STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Lancaster County
Court of Common Pleas
The Honorable William Jeffrey Young, Circuit Court Judge

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Appellate Case No. 2017-001265

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ANTHONY RODRIEKUS CARTER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**INDEX**

## RESPONDENT'S QUESTIONS PRESENTED

Is there evidence of probative value in the record to support the PCR judge's finding that Petitioner failed to demonstrate Trial Counsel was ineffective for arguing during his motion for a directed verdict that the state failed to prove accomplice liability and whether Petitioner is able to show prejudice as had this issue been preserved for appeal review would the outcome have been different?

## STATEMENT OF THE CASE

### Procedural History

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant orders of commitment of the Clerk of Court of Lancaster County. During its August 2010 term the Lancaster County Grand Jury indicted Petitioner for murder (2010-GS-29-1000). Michael Lifsey, Esquire, represented him. On November 7, 2011, Petitioner proceeded to trial before the Honorable Ernest J. Kinard and a jury. The jury found Petitioner guilty of murder. Judge Kinard sentenced Petitioner to thirty-two years imprisonment.

A notice of appeal was perfected by Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed the Petitioner's conviction. State v. Carter. 2014-UP-178 (filed April 30, 2014). The Remittitur was issued on December 12, 2014. Petitioner filed a Petition for Rehearing. The Court of Appeals denied rehearing in an Order filed on June 25, 2014. Petitioner filed his Petition for Writ of Certiorari to the Supreme Court on July 24, 2014. The Court the Petition. The Remittitur was issued on December 12, 2014.

On January 13, 2015, Petitioner filed an application for post-conviction relief. Respondent made its return on July 7, 2015 requesting an evidentiary hearing be convened. An evidentiary hearing was held on January 10, 2017, at the Lancaster County Courthouse before the Honorable William Jeffery Young. Petitioner was present at the hearing and was represented

by Nathan Sheldon, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. Thereafter, Judge Young denied Petitioner's PCR application by written order filed May 15, 2017.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

## Factual History

Rondriana Lanisha "Nisha" Cunningham testified that she was the victim's mother and that her daughter was three years old on May 3, 2010. She and the victim shared an apartment along with Nisha's boyfriend of over a year, Marico Stevens. Nisha had met Green, who worked with Stevens, on one occasion and she told Stevens that she did not like him. (App.p.155-158). On Monday, May 3, 2010, Stevens picked Nisha up from York Tech, where she was going to school, around 6:15 p.m. He was driving their only vehicle, Nisha's blue, 1998 Chevrolet Malibu, and the victim was with him.[1] They got home at 6:30 and Nisha remained there. However, Stevens and the victim left the apartment later that evening, with Stevens telling Nisha that he was going to his father's house to get some money. Nisha got a phone call from Stevens at approximately 9:49 p.m., and she immediately went to the emergency room of Springs Memorial Hospital, in Lancaster. (App.p.158-162). Nisha identified a gun for the Sheriff's Department as one that Stevens kept. (App.p.163-164).

The victim was treated for a gunshot wound to her head at the hospital. Eventually, she was airlifted to Carolinas Medical Center, in Charlotte, North Carolina, that same night or early in the morning of May 4, 2010. Doctors treated her there, but Dr. Thomas D. Owens, medical examiner from Mecklenburg County, North Carolina, pronounced her dead at 6:15 a.m.

[1] He had picked her up from daycare.

(App.p.162-163)(p.368-369). Dr. Janice Ross, the forensic pathologist who performed the autopsy of the victim, opined that the cause of death was "[a]noxic encephalopathy," meaning that the victim's "brain was damaged enough to be actually dead due to laceration of the brain due to the gunshot wound of the head." Dr. Ross explained that "the bullet entered the right side of the head towards the back and it went forward and to the left slightly upward, and it came out of the head, the left side of the head just above the left ear." Otherwise, the victim had been a healthy little girl. (App.p.370-373).

Emmie Amanda Coats testified that she lived in a Lancaster County mobile home park in May of 2010. Although she and Petitioner - who was known by the nickname of "Ant" - were not "boyfriend and girlfriend," they were romantically involved. Coats had never met or heard of either Stevens or the victim before May 3, 2010. Sometime after the shooting, Coats became romantically involved with Beneco "Neco" Ganson. (App.p.206-211). At the time of the murder, Coates worked as a nursing assistant from 11:00 p.m. until 7:00 a.m. each day. Coats described the trailer park in which she lived as a place where "[l]arge groups of people just hang[] out in the road or at someone's house" almost daily. Stevens, Ganson, J.D. Hemphill and John Jerrod "John John" Hill, routinely hung out there. Also, Coats regularly heard gunfire in the trailer park. (App.p.211-214)(p.217).

