> excuse and with an intent to inflict an injury or under such circumstances that the law would infer an evil intent.
>
> Now, malice aforethought does not require that that malice exist for any particular time before the act was committed, but malice has to exist in the mind of the defendant just before and at the time the act was committed. Therefore, there has to be that combination of the previous evil intent and the act.
>
> Now, malice aforethought can either be expressed or inferred. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from conduct showing a total disregard for human life. *Inferred malice may also arise when the deed is done with a deadly weapon.* A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.
>
> I'll just give you some examples of deadly weapons. There's a lot of them, and I'm not—this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, *a pistol*, a razor, gasoline. Any number of things that you determine from the facts would be a deadly weapon.
>
> I tell you that in the State of South Carolina motive is not an element of the offense of murder and, therefore, the State need not prove motive.

Trial Tr. p. 1018, line 9-p. 1019, line 17 (emphasis added). Defense counsel did not object to this portion of the jury charge. See Trial Tr. p. 1025, line 20-p. 1027, line 3. In his testimony before this Court, defense counsel testified that he did not object to this portion of the jury charge because he did not see any error in the trial court's instructions. He further testified that the only evidence of malice that he saw in this case—as to either the Applicant or his co-defendant Jacques—was the use of a deadly weapon.

In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), the Supreme Court set forth a standard charge to be used when instructing the jury on drawing a permissive inference of malice when a deadly weapon was used in a homicide:

> 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.

279 S.C. at 421, 308 S.E.2d at 784. Immediately after promulgating the standard charge, the Supreme Court issued the following warning: "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), the Supreme 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 (footnote 9).[2]

It is unquestioned that the trial court did not give the general permissive inference instruction set forth in Elmore. The Applicant contends that the trial court's failure to give Elmore's permissive inference instruction violated the common law and rendered the malice instruction burden-shifting. The Applicant further contends that defense counsel was ineffective for failing to object to the charge on these bases. This Court agrees with the Applicant on both counts. This Court will begin its inquiry with the common law argument before addressing the burden-shifting argument.

[2] This Court will utilize Belcher's description of Elmore's charge throughout this Order.

1. The Implied Malice Charge Violated the Common Law

a. The Trial Court did not Convey Elmore's Permissive Instruction to the Jury

The Applicant contends that the inferred malice charge as given by the trial court was improper under South Carolina's common law because it did not substantively convey Elmore's general permissive instruction to the jury. This Court agrees.

The Supreme Court explicitly stated in Elmore that "only slight deviations" from its inferred malice charge—which included the permissive inference charge—"will be tolerated." 279 S.C. at 421, 308 S.E.2d at 784. 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 generally 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");[3] 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") (emphasis added); Belcher, *supra*, 385 S.C. at 612, 685 S.E.2d at 811 (2009) (footnote 9) (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*

[3] In Lewellyn, the Supreme Court also cited with approval the language set forth in State v. Mattison, 276 S.C. 235, 277 S.E.2d 598 (1981), which, like Elmore, stresses the need for the jury to consider all of the evidence in conjunction with the inference of malice:

> [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. *In other words, the presumption or inference of malice from the use of a deadly weapon is simply an evidentiary fact to be taken into consideration by the jury, along with other evidence in the case, and to be given such weight as the jury determines it should receive.* The inference of malice may be drawn from proof of the use of a deadly weapon *if the jury concludes such is proper after considering all of the facts and circumstances in evidence.*

276 S.C. at 238, 277 S.E.2d at 600 (emphasis added).

jury that it is free to accept or reject the permissive inferences depending on its view of the evidence") (emphasis added). Given these repeated directives from the Supreme Court and the Court of Appeals, this Court concludes that the inclusion of a general permissive inference instruction is mandatory under South Carolina's common law.

The charge given in this case was a significant deviation from Elmore because it failed to give Elmore's general permissive inference instruction. Instead, the charge only instructed the jury on Elmore's implied malice charge. The instruction did not couch the inference in terms that permitted the jury to consider the inference in light of the other evidence admitted at the trial. This was improper under Elmore.

