LAW OFFICE OF
TRICIA A. BLANCHETTE

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APR 01 2019
S.C. SUPREME COURT

April 1, 2019
VIA HAND DELIVERY

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

RE: David Jamar Benjamin v. State

Dear Sir:

For filing, attached please find a Notice of Appeal, Certificate of Service and copies of the Order from the underlying PCR Application. I have been retained to represent Mr. Benjamin on this appeal. I have received the PCR transcript, so I ask that my time for filing the Petition and Appendix be set accordingly.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Calhoun County Clerk of Court (without Orders)
Benjamin Limbaugh, Assistant Attorney General
David Benjamin

PO Box 2147 • Leesville, SC 29070
803.908.3266 • blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 01 2019

S.C. SUPREME COURT

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

Case No.: 2016-CP-09-0085

David Jamar Benjamin, Petitioner,

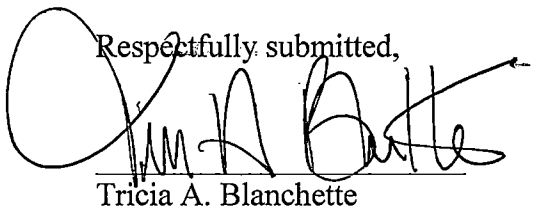
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

David Jamar Benjamin, Petitioner, appeals the Order of Dismissal issued by the Honorable Robin B. Stilwell on February 1, 2019. Petitioner also appeals the Order Denying Applicant's Motion Pursuant to Rule 59 (a) & (e), SCRCP, issued by the Honorable Robin B. Stilwell on February 26, 2019, which was filed on March 4, 2019. Petitioner, through counsel, received notice of the issuance of the Order by mail on March 1, 2019 and entry of the Order on March 8, 2019.

Respectfully submitted,



Tricia A. Blanchette
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Attorney for Petitioner

March 29, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

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David Jamar Benjamin, Petitioner,

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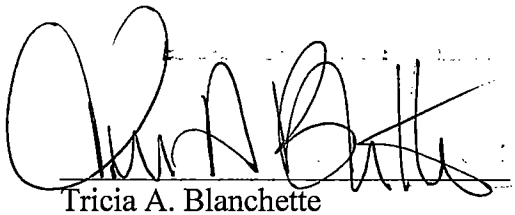
State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that served this 29th day of March 2019 a Notice of Appeal, with underlying Orders, to Benjamin Limbaugh, of the Attorney General's Office, by placing it in the United States mail addressed as follows:

Office of the Attorney General
Att: Benjamin Limbaugh, Assistant Attorney General
PO Box 11549
Columbia, SC 29211



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March 29, 2019

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	)	IN THE COURT OF COMMON PLEAS IN THE FIRST JUDICIAL CIRCUIT
David Jamar Benjamin, #354583, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-09-0085

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 20, 2016. An evidentiary hearing into the matter was convened on July 12, 2018, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court were the records of the Calhoun County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, the State's return, and Applicant's PCR application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Calhoun County. Applicant was indicted by the February 2013 term of the Grand Jury for Calhoun County for murder (2013-GS-09-0051) two count of attempted murder (2013-GS-09-0052, -0053). Nicholas Gray Thomas, Esquire, represented Applicant at trial. Applicant was found guilty of all charges and was sentenced on

March 7, 2013, by the Honorable Diane S. Goodstein to forty years imprisonment for murder and thirty years for each count of attempted murder, all to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Wendy Keefer, Esquire. Throughout the appeal process, Applicant was also represented by James Lee Goldsmith, Jr., Esq. and Robert L. Sirianni, Jr., Esq. On direct appeal, Applicant argued the trial court erred in not granting the defense's motion for directed verdict where the State failed ot produce evidence tending to prove Applicant's guilt, and also the trial court abused its discretion in denying Applicant's motion for a new trial where the State allegedly failed to produce substantial circumstantial evidence to support an accomplice liability theory. The South Carolina Court of Appeals affirmed Applicant's conviction in an opinion filed December 16, 2015. State v. Benjamin, Op. No. 2015-UP-554 (S.C. Ct. App. 2015). On December 21, 2015, Applicant petitioned for a rehearing. The Court denied the petition in an order filed January 20, 2016. The Remittitur was returned on May 27, 2016.