On the night of May 3, 2010, Coates walked over to Petitioner's residence, after they had corresponded by text messages. Several minutes later, Stevens arrive at Petitioner's residence. The victim was with him and he was driving the Malibu. Then, "[t]they told me they were going to take me home." So, they all piled into the car. Stevens was driving, Petitioner was in the passenger seat, the victim was sitting in a car seat behind him and Coates was on the rear, passenger side. (App.p.217-222).. Following a brief stop at a convenience store, they headed to

Coates' trailer. Petitioner had previously told Coates about a dispute that he had with Ganson, Hemphill, and Hill over something he had stolen from them. However, he did not tell her any details. Along the way to her residence, Petitioner told Stevens "about an incident that had happened between them earlier in the trailer park a few days before that came from the dispute that they had," in which the group had chased Petitioner out of the trailer park.[2] (App.p.222-225)(p.251)(p.253). She described their conversation as a "hyped up situation" and she explained that Petitioner was not talking like he was worried or he did not want to go to the trailer park. To the contrary, Coates got the impression that "he wanted to see them on the way over there, like it kind of excited him that he was going into the trailer park." Although there was no discussion about whether anyone from the other group was at the trailer park, Stevens "reach[ed] down ... under his seat and he passed Ant the gun." Petitioner laid the gun in his lap. (App.p.222-225) (p.251)(p.254)(p.261-262).

As they approached her trailer, Coates saw Ganson, Hemphill and some other people (but not Hill) crowded around an older model, light colored car that was parked near the roadway. This group was across the street and some distance from Coates' trailer. Petitioner also saw the group and said, "There they go." When they reached Coates' residence, Stevens parked the Malibu close to the trailer and not completely in the driveway, so that the front of the vehicle was closest to the trailer. (App.p.227-233)(p.247-248). As soon as the car stopped, Petitioner jumped out of it and began walking toward the roadway. He had his weapon at his side, covered by his shirt. Coates did not want any trouble at her residence. So, she got out of the driver's side rear door and ran to the passenger side, pleading with Petitioner "Don't do this, don't do this near

[2] On cross-examination, she testified that she was only aware of one incident. On that occasion, Ganson ran Petitioner out of the trailer park and told Petitioner, if he ever saw Petitioner again, Petitioner "better have a gun." Petitoner was reluctant to come to the trailer park for about a week after this incident. (App.p.253)

my house." Petitioner and Hemphill[3] met "in the middle like they were facing off." (Sic). (App.p.233-235) Stevens was standing by the front passenger side of the car and near the front of the car, while the victim remained in the unbuckled child seat. Although Petitioner and Hemphill spoke, Coates could not hear what was said. By then, she was on the steps to her residence. After other members of Hemphill's group joined in the argument, Petitioner "turned and walked ... back towards the car on the passenger side." (App.p.235-236).

By the time "[h]e got between the end of the car and probably the back passenger side door," Coates heard a shot and she "saw a flash from across the street." When Petitioner turned as if he was going to fire back at the group and Stevens was yelling for him to "squeeze," Coates ran into her trailer and heard "eight or nine" more gunshots. She looked out of a window after the shooting stopped, and she saw the Malibu backing out of her driveway. She also saw "people running" into nearby woods. (App.p.236-237)(p.258). Coates went to work that night. She did not know that anyone had been shot until Petitioner telephoned her from the hospital and told her that his "baby cousin" had been shot.[4] She spoke to police on the night of May 3rd and again the following morning. Although she knew that the victim had been shot by that time, she was not completely honest about what she had seen until she gave a second written statement on the 4th, because she did not want to be involved. She found three .40 caliber shell casings in the yard, close to her residence on the morning of the 4th, which she gave to Inv. Danny Bennett, of the Lancaster Sheriff's Department, when he came to her residence looking for them. (App.p.214-216)(p.239-244)(p.249-250)(p.266-269)(p.424).

Beneco Ganson testified that he knew Petitioner, or Ant, from school, and that he was good friends with both J.D. Hemphill and John Jerrod Hill. He also confirmed that he and Coates

[3] Coates did not see Hemphill, Ganson or anyone, other than Petitioner, with a weapon. (App.p.234-235)
[4] It was her understanding that Stevens was the victim's father and that Stevens and Petitioner were cousins. Also, she and Petitioner later exchanged text messages that night. (App.p.240).

had been romantically involved. However, he denied knowing Stevens. (App.p.306-308)(p335). Ganson and many of his friends hang out in the trailer park where Coates lived and he agreed that it was "a hangout place." A dispute arose between Hill and Petitioner roughly two months before the murder. While Ganson was not present when the transaction leading to the dispute occurred, he was told that Petitioner owed Hill money. On the night of May 3, 2010, he was with the mother of his child, Jennifer Morris, at the home of Morris' mother where he also lived. Eventually, he went to the trailer park in question "around 7:30 or 8:00." (App.p.308-311)(p.337).