Moreover, this Court finds that Elmore's general permissive instruction was not conveyed to the jury through the standard implied malice instruction. Cf. Respondent's Memorandum at 3 ("[T]he trial court's charge encompasses Elmore's essential concept"). If the standard implied malice instruction conveyed the general permissive instruction, the Supreme Court would have just promulgated the standard implied malice instruction in Elmore and found it sufficient. The Supreme Court did not do so. By including the general permissive instruction in the standard charge, the Supreme Court clearly conveyed its intent that the general permissive instruction was just as necessary as the implied malice instruction. Inasmuch as Elmore's general permissive instruction was never given to the jury, the inferred malice instruction given in this case was erroneous.

b. Defense Counsel's Performance Was Deficient

A defense attorney's failure to object to jury instructions that fail to convey the proper standard for intent constitutes deficient conduct. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (improper standard on homicide by child abuse); Taylor v. State, 312 S.C. 179, 439

S.E.2d 820 (1993) (burden-shifting charge on possession with intent to distribute crack cocaine and marijuana). Similarly, a defense attorney's failure to object to improper charges on malice constitutes deficient conduct. Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002).

This Court concludes that defense counsel's failure to object to the trial court's instruction on common law grounds constituted deficient conduct. Elmore was decided in 1983 and its directive that the general permissive inference instruction be given has been repeatedly reinforced. Moreover, malice was one of the central issues, if not *the* central issue, in the trial. Defense counsel admitted before this Court that there was very little evidence that either the Applicant or Jacques acted with malice aside from the use of a deadly weapon—a statement with which this Court agrees. Accordingly, given the Supreme Court's longstanding command that the general permissive inference instruction must be given and the significance of the existence of malice in this case, this Court concludes that defense counsel was deficient in failing to object to the trial court's failure to give the general permissive inference instruction.

c. Defense Counsel's Deficient Performance Prejudiced the Applicant

This Court also finds that defense counsel's failure to object to the trial court's implied malice instruction on common law grounds prejudiced the Applicant. The central question that this Court must answer in this regard is whether or not there is a reasonable probability that had the jury been given the correct instruction, then the result of the Applicant's trial would have been different. Stated differently, this Court must determine if there is overwhelming evidence of malice such that the failure to give the general permissive instruction would not have prejudiced the Applicant. See generally Arnold & Plath v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (finding no prejudice because an erroneous malice charge "beyond a reasonable doubt did not contribute to the verdict" due to the overwhelming evidence of malice); Lowry v.

State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) ("Harmless error review looks to the basis on which the jury actually rested its verdict"). This Court concludes that the Applicant has met his burden with regard to this issue.

This Court finds that there are two bases that the jury could have found the Applicant guilty of murder. First, and least likely, the jury could have believed Shunta Wilson and found that the Applicant acted with malice as the fatal shooter. Second, and more likely, the jury could have found that the Applicant was acting as an accomplice to Jacques, and that Jacques acted with malice in discharging his firearm. Under either scenario, there was not overwhelming evidence of malice.

Beginning with the argument that the Applicant was the fatal shooter, there is no evidence that the Applicant acted with malice other than from the use of a firearm. Aside from Wilson, nearly every witness at the trial testified that the Applicant was not involved in the fighting or the shooting.[4] Had the jury been instructed that they must consider all of the evidence—much of which showed that the Applicant had no desire to harm anyone that night—there is a reasonable probability that they would have concluded that the Applicant did not act

[4] The witness accounts of the Applicant's actions during the altercation are located in the trial transcript as follows:

- Torri Boyd: Doesn't know (p. 256, line 22-p. 257, line 1);
- Ravaris Henry: Not fighting; no gun; not in the Escort (p. 333, lines 3-13);
- Antwan Martin: No gun (p. 375, lines 13-16);
- Lakisha Davis: Standing outside; not involved in the fight (p. 431, lines 8-13);
- Demetric Davis: No gun; not fighting (p. 457, line 21-p. 458, line 1);
- Tramele Davis: Definitely no gun (p. 488, line 21-p. 489, line 4);
- Antonio Smith: Kicking and hitting Boyd (p. 506, lines 1-11);
- Stephon Willingham: Standing away from the fight (p. 529, line 9-p. 530, line 8); no gun; not fighting (p. 541, lines 3-9);
- Marcus Tucker: Standing off to the side; not fighting (p. 552, lines 7-17); no gun (p. 559, lines 8-11);
- Shunta Wilson: Shooter (p. 565, line 25-p. 567, line 2);
- Vernon Davis: Swinging down at someone; no gun (p. 808, lines 3-18; p. 829, line 11-p. 830, line 2); and
- Jacques Gibson: Not fighting (p. 884, lines 8-11).

with malice in firing a firearm. Therefore, the Applicant was prejudiced by the trial court's failure to give the general permissive instruction if the jury concluded that the Applicant was the shooter.