II. ALLEGATIONS

In his PCR application filed April 20, 2016, Applicant raised the following allegations:

1. Ineffective Assistance of Trial Counsel
    a. "Failure to properly investigate."
    b. "Failure to utilize evidence."
2. Ineffective Assistance of Appellate Counsel
    a. "Failure to raise all meritorious issues on appeal."

Applicant amended his application on June 15, 2018, to enumerate the following allegations:

1. Ineffective Assistance of Trial Counsel
    a. "Failure to fully and properly advise and advocate for Applicant prior to the rejection of the fifteen year plea offer."[1]
    b. "Failure to effectively and fully utilize the services of Kelly Fite or an expert in his or a similar capacity prior to and at trial."

[1] Following the evidentiary hearing, Applicant conceded to the dismissal of this allegation.

c. "Failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense."
d. "Failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016)."
e. "Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing."

III. SUMMARY OF TESTIMONY PRESENTED

Antonio Gidron

Antonio Gidron was present at the party when the shooting occurred and testified at Applicant's trial. According to Gidron, he did not have time to prepare for his testimony with Trial Counsel before testifying at trial. Nevertheless, Gidron also testified he went out to the scene with Trial Counsel, but "don't know who that guy was from." PCR p. 12, l. 2. Gidron testified he also visited the scene with Applicant's current PCR Counsel and her investigator. Gidron testified he is a "different person" than he was five years prior, when the trial occurred.

Gidron recalled testifying Applicant pointed out the victim to him at the club and Gidron "had a feeling something was going to happen." PCR p. 13. However, Gidron testified he did not see Applicant or anyone from Applicant's group go to the vehicle to get a gun. PCR p. 13. According to Gidron, despite Gidron's assertions Applicant had pointed out the victim and he felt something was going to happen, Gidron nevertheless testified Applicant never expressed an intent to harm the victim that evening. Gidron reaffirmed his trial testimony that he saw Frazier, who was with Applicant, shoot first. PCR p. 15.

Gidron opined the diagram used at trial was "off," but regardless, he did not use the diagram at trial. PCR p. 20. Gidron reaffirmed his testimony from trial that one shooting victim looked "like he was on a hook" when he was shot, and Gidron was less than ten or twelve feet away from him. According to Gidron, there were shots coming from the direction of the road, behind a tree,

a different direction than Applicant's car. Again recalling his trial testimony, Gidron reaffirmed he saw Applicant start his car and never exit the car again. As he testified at trial, Gidron again testified he saw Haggood, Applicant's codefendant, shooting that night. PCR p. 26. Gidron described his view of Applicant and the victim who was shot as like watching a big-screen TV, he was able to see it clearly and "can't forget that." PCR p. 27. This, however, was in contrast to his other testimony that he was looking directly at the shooting victim when the shooting occurred. PCR p. 37. Gidron stood by his trial testimony that he did not see Applicant shooting when he saw the murder victim get shot. PCR p. 27.

Gidron testified the crime scene was handled poorly, and law enforcement was having difficulty locking down the scene. PCR p. 28. Gidron recalled visiting the scene with PCR Counsel and Tressel, and he saw Tressel take measurements. PCR p. 31.

On cross-examination, Gidron noted he arrived at the party around 8pm, and stayed until they closed. Free alcohol was served at the party. PCR p. 33.

Gidron testified to his longstanding friendship with Applicant, describing them as "kind of like family." PCR p. 35. Gidron could not recall the difficulty the solicitor had in contacting him prior to the trial. PCR p. 49.

Gidron also recalled his trial testimony that he was "99% sure" Applicant didn't do anything. PCR p. 40. At the PCR hearing, Gidron was questioned why, if he was able to see Applicant and the shooting victim at the same time "like a big-screen tv," he would not be 100% sure Applicant did not do anything.