Subsequent to the initial dispute but before the shooting, Ganson, Hemphill and Hill accosted Petitioner as he was leaving Coates' trailer. Also, they beat up Petitioner's brother on another occasion. (App.p.328-336). Ganson had planned to meet Hemphill and did not know if anyone else would be there. Ganson was unarmed. He saw Hemphill, who was likewise unarmed at the time, but he did not see Hill. Petitioner was not there when he first arrived. He and Hemphill were talking as they stood near the Honda owned by Hemphill's girlfriend, across the street and two or three trailers from Coates' trailer. An unfamiliar car pulled into Coates driveway and three people got out of it. At first, Ganson could not see the faces of these people, but he soon saw Petitioner walking across the street and headed in the direction of Ganson and Hemphill. (App.p.311)(p.315-319). As Petitioner got close to them, Hemphill walked toward Petitioner in the road. Petitioner had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill. The two men continued to argue with one another. Ganson heard Petitioner tell Hemphill, " 'I ought to shoot you but I ain't want [(sic)] to do the time.' " He also asked, " 'What you gone do now?' " Then, Petitioner turned and walked back into Coates'

driveway. The last time Ganson saw Petitioner, he was "a good little ways" from the car, while he and Hemphill were on opposite sides of the Honda. (App.p.319-324).

According to Ganson,

> When he turned around and walked back to his direction, the girl we was talking to, she had my phone in her car so we walked to the car and I was trying to get my stuff from her and everything, she had moved my phone and everything and the next thing I know I heard the gunshots. When I heard the gunshots I took off running behind this trailer and I hid under the trailer until the gunshots stopped. When the gunshots stopped I laid right there for about an hour or two and ... me and J. D. ran through the woods and met up at Crimson Drive, and when we met up on Crimson Drive I think [Hemphill] walked up toward the store, I went in the woods and hid in the woods because the police and stuff was around.

(App.p.322), lines 3-16.[5] *See also* (App.p.324-325). Also, Hemphill had a gun by the time the shooting occurred but Ganson was still unarmed and he did not see anyone else with a gun. (App.p.324).[6]

At some point late that night or early the following morning, Morris picked up Ganson and ultimately took him to Hill's residence where he stayed until later on the morning of the 4th. After receiving a phone call from Hemphill, on the 4th, he had Morris take him to the Lancaster County Sheriff's Department and he gave a statement. He was immediately arrested as the result of a detainer from York County for unrelated charges. (App.p.312-314). Morris corroborated his account with respect to the times he claimed that he had been with her. (App.p.294-301).

Although there had just been a shooting, there was a hole in the rear window and the Malibu had two bullet holes in it, apparently neither Stevens nor Petitioner bothered to check on the well-being of the three year old victim. This is readily inferrable from evidence that, instead

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[5] He did not know if the police were looking for him, but he was on probation and had not reported. (App.p.322). He explained that the girl left in her Honda after the shooting. (App.p.326). Further, he had not said anything to Petitioner during the incident. (App.p.328-329). Also, he learned the following day that law enforcement had found his cell phone. (App.p.323-324).

[6] Chris Benson lives across the street and some distance down the street from Coates, in the same trailer park. He was inside his home when he heard the shooting. He immediately told his daughter to go to the back end of the trailer and he ducked when the shooting began. He went outside after the shooting was over and saw the Honda drive away from the area. In all, he heard between five and ten shots. (App.p.167-175).

of driving to the hospital immediately, Stevens drove to the apartment of his father's friend, Lawrence Alexander, where his father, Eric Sanders, was playing cards. Stevens excitedly told those present that his car had been shot up. Only when someone inquired about the victim's well-being did he go to the car and Petitioner handed her to him. Then, he only took her to the hospital after the others who had seen the condition of the car and saw blood coming from her head ordered him to do so. (App.p.355-362)(p.365)(p.374-379).

Kayla Estes was Petitioner's girlfriend on May 3, 2010. Estes knew Ganson, Hemphill and Hill. However, she did not know Stevens. Petitioner told her that he had a beef with the other men she knew "[o]ver money," and he had told her that "he would handle it." Between 9:00 and 10:00 p.m., Petitioner called her from his residence and told her about what had occurred at the trailer park. (App.p.345-350). On cross-examination, Petitioner elicited that Petitioner had told her that "there was a problem;" that he and Hemphill had met in the roadway; and that both men agreed that the matter was "quashed." Petitioner also told her that after he had turned and walked away from Hemphill, Ganson said, "'F--- that, I'll get him.'" At that point, Petitioner heard shots. Stevens wound up with the gun and began shooting. Afterwards, they drove to the hospital. (App.p.350-351).