Turning to the argument that Jacques was the fatal shooter, Jacques' statement is clear that he fired his firearm in the air and that he "didn't mean to shoot [the victim]." Trial Tr. p. 885, line 8; see also Trial Tr. p. 883, lines 7-14. An inadvertent killing is a killing done without malice. See Yates v. Evatt, 500 U.S. 391, 411 (1991) (concluding that a defendant convicted on an accomplice liability basis was prejudiced by a presumptive malice charge because one of the victims "could have been killed inadvertently" by the principal) overruled on other grounds by Estelle v. McGuire, *supra*. This is because "[m]alice is the wrongful *intent to injure another* and indicates a wicked or depraved spirit intent on doing wrong." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005) (emphasis added). Pursuant to Elmore's full charge, the jury could have concluded that Jacques acted without malice because he did not intend to kill—or even harm—the victim. The trial court's failure to give the general permissive inference charge, however, likely defeated any possibility of an acquittal on that basis, as the jury would have simply stopped its malice inquiry once it concluded that a firearm was used. There was no evidence of express malice, and there is little other evidence that the jury could have used to conclude Jacques acted with malice. Accordingly, there is a reasonable probability that the jury would have acquitted *both* the Applicant and Jacques if they had been given the full Elmore instruction because they would have considered the inference in conjunction with Jacques' explanation for shooting his firearm.

Additionally, the State, in its closing argument, largely argued that the jury could infer malice simply through the use of a firearm without taking any other evidence into account. See

Trial Tr. p. 956, lines 3-4 ("Malice may be inferred from the use of a deadly weapon alone"); p. 957, lines 4-5 ("The fact that a deadly weapon is used – the use of a deadly weapon, you can infer malice from that alone"). If the jury convicted the Applicant by following the State's argument—which would have been permitted by the trial court's instruction—then he was plainly prejudiced because the jury needed to understand that the inference of malice was only to be utilized once the rest of the evidence in the case was considered in conjunction with that inference. The State's closing argument only further demonstrates the prejudice the Applicant suffered by the trial court's failure to give the general permissive inference charge.

The Respondent erroneously argues that the Applicant can only show prejudice by demonstrating that "there were no defenses or circumstances tending to reduce, mitigate, or justify the homicide." Respondent's Memorandum at 4 (citing Belcher). The State errs by limiting Strickland's prejudice standard to Belcher's prejudice standard. Belcher dealt with the propriety of the standard implied malice instruction—which is not at issue here—not the general permissive inference instruction. Accordingly, Belcher's prejudice inquiry is inapposite. Furthermore, the Respondent's contention that there must be a lesser-included offense or applicable defense in order to demonstrate prejudice from an erroneous malice charge is simply not supported by the law. There are countless decisions by South Carolina's appellate courts, as well as by the United States Supreme Court, concluding that an erroneous malice instruction prejudiced the defendant even when there were no defenses or lesser-included offenses charged. See Francis v. Franklin, 407 U.S. 371 (1985) (defendant claimed he fired a gun accidentally but no indication that a formal defense of accident was charged); Yates, *supra* (defendant stabbed a victim but no indication that any defenses or lesser-included offenses were charged); Elmore, *supra* (no indication of lesser-included offenses or defense charged); Peterson, *supra* (same);

Lewellyn, *supra* (no indication of lesser-included offense or defense for conviction of malicious injury to real property). The reason underlying these decisions is simple: the inquiry is not what other options the jury had available to them but, rather, whether or not there was overwhelming evidence that the State met its burden of proof in establishing all of the elements of the crime. Here, there is not overwhelming evidence of malice with regard to either the Applicant or Jacques. Accordingly, this Court concludes that the Applicant has met his burden of proof in establishing prejudice, and that he is entitled to a new trial.