Robert Tressel

Robert Tressel was qualified, without objection, as an expert in the area of homicide investigation and crime-scene reconstruction. Tressel testified he was aware Kelly Fite was offered as an expert by the defense at trial. Tressel testified he has known Fite for over forty years, and the

two often referred each other. As Tressel explained, he went in March 2018 to review the exhibits which were presented at trial. He also visited the crime scene with Gidron.

Tressel testified the diagram was somewhat helpful to him but not very helpful. It was Tressel's opinion a different diagram, from the case file, was more helpful to him as it depicted where vehicles were parked and where shell casings were recovered. PCR pp. 57-58. When asked whether a Google Earth aerial photo would have been helpful, Tressel explained it would not have been due to the amount of trees. PCR p. 79.

Tressel explained he had a problem reviewing this case because all of the photographs were done after virtually all of the cars had scattered from the crime scene. PCR p. 59. Also, he claimed there was no documentation in the investigative file of where certain vehicles were parked. PCR p. 59.

Based on Gidron's representations made to Tressel when they visited the scene, Tressel testified Gidron was able to see Applicant and the victim at the same time during the shooting. PCR p. 60. As Trial Counsel's investigator was unable to meet with Gidron at the scene prior to trial, Tressel testified, now years later, it would have been vital to do so.

Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to produce a diagram. PCR p. 62. He explained outside crime scenes are difficult to work. PCR p. 62. Furthermore, Tressel opined there were not enough measurements taken when law enforcement responded for him to make a diagram. PCR p. 62. It was Tressel's opinion the investigation of the crime scene by law enforcement fell "well below" the standards for a homicide investigation, and he understood it was the investigator's first homicide investigation. PCR p. 64, p. 73. Tressel also described the scene as chaotic. PCR p. 64. Tressel

testified he was unable to reconstruct the scene. PCR p. 67. Tressel likened the chaotic shooting scene in this case to "a shootout at the O.K. Corral." PCR p. 68.

Tressel speculated a .40 caliber bullet was more likely to have caused the fatal injury in this case than a .45 caliber bullet. PCR p. 71.

Tressel also reviewed Kelly Fite's testimony in the trial transcript. According to Tressel, he did not remember Fite offering an opinion regarding the level of investigation in the case. PCR p. 76. Tressel testified that if he would have been retained at trial, he would have been more adamant that the defense offer the other diagram into evidence which contained the location of shells. However, the diagram he was speaking of was color-coded and only the black and white copy has been able to be located, and therefore Tressel has not seen what the colors would indicate. PCR pp. 79-80, p. 99. On cross-examination, Tressel testified he did not consult with Fite regarding this case. PCR p. 90. Tressel testified he does not think Fite could have reconstructed the crime scene with the materials available. PCR p. 93.

On cross-examination, Tressel conceded he did not speak with any eyewitnesses other than Gidron, Applicant's friend. PCR p. 87. Furthermore, the owner of the Piggy Park was not interviewed in anticipation of the PCR hearing. PCR. P. 87.

Tressel testified there was no ballistics evidence to corroborate Haggood's testimony at trial that Applicant fired two shots on the move to his car due to the absence of shells to the right and rear of where Applicant would have been. However, Tressel later conceded the resting place of the shells after being ejected from the gun would "absolutely" depend on what angle Applicant was holding the gun. PCR p. 88. Furthermore, Tressel conceded he had no way of determining how Applicant was holding the gun. PCR p. 88. Tressel also conceded that the problem with shell

casings is they are very movable, and he recalled testimony from trial and the PCR hearing that there was a large group of people coming and going at the scene. PCR p. 88.

Tressel acknowledged there was a positive gunshot residue result in the apex of the driver door of the car in which Applicant was allegedly standing during the shooting. PCR p. 96. He also acknowledged a group of .45 shell casings in the general vicinity of the rear of Applicant's car. PCR p. 96. Tresssel was unable to determine what caliber bullet caused the fatal wound to the victim's head. PCR p. 98.