At 9:53 p.m. on May 3, 2010, Craig Greenlee, then in the patrol division of the City of Lancaster Police Department, was parked in the parking lot of a Main St. restaurant when a late model Malibu passed. The vehicle had its emergency flashers on and was traveling at a high rate of speed. Officer Greenlee pulled in behind the vehicle, which did not stop even after he turned on both his blue lights and siren. As they were driving, he noticed that the car's rear window "had been shot out" and he reported this to dispatch. (App.p.123-128). Officer Greenlee ultimately followed the Malibu to the emergency room driveway at Springs Memorial Hospital,

where it stopped. Petitioner and Stevens got out of the vehicle and Petitioner carried a smaller person into the emergency room. Both men were yelling and both had blood on their clothing. Officer Greenlee had to force both men out of the emergency room, so that the medical personnel could treat the victim. Both men told him that Ganson was responsible for the victim's condition and that the incident had occurred on Mcilwaine Rd. (App.p.128-132).

Because Mcilwaine Rd. is not in the City of Lancaster, he reported this information to dispatch and asked for assistance from the Lancaster County Sheriff's Department. He then helped secure the vehicle until members of the Sheriff's Department arrived. While there, he not only saw the damage to the rear window, he also saw two bullet holes in the roof of the car. (App.p.133-134). A few minutes after Officer Greenlee arrived at the hospital, then-Deputy Joseph Catalano, with the Lancaster County Sheriff's Department, also got there. He had been informed of a report of "shots fired" on Athena Rd., where the trailer park is located, and he was asked to go to the hospital to determine if that incident was connected to the reported shooting. At the hospital, Deputy Catalano spoke to both Stevens and Petitioner, as the men sat on the curb outside of the emergency room. Both men had blood on their shirts and Catalano learned that Stevens was the victim's father. When Petitioner was asked about what had occurred, he said that they had been driving down Athena Road when "someone started shooting into the vehicle." (App.p.136-140).

Petitioner, however, denied knowing who had shot at the car. Deputy Catalano observed the same defects to the car that Officer Greenlee had described. Both Stevens and Petitioner were allowed to leave the hospital that night because the Sheriff's Department did not have any information that either had committed a crime. (App.p.140-142).

Inv. Mike Adams, of the Lancaster County Sheriff's Department, also went to Springs Memorial Hospital on the night of May 3, 2010. After being briefed about the matter and learning about a shooting on Athena Rd., Inv. Adams saw the Malibu with the cracked rear window and the bullet holes in the roof. He then spoke to Petitioner and Stevens, who were not then suspects. When Inv. Adams questioned Petitioner in the parking lot about what had happened, all Petitioner told him was that Beneco Ganson had shot at them on Athena Rd. and Petitioner did not elaborate. Because Petitioner's shirt was bloody, Inv. Adams obtained it from him even though Petitioner was reluctant to give it to him (App.p.143-148)(p.153). After that conversation, Inv. Adams went into the emergency room and spoke to Stevens. He also obtained Stevens' bloody t-shirt.[7] The Sheriff's Department was, at the time, unaware of any reason to arrest Petitioner or Stevens. (App.p.148-149)(p.152).

Sgt. Mike Miller and Deputy Caleb Graffam were dispatched to the "shots fired" call, and they arrived at 9:54 p.m. Along their way to that location, they heard the transmissions from Officer Greenlee and the City of Lancaster Police Department. However, there was not yet any known connection between the cases. When they reached the Athena Rd. area, they drove slowly through the area with their windows down. (App.p.177-179)(p.189-193). The officers came across a black male walking in the roadway, alone, and they stopped him. They patted him down and he was unarmed. The officers then obtained his identification. The man was John Jarrod Hill. As soon as they had confirmed that Hill did not have any outstanding warrants, a woman "came out into the yard close to where we [were] ... screaming that a child had been shot." (App.p.182-186)(p.194).

[7] Expert testing of the t-shirts by a member of SLED's trace evidence department did not reveal the presence of gunshot residue. (App.p.513-519).