2. The Implied Malice Charge was Unconstitutional

a. The Implied Malice Charge Shifted the Burden of Proof to the Applicant

The Fifth and Fourteenth Amendments to the United States Constitution require that the State prove beyond a reasonable doubt each element of a crime before a criminal defendant can be convicted of that crime. In re Winship, 397 U.S. 358 (1970). "[A] State must prove every ingredient of an offense beyond a reasonable doubt, and ... it may not shift the burden of proof to the defendant" through a presumptive jury charge. Patterson v. New York, 432 U.S. 197, 215 (1977). Jury charges which create a presumption that malice existed in murder cases are unconstitutional. See generally Mullaney v. Wilbur, 421 U.S. 684 (1975); Yates v. Aiken, 484 U.S. 211 (1988).

"If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole." Francis v. Franklin, *supra*, 471 U.S. at 315. A reviewing court must determine if "'there is a reasonable likelihood that the jury has applied the challenged instruction

in a way' that violates the Constitution." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

This Court finds that the failure to give the general permissive inference instruction renders the standard implied malice instruction burden-shifting. As noted above, Belcher reaffirmed that both instructions must be given when an implied malice instruction is warranted. 385 S.C. at 612, 685 S.E.2d at 810 (footnote 9). Consequently, this Court concludes that if the implied malice charge sufficiently conveyed the permissive inference instruction in its language, then there would be no need for the separate permissive inference instruction. It can be presumed, therefore, that the implied malice charge does not sufficiently inform the jury that they do not have to infer malice from the use of a deadly weapon. This failure to sufficiently convey the permissive inference instruction renders the standard implied malice instruction—standing alone—burden-shifting.

b. Defense Counsel's Performance was Deficient

This Court finds that defense counsel was deficient in failing to object to the burden-shifting malice charge. The Supreme Court has squarely held that the failure to object to a burden-shifting malice charge constitutes deficient conduct. See Lowry v. State, *supra*, 376 S.C. at 507, 657 S.E.2d at 764 ("[W]e hold that the jury's application of the instruction violated Petitioner's due process rights and therefore, that counsel was deficient in failing to object to the charge"). Furthermore, it is difficult to envision a scenario where a trial attorney could "articulate[] a valid reason" for failing to object to such an unconstitutional charge. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); see also Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) ("[W]e can discern no defensible basis for trial counsel's failure to challenge the forensic interviewer's objectionable testimony"). Defense counsel testified before

this Court that his only explanation for failing to object to the charge was that he didn't believe that it was burden-shifting. As this Court has concluded that the charge was burden-shifting, this Court construes this testimony as an admission that defense counsel did not realize the improper nature of the charge. Consequently, this Court concludes that defense counsel was deficient in failing to object to the charge and that defense counsel did not articulate a valid strategic reason for this deficiency.

c. Defense Counsel's Deficient Performance Prejudiced the Applicant

In determining prejudice, this Court must "address the issue of whether 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" Arnold & Plath v. State, *supra*, 309 S.C. at 165, 420 S.E.2d at 838 (quoting Chapman v. California, 386 U.S. 18, 24 (1967). This analysis requires this Court to "take two quite distinct steps." Yates v. Evatt, *supra*, 500 U.S. at 404. "First, it must ask what evidence the jury actually considered in reaching its verdict." Id. "Once a court has made the first enquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone." Id. This inquiry is the same for evaluating the prejudice prong of Strickland. Lowry, *supra*.

The Court has largely already resolved these issues in favor of the Applicant. As there was little evidence of malice aside from the use of a firearm, this Court concludes that the evidence that the jury actually considered in reaching its verdict was the evidence that either the Applicant or Jacques used a firearm. Furthermore, this Court concludes that there was not overwhelming evidence of malice as most of the testimony showed that the Applicant acted peacefully the night of the incident and Jacques' statements indicated that he inadvertently killed the victim. In other words, the probative force of the evidence—independent of the

presumption—does not require a conviction for murder as to either defendant. The presumptive charge, however, *did* require such a conviction because it mandated a finding of malice if the jury concluded that either the Applicant or Jacques used a firearm. As Jacques admitted that he did so in his statement, and Shunta Wilson claimed the Applicant fired a weapon, it's clear that the jury likely convicted the Applicant based solely on the burden-shifting nature of malice charge. Accordingly, this Court finds that the Applicant has met his burden of proof with regard to this issue, and he is entitled to a new trial. See Lowry, *supra*.

B. The Applicant's Remaining Allegations

Although this Court's rulings on the implied malice claims are dispositive of this Application, this Court must address all of the Applicant's allegations which were presented at the evidentiary hearing in this matter. See S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (concluding that a PCR court's failure to comply with § 17-27-80 "precludes appellate review of the issues" not addressed in the order). This Court finds that the Applicant's remaining allegations are without merit.

1. Allegation #1: Voluntary Manslaughter

The Applicant alleges that defense counsel was ineffective for failing to request a jury instruction on the lesser-included offense of voluntary manslaughter. This Court finds that defense counsel's performance was not deficient with regard to this issue as a charge on voluntary manslaughter was not warranted on these facts.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Johnson, 333 S.C. 62, 65, 508 S.E.2d 29, 31

(1998). Here, the element of sufficient legal provocation has not been established. There is no evidence that the victim provoked either the Applicant or Jacques "either by possessing a weapon or through hostile acts" which would have given rise to sufficient legal provocation. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). As there was no basis for requesting the lesser-included offense, defense counsel's performance cannot be deficient for failing to request the charge. Accordingly, this Court denies and dismisses this allegation.

2. Allegation #2: Jacques' Statement

The Applicant alleges that defense counsel was ineffective for failing to object to the introduction of Jacques Gibson's second statement on Confrontation Clause grounds. This Court finds that defense counsel's performance was not deficient with regard to this issue as defense counsel gave a valid strategic reason for not objecting to the statement.

In Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court held that the admission of a non-testifying co-defendant's statement which inculpates the defendant at a joint trial violated the Confrontation Clause of the Sixth Amendment. The Supreme Court, however, has permitted such statements to be introduced if they are redacted in such a fashion to eliminate all references to the defendant whose rights would be violated by the introduction of the statement. See Richardson v. Marsh, 481 U.S. 200 (1987).

Here, Jacques' statement clearly violates Bruton and its progeny as it was introduced unredacted and the statement contained several references to the Applicant, some of which were inculpatory. See Trial Tr. p. 881, line 8-p. 885, line 10. The fact that the statement violated the Applicant's Confrontation Clause rights, however, does not end the inquiry. If a defense attorney articulates a valid strategic reason for not objecting to inadmissible evidence, then that attorney's performance will not be deemed deficient. See generally Watson v. State, 370 S.C.

68, 634 S.E.2d 642 (2006). Defense counsel testified before this Court that he chose not to require that Jacques' statement be redacted because he wanted the helpful information from the statement—that the Applicant was not involved in the altercation—to be presented to the jury. This is a valid strategic decision entitled to deference by this Court, and the Applicant has not persuaded this Court that this decision was unreasonable. Accordingly, this allegation is denied and dismissed.[5]

3. Allegation #3: Jury Instruction as to Jacques' Statements

The Applicant alleges that defense counsel was ineffective for failing to request a jury instruction that Jacques' statements could only be considered as evidence against Jacques, and could not be considered as evidence against the Applicant. For largely the same reasons discussed above with regard to Allegation #2, this Court finds that defense counsel's performance was not deficient with regard to this issue.

During the colloquy on the jury charge, the trial court asked defense counsel if he wanted an instruction that the jury could only consider Jacques' statement against Jacques. Trial Tr. p. 941, lines 2-6. Defense counsel responded that he didn't want the court "to be that restrictive" and that he did not want such an instruction to be given. Trial Tr. p. 941, lines 7-8. The record reveals that no such instruction was given during the court's instruction to the jury. See Trial Tr. pp. 1009-1024.

The Applicant is correct that such an instruction, if requested, must be given in a joint trial where a statement given by a co-defendant which inculpates the defendant is introduced against the co-defendant. See generally Richardson, *supra*, 481 U.S. at 211 ("We hold that the

[5] Inasmuch as the inquiry on the deficiency prong of Strickland is dispositive of this issue, this Court does not reach the prejudice inquiry. See Strickland, *supra*, 466 U.S. at 697 (holding that "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").

Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction* when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence") (emphasis added). As with Allegation #2, however, the fact that such an instruction must be given if requested does not end the inquiry. Defense counsel testified before this Court that he did not want the instruction to be given because he wanted the jury to consider Jacques' statements as evidence that the Applicant did not participate in the fight or in any crime. The Applicant has not met his burden in establishing that this strategy was unreasonable. Accordingly, this allegation is denied and dismissed.[6]

4. Allegation #4: Severance Motion

The Applicant alleges that defense counsel was ineffective for failing to move for a severance from Jacques prior to trial. This Court disagrees, and concludes that the Applicant had not met his burden of proof with regard to prejudice on this issue.

"Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). "[S]everance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id. at 282 (citing Zafiro v. United States, 506 U.S. 534 (1993)).

Essentially, the Applicant contends that had he received a separate trial, Jacques' statement that he fired a nine millimeter gun could not have been admitted against him. See Trial Tr. p. 882, line 23-p. 883, line 6. This Court is unpersuaded by the Applicant's arguments

[6] As this Court's analysis of this issue pursuant to Strickland's performance prong is dispositive, this Court does not reach the prejudice inquiry. See footnote 5.

that Jacques' admission of this minor detail warranted severance. Multiple witnesses testified that Jacques fired a gun, and Shunta Wilson testified that the Applicant fired a gun. This evidence would have been admissible against the Applicant in a separate trial. The fact that Jacques admitted to firing a nine millimeter weapon in the same statement where he also claimed that he shot that firearm into the air—and that the Applicant was not involved with the shooting or the fight—simply does not constitute prejudicial evidence warranting severance. Accordingly, even assuming that defense counsel should have asked for a severance, the Applicant has failed to meet his burden of proof by establishing that there is a reasonable likelihood that such a motion would have been granted. This allegation is denied and dismissed.

5. Allegation #5: The Jury Note

The Applicant alleges that defense counsel was ineffective for failing to request that the jury be reinstructed regarding reasonable doubt after the jury sent a note to the trial judge that read: "Can we get a whole copy the law as stated and reasonable thought (doubt)?" Court's Exhibit #4.[7] This Court finds that the Applicant has not met his burden of proof with regard to establishing that he was prejudiced by the trial judge's response to the note.

In response to the note, the presiding judge handwrote a message back to the jury that reads in full:

> I cannot comply with your request. I can recharge the entire law given, or recharge any particular portion that you would like. This will need to be done in the courtroom so the court reporter can record it.

Court's Exhibit #4. This Court finds that the response given by the trial judge was proper and appropriate under the circumstances. The Court does not share the Applicant's concern that the jury did not understand the appropriate burden of proof. Although the jury used the phrase

[7] This document was also admitted as an exhibit by the Applicant in this case.

"reasonable thought," they also included the word "doubt," indicating that they understood the instructions given by the judge. Furthermore, if there was any confusion, the trial court's response informed the jurors that they could rehear the charge if they wanted clarification. The fact that the jury did not request further instruction, even after being invited to do so by the trial judge, shows that the jury did understand the instructions provided by the jury charge. Accordingly, the Applicant has failed to demonstrate there is a reasonable probability that a different response would have resulted in an altered verdict. This allegation is denied and dismissed.

6. Allegations #7 and 8: Jury Instruction on Prior Inconsistent Statements

The Applicant alleges that both defense counsel and appellate counsel were ineffective regarding the trial judge's failure to instruct the jury that they could consider prior inconsistent statements of witnesses as substantive evidence. With regard to defense counsel, this Court finds that the Applicant has failed to demonstrate prejudice. With regard to appellate counsel, this Court finds that the Applicant has failed to demonstrate both deficient conduct and prejudice.

In State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), the Supreme Court recognized that "South Carolina has followed the traditional rule that testimony of inconsistent statements is admissible only to impeach the credibility of the witness." 278 S.C. at 581, 300 S.E.2d at 69. The Supreme Court then changed that rule, and stated "[h]enceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross-examination." Id. The Court of Appeals has held that a trial court's failure to give Copeland's instruction is error. State v. Caulder, 287 S.C. 507, 513, 339 S.E.2d 876, 879-880 (Ct. App. 1986).