Hill left at this point. The officers learned that this woman was Coates and this was the first suggestion that the victim's injury may be connected to this shooting. The officers began looking around in the area and they soon discovered some spent shell casings between her trailer and the trailer across the street. Immediately, they blocked off the roadway, secured the area and waited on other officers to arrive. The other officers came shortly. (App.p.185-189)(p.194-195).[8]

John Jarrod "John John" Hill was not living in the same trailer park as Coates on May 3, 2010, although he frequently went there. He spent the whole day at the home of his girlfriend's grandmother. Unlike the other witnesses, he knew all of the participants, including Stevens. He had seen Ganson and Hemphill during the day of May 3rd. However, he did not see them that night and he did not see Stevens anytime that day or night. (App.p.271-274)(p.276-278)(p.286). Hill's dispute with Petitioner arose about a month and a half before the murder. It started when he gave Petitioner $450.00 with which to buy him some cocaine. Instead of getting him the cocaine or returning the money, Petitioner "jumped the fence" or robbed him. Following that date, the men had two confrontations. About a week later, Hill approached Petitioner as Petitioner was visiting a man in the trailer park. Petitioner claimed that he had been in a wreck and that he would pay Hill after he got a check from that. (App.p.281-284).

Then, about two weeks before the murder, they ran into each other on the road on which Coates lived. The men were about twenty feet from one another. Hill "told him to pay me and stuff like that when I seen him and he just took off running." Hill claimed that neither Ganson nor Hemphill were there and that no one had chased Petitioner on the second occasion. No guns were involved in either confrontation. (App.p.284-286).

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[8] Hill corroborated the officers' testimony about the stop. The only discrepancy in his account was that he was not patted down. (App.p.274-276). Hill gave the Sheriff's Department a statement on May 3rd or on the morning of the 4th, and he voluntarily submitted to gunshot residue testing that later was determined to be negative. (App.p.197-199)(p.202)(p.278-279)(p.514)(p.219-521).

Lancaster County Sheriff's Department crime scene Inv. Jeff Steele processed the trailer park crime scene on May 3, 2010, where he was later joined by crime scene Inv. Ken Taylor.[9] They found a fired bullet jacket fragment at the edge of the driveway of the residence across the roadway from Coates' residence. On the side of the roadway, they found a .380 caliber cartridge casing; two .22 caliber cartridge casings; Ganson's Samsung cell phone; and a tan hat. In the roadway, they found two 7.65 millimeter casings and an unfired 7.65 millimeter bullet. (App.p.418-420)(p.422-427)(p.435-436)(p.444-449). Investigators Steele and Taylor processed the Malibu on May 4th. When they did so, they discovered a fired bullet jacket fragment on the passenger's side floorboard two pieces of a copper fragment from the seat cushion of the headrest on the back of the seat; and a lead core fragment under the spare tire in the trunk. From their review of the items seized, they determined that the car would have been parked so that the front of it was closest to Coates' trailer and the rear of the car was closest to the roadway, which was consistent with eyewitness descriptions. Also, there were no defects in the car on the driver's side or rear that would have been consistent shots hitting the car from those directions. (App.p.407-410)(p.421-423)(p.429-430)(p.450-456).

Investigators Steele and Taylor also attempted to determine what they could conclude from examination of the bullet holes in the car's roof and the bullet hole in the car's rear window.(App.p.430-431)(p.451)(p.455).He explained that he usually uses dowel rods to make these determinations. (App.p.455-456)

In this case, there were two defects on the roof of the car. The first defect was toward the front and passenger side of the car's roof, while the second defect was "[a] little more toward the mid-section." Inside the car, he found that the defect to the rear window corresponded to the

[9] Both were qualified as experts in crime scene investigations and shooting reconstruction, without objection. (App.p.413-417)(p.443-446).

second defect in the roof. Because the larger hole was to the outside of the tempered glass (or, as he described it, "outward [cratering]"), he opined that the shot was not fired from the outside of the rear window. Further, both defects in the roof and the defect to the rear window "came from the front of the car toward the back of car at the passenger side moving toward the [mid-section] of the car at a downward angle." (App.p.456-464)(p.468-469)(p.487).[10] He explained that the front window on the passenger side was completely down, but the driver's window was rolled up completely. On the other hand, the two rear windows were down several inches. None of these windows had defects in them. "The hole that I referred to as defect number one [in the roof] that was toward the front of the car, closest one up toward the front, we tracked it ... into the back seat cushion." This was represented by a photograph, (App.p.464-457)(p.484-486).

SLED Agent Carl Kenley, a crime scene investigator, also processed the Malibu to determine the angles at which the shots had been fired into the roof of the vehicle. He was assisted by Agents Ricardo Prince and Scott Hardy. He corroborated Inv. Taylor's findings. (App.p.503-511). When Stevens returned to Mr. Alexander's apartment and talked to his father after the shooting, Mr. Alexander did not see a gun. Later that night, however, Mr. Alexander saw Mr. Sanders "had a gun on the hood of his truck." There were some angry "young guys" present and they were talking about trying to get some .40 caliber bullets. Mr. Sanders thereafter put that weapon in his truck. (App.p.356-357).

With the assistance of the Sanders, law enforcement found the weapon. Ms. Sanders retrieved this weapon from a man named Derrick, and she turned it over to Inv. Mike Howell. (App.p.380-383)(p.388-393)(p.397-403)(p.411-412). SLED tested this Hi-point .40 caliber weapon for "touch DNA" and compared swabs from it to known standards from the victim,

[10] A copper-jacketed fragment found at the scene was consistent with having passed through the window. (App.p.469-470).

Petitioner, Stevens, and Coates. Testing revealed a mixture of DNA from more than one person. Everyone was excluded as a possible contributor to the DNA mixture, except for Stevens, and he could not be excluded. "[T]he probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 65." (App.p.526-533)(p.537-540)(p.542-543).

Michelle Eichenmiller, a firearms examiner with SLED, testified that the three .40 caliber cartridges collected by Coats the bullet jacket fragment found in the passenger side floor board of the car the copper fragment from the headrest in the backseat of the car and the bullet jacket fragment found in the driveway across the street from Coates' trailer were all fired by the recovered .40 caliber weapon. (App.p.551-558).

Petitioner gave law enforcement two statements in this case. He gave the first statement on May 4, 2010, before he was arrested and he gave the second statement on May 6th, after he was under arrest. Each statement was long and was videotaped. A DVD of each statement was introduced and published to Petitioner's jury respectively. *See* (App.p.559-600). In the first statement, he initially denied knowing Coates, he inaccurately described Coates as a "skinny white girl" when she is a larger woman, and he claimed that Stevens must have known her. He admitted getting out of the vehicle at Coates' residence after seeing the people with whom he had a dispute, but he claimed that he had been unarmed. By the end of this interview, however, he admitted knowing Coates; he admitted that she had been to his residence; and he stated that Coates had hugged him when he got out of the car. He likewise finally admitted that he had handled the weapon that day, but he denied that there had been any return fire from his side of the road. In the second interview, he first repeatedly denied having a weapon on May 3rd, but eventually changed his story. He indicated that he knew the people with whom he had the

dispute would be at the trailer park before he went there and that he placed the gun that he had gotten from Stevens in his lap.

He also admitted that he had gotten out of the car with the weapon after he saw the persons with whom he had the dispute, and that he had displayed the weapon to Hemphill. Further, he claimed that Hemphill was likewise armed. Yet, he did not say that Hemphill had pointed a weapon at him, and he ultimately claimed that Stevens had been the shooter.

## STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C.115, 386 S.E.2d 624 (1989). In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief.

Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

## ARGUMENT

There is evidence of probative value in the record to support the PCR judge's finding that Petitioner has failed to demonstrate Trial Counsel was ineffective for arguing during his motion for a directed verdict that the state failed to prove accomplice liability and Petitioner is unable to show prejudice as had this issue been preserved for appeal review the outcome would not have been different.

Petitioner argues the post-conviction relief judge erred by finding Trial Counsel was not deficient when he failed to challenge the sufficiency of the evidence during his motion for a directed verdict concerning whether Petitioner fired the fatal shot or could be guilty under an accomplice liability theory where the state failed to introduce any evidence that Petitioner and his codefendant joined to accomplish an illegal purpose, and that Petitioner failed to prove prejudice, where if counsel had raised these additional grounds at trial, the trial judge would have directed a verdict of acquittal or, in the alternative, the appellate court would have directed a verdict if the arguments had been preserved for appellate review However, this argument is without merit as Petitioner has failed to demonstrate Trial Counsel was constitutionally ineffective in his motion for a mistrial and had the issue been preserved, the outcome would have been different.

In its Order of Dismissal, the PCR Court noted that Trial Counsel did, in fact, move for directed verdict. Tr. p. 605. However, the PCR Court found the Court of Appeals determined that the motion did not adequately preserve the issue of whether there was sufficient evidence to submit the charge of murder to the jury. Regardless, the PCR Court found Petitioner had failed to show actual deficiency. The PCR court found the fact that Trial Counsel did not make an argument he did not believe was meritorious did not constitute ineffective assistance of counsel. The PCR Court also found that Petitioner had failed to meet his burden to show prejudice, or a reasonable likelihood that had Trial Counsel preserved the issue to the Court of Appeals' satisfaction, the outcome of the proceeding would have been different. The PCR Court further analyzed the issues of principal and accomplice liability and how they played a part in Petitioner's case. The PCR Court found Petitioner would not have been entitled to directed verdict on the issues raised regarding principal and accomplice liability for the following reasons.