During the colloquy on the jury charge, defense counsel asked the trial judge if he intended to charge the jury "that they can accept some, none, or part of all of" a witness' prior inconsistent statement "and use that as a part of their strategy in determining the truth of what happened." Trial Tr. p. 945, lines 7-11. The trial judge responded that he would charge the jury "[e]arlier contradictory statements are admissible to impeach the credibility of the witness and not to establish the truth of the statements." Trial Tr. p. 946, lines 5-7. In response, defense counsel stated "[y]es, sir." Trial Tr. p. 946, line 8. In its charge to the jury, the trial court instructed the jury that "earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of the statements." Trial Tr. p. 1013, lines 5-7. Defense counsel did not renew any objection at the close of the trial court's charge to the jury. See Trial Tr. p. 1025, line 20-p. 1027, line 4. In an affidavit, appellate counsel stated that he would not have raised this issue on appeal because trial counsel failed to preserve the claim for appeal by failing to specifically cite to any authority regarding the charge, by failing to file any proposed charge on the issue as an exhibit, and by acquiescing to the trial court's proposed charge. See Affidavit of Robert M. Dudek at 1-2.[8]

Beginning with appellate counsel, this Court agrees with appellate counsel that defense counsel failed to preserve any issue related to the jury instruction for direct appeal. See generally State v. Williams, 319 S.C. 54, 56, 459 S.E.2d 519, 520 (Ct. App. 1995) (holding that a party's "express[] agree[ment] with the trial court regarding the instructions that the trial court planned to give the jury" waives an argument that the trial court erred in giving the charge). Therefore, this Court finds that appellate counsel's performance was not deficient in failing to raise this issue on appeal because defense counsel failed to preserve the issue for appeal. The

[8] This affidavit was filed as an exhibit with this Court and is properly considered as substantive evidence pursuant to S.C. Code Ann. § 17-27-80 ("The court may receive proof by affidavits").

issues that appellate counsel did raise on appeal were sufficiently strong that the Court of Appeals published its decision disposing of those issues and that the Supreme Court initially granted certiorari to review. Given the strength of the issues that appellate counsel did raise on appeal, it is likely that raising an unpreserved issue such as this one would have detracted from the preserved claims. Accordingly, this Court concludes that appellate counsel was not deficient in failing to raise this claim on direct appeal.

This Court also finds that the Applicant has failed to establish prejudice stemming from the trial court's failure to give Copeland's charge. The Applicant points to three prior inconsistent statements that were admitted at trial that he claims the jury should have been permitted to consider as substantive evidence: (1) Shunta Wilson's statement regarding the number of shots that were fired and the kinds of firearms she saw; (2) Melvin DeWitt's statement regarding the number of shots that were fired; and (3) Jacques' statement where he did not admit to firing a firearm. This Court concludes that the Applicant cannot show that there is a reasonable likelihood that the result of the trial would have been different had the jury been able to consider these prior statements as substantive evidence. With regard to Wilson's and DeWitt's statements, the ballistics evidence reveals that it is highly likely that two guns were fired the night of the incident, so it is not likely that the jury would have considered their prior inconsistent statements as substantive evidence that only one gun was fired and acquitted the Applicant on that basis. With regard to Jacques' statement, multiple witnesses identified Jacques as a shooter, so it is not likely that the jury would have considered his prior inconsistent statement that he did not fire a gun and acquitted the Applicant on that basis. Accordingly, this Court finds that the Applicant has failed to demonstrate that defense counsel's deficient conduct prejudiced him. Furthermore, this Court finds that the Applicant has failed to demonstrate that

there is a reasonable likelihood that the result on appeal would have been different had this issue been presented on appeal. Accordingly, these allegations are denied and dismissed.

VII.
CONCLUSION

This Application for Post-Conviction Relief is hereby **GRANTED**. The Applicant's conviction and sentence for murder are vacated, and this matter is remanded to the Richland County Court of General Sessions for a new trial.

IT IS SO ORDERED.

James R. Barber, III
Presiding Circuit Court Judge
Fifth Judicial Circuit

This 20th day of March, 2014.

Columbia, South Carolina.