Regarding principal liability the PCR Court found a reasonable jury could have clearly found that the Petitioner shot and killed the minor child while meaning to kill the intended victims with malice. The PCR court found the evidence established that there was some prior dispute between the Petitioner and intended victims, in which he had stolen 450 dollars. Tr. p. 277; 304. There was also testimony that the group had recently "chased [the Petitioner] out" of a trailer park. Tr. p. 221. In discussing the altercations to others, Petitioner had merely stated he would "handle it." Tr. p. 341-42. In this context, the Petitioner and his co-defendant gave a friend – [Coats] – a ride home to the same trailer park. Tr. p. 218. On the way there, Petitioner

told his co-defendant about the prior altercations, who then handed him a gun.[11] Petitioner laid the gun in his lap. Tr. p. 222.

The PCR Court also found testimony was presented at trial that upon arriving, Petitioner got out of the car and approached the intended victims with his gun pointed at one of them.[12] Tr. p. 314-16. After saying he "ought to shoot you but I ain't want to do the time," and asking "[w]hat you gone do now," Petitioner turned around and started walking back. Tr. p. 316-17. While at this point the testimony diverged to some extent as to where the first shot came from, the expert testimony clearly established that the bullet that ultimately killed the minor child came from the side of the street the Petitioner and his co-defendant were on.[13] The PCR Court concluded clearly it was reasonably inferable that Petitioner walked into an already heated situation armed, was pointing a gun at people – thereby bringing on the difficulty – and ultimately fired the shot that killed the victim.

Regarding accomplice liability, the PCR Court found even if Petitioner's co-defendant fired the fatal shot, a reasonable jury could still have found him guilty. The PCR Court found it was clearly inferable from the testimony and evidence presented at trial that if the co-defendant shot the victim, then the Petitioner was guilty under a "hand of one, hand of all" theory of liability. The PCR Court noted "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langly, 334 S.C. 643, 515 S.E.2d 98 (1999). Under an accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through

[11] According to a witness to the exchange, the gun looked like the one admitted into evidence as State's Exhibit 2. Tr. p. 221-22.

[12] Another witness, Ms. Coats, testified that the gun was either in his pocket or tucked under his shirt as he approached them. Tr. p. 230.

[13] The Petitioner's trial counsel agreed, noting that this was not an issue at trial.

a common design, aid, abet, or assist in the commission of that crime through some overt act." Id. at 648-49, 515 S.E.2d at 101. A formally expressed agreement is not necessary to establish the conspiracy. State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980).

The PCR Court found the evidence presented at trial was that Petitioner and his co-defendant went to the location of the intended victims. They talked about the dispute prior to arriving. Under these circumstances, the jury could have clearly interpreted that the gun changing hands signified a common design, from which the victim's death resulted.[14] The PCR Court concluded in any event, whether Petitioner or the co-defendant fired the shot that ultimately killed the victim, a motion for directed verdict would have been appropriately denied.

There is evidence of probative value in the record to support the PCR judge's finding that Petitioner has failed to demonstrate Trial Counsel was ineffective for arguing during his motion for a directed verdict that the state failed to prove accomplice liability and Petitioner is unable to show prejudice as had this issue been preserved for appeal review the outcome would not have been different.

This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth

[14] In fact, it appears that counsel conceded, during trial, that the trial judge's decision to charge "hand of one, hand of all" was appropriate. Tr. p. 596-97. Counsel testified at the evidentiary hearing that he did not believe there was any issue as to whether the "hand of one, hand of all" charge was appropriate, noting that the Petitioner and his co-defendant went to the scene together, and were both holding the gun at different points. Given the evidence in the record, this Court finds such a concession was inherently reasonable.

Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

In Petitioner's case and as the PCR court correctly noted, Petitioner claim was not meritorious and there was a reasonable probability it would not have resulted in a reversal and a new trial. South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). See also State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002).

"[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another." State v. Fennell, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000). [15] This Court sets forth the applicable

[15] This doctrine has been consistently recognized in South Carolina cases. See State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed

law on review of motions for a directed verdict in State v. Bostick, 392 S.C. 134, 139-40, 708 S.E.2d 774, 776-77 (2011):

> A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452–53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

See also State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). This standard is consistent with Jackson v. Virginia, 443 U.S. 307 (1979) (evidence is sufficient to send a case to the jury if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). See State v. Stokes, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989).

Here, the State's evidence, as discussed above, reasonably tended to establish that Petitioner fired the fatal shots that struck the victim in the head and killed her. Specifically, the record shows that:

- Petitioner created the dispute with Hill, Ganson and Hemphill, by robbing Hill of $ 450.00;

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door, killing unintended victim instead), overruled on other grounds, State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that the State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him).

- Petitioner had at least one, if not two run-ins with these men following the robbery and before the murder;

- Petitioner had told his girlfriend at the time, Kayla Estes, about a beef with the other men "[o]ver money," and he had told her that "he would handle it;"

- Petitioner was aware that there may be a difficulty with these men if he encountered them at the trailer park, but he and Sanders agreed to take Coates home on the night of May 3rd;

- following a "hyped up" conversation with Sanders on the way to Coates' residence, in which he apparently was looking forward to seeing his rivals at the trailer park, Sanders gave him the .40 caliber semi-automatic pistol (**Court's Exhibit 4**) and he kept it in his lap;

- he saw Hemphill and Ganson as they approached Coates' trailer, and he said, "There they go;"
- Petitioner jumped out of the car as soon as it stopped, and he began walking toward the roadway, with the weapon at his side, covered by his shirt;

- he then met Hemphill in the roadway, and the men argued;[16]

- Ganson testified that Petitioner had an automatic pistol "[b]y his side, he pulled it up" and pointed it at Hemphill;

- Petitioner and Hemphill continued to argue and Ganson heard Petitioner tell Hemphill, "'I ought to shoot you but I ain't want [(sic)] to do the time.'" He also asked, "'What you gone do now?'"

- Petitioner walked back toward the passenger side of the Malibu after this confrontation, but when a shot was fired from the other side of the road, he turned as if to shoot, with Stevens repeatedly encouraging him to "squeeze;"

- then, a number of shots were fired, inferably by him;

- following the crime, neither Petitioner nor Stevens checked on the three year old victim, until Stevens spoke to family and friends shortly after the shooting and they inquired about her;

- all of the shots that hit the car, including the shot that took the life of the innocent three year old victim, were fired from the passenger side of the vehicle and none could have been fired from the other side of the roadway; and

[16] From Ganson's testimony, it does not appear that Hemphill was armed, yet. However, Hemphill was armed after the shooting began

- ballistics testing confirmed that the three .40 caliber cartridges collected by Coats (**State's Exhibit 11**), the bullet jacket fragment found in the passenger side floor board of the car (**State's Exhibit 75**), the copper fragment from the headrest in the backseat of the car (**State's Exhibit 80**) and the bullet jacket fragment found in the driveway across the street from Coates' trailer (**State's Exhibit 74**) were all fired by **Court's Exhibit 4**, the recovered .40 caliber weapon.

Standing alone, this evidence - based upon the two eyewitness accounts - was sufficient to submit the charge of murder to his jury, separate and apart from potential guilt under a theory of accomplice liability.

Petitioner's contention that he lawfully armed himself ignores that he could not lawfully arm himself because he was a previously convicted felon, and that he pled guilty at the close of the State's case to the offense of possession of a pistol by a person convicted of a violent crime. **R. p. 572, line 14 - p. 574, line 5**. More importantly, his unlawful possession of the weapon was the proximate cause of the homicide because he knowingly brought it to a confrontation with Hemphill, which he instigated. Thus, he was not entitled to a charge on self-defense because he was not without fault in bringing on the difficulty. Accord State v. Slater, 373 S.C. 66, 70-71, 644 S.E.2d 50, 52 (2007) ("the instant case, Slater fails to meet the first requirement for the self-defense charge: specifically, Slater was not without fault in bringing on the difficulty. ... Slater's actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim"). Instead, Petitioner went looking for trouble and, unsurprisingly, he found it. Id.

Alternatively, the trial judge properly submitted the case to the jury because there was evidence that Stevens shot the victim, albeit emanating from Petitioner's self-serving statements to Estes and law enforcement. Because this point was conceded in the lower court during the direct appeal, Respondent will not argue it in detail. However, Respondent would note that

Stevens' act in shooting the weapon that he had just reacquired from Petitioner, after Petitioner had initiated the confrontation with the other group, clearly occurred while both men were present at the scene and "intentionally, or through a common design, aid[ing], abet[ting], or assist[ing] in the commission of [the murder] through some overt act." See State v. Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70 (Ct.App. 2010).

As the Court explained in Gibson,

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).

> "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " See State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting State v. Langley, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70. Because of the discrepancy as to who fired the shots that killed the victim, the matter was properly submitted to the jury. Id; See also Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-39 (2011) ("Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral

fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted"). As a result, Petitioner argument fails. Trial Counsel would have been unsuccessful in challenging the sufficiency of the evidence during his motion for a directed verdict.

## CONCLUSION

For the foregoing reasons, the petition should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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May 9, 2018

STATE OF SOUTH CAROLINA

In The Supreme Court

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CERTIORARI TO LANCASTER COUNTY
Court of Common Pleas

The Honorable William Jeffrey Young, Circuit Court Judge

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Appellate Case No. 2017-001265

ANTHONY CARTER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Lara M. Caudy, Esquire**
**S.C. Commission on Indigent Defense**
**Post Office Box 11589**
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This 9th day of May, 2018

KAITLYN S. SLICE
LEGAL ASSISTANT