Peter Skidmore

Peter Skidmore is a licensed private investigator in South and North Carolina. PCR p. 103. Skidmore opined there was not a thorough investigation conducted in this case. PCR p. 105. Other than Gidron and codefendant Haggood, Skidmore was unable to locate any other eyewitnesses. PCR p. 105. Skidmore visited the scene with Tressel and Gidron, and recalled Gidron is still very upset about the incident. PCR p. 106. Skidmore felt it would have been beneficial to the defense for the jury to visit the crime scene. PCR p. 109. He testified he would have assisted in obtaining photographs or visual aids had he been retained for the trial, but he provided no such materials at the PCR hearing. PCR p. 111.

While Skidmore testified to visiting the scene with Gidron's cooperation in anticipation of the PCR hearing, Skidmore conceded he did not know Gidron five years prior, at the time of trial. PCR p. 112. Skidmore recalled hearing from Gidron about a confrontation between Gidron and Trial Counsel's investigator prior to the trial. PCR p. 117. Skidmore opined perhaps Trial Counsel's investigator needed to "warm up to Mr. Gidron." PCR p. 118.

Skidmore testified he did not read the trial testimony and was not familiar with the record in this case, but later testified he reviewed portions of the trial testimony. PCR pp. 114-115.

Skidmore also explained he had no personal knowledge of where people were at the crime scene other than what Gidron had told him. PCR p. 121.

Applicant

Applicant testified Trial Counsel "somewhat" reviewed the discovery with him. PCR p. 186. Applicant also claimed Trial Counsel told him he knew for sure he would beat the murder charge. PCR p. 186. Despite Trial Counsel's testimony that they went over the meaning of an Alford plea when it was finally offered, Applicant testified he never knew about an Alford plea. PCR p. 187. Applicant testified Trial Counsel spoke with him about accomplice liability or "hand of one, hand of all," but Applicant claimed "that still just stuck on the basis of he knew how to beat the murder charge." PCR p. 188. Nevertheless, Applicant testified he would have considered taking the Alford plea had he been properly advised. PCR p. 189.

Applicant conceded there was a verbal altercation inside the club prior to the parties shooting. PCR pp. 194-195.

Trial Counsel

According to Trial Counsel, the testimony of codefendant Josh Haggood changed the entire approach of the defense strategy, as before there had been "strength in unity," but it became "havoc in division" once Haggood decided to testify. PCR p. 127. This is because, as Trial Counsel explained, it gave rise to accomplice liability. PCR p. 128.

Trial Counsel testified he met with Applicant approximately twenty-one times prior to trial and discussed possible defenses as well as trial strategy. PCR p. 126. When asked whether he told Applicant he would beat the murder charge, Trial Counsel explained, "Two things I don't do are promises and guarantees." PCR p. 198. Trial Counsel recalled discussing an offer to plead guilty under Alford to Applicant which would have been to voluntary manslaughter and assault and battery of a high and aggravated nature ("ABHAN") for a fifteen year sentence. Trial Counsel

testified he explained to Applicant what it meant to plea under Alford. As Trial Counsel explained, this discussion took place at the Calhoun County Courthouse because there was no offer available until that point. PCR p. 127. Trial Counsel recalled telling Applicant the problem with the trial was going to "hand of one, hand of all," and he was afraid they would convict Applicant of something. PCR p. 129. Therefore, Trial Counsel encouraged Applicant to plead guilty. The plea was left open until jury selection was complete. PCR p. 132. Trial Counsel as well as the Honorable Martin R. Banks spoke with Applicant about what they felt to be an unfavorable jury, yet Applicant still chose to proceed to trial. PCR p. 133.

Trial Counsel testified he retained Kelly Fite after Fite was recommended by two very successful criminal defense attorneys who were friends of Trial Counsel. PCR p. 133. Trial Counsel referred to his notes and testified he called Fite in September of 2012 and mailed the entire discovery package to him as copies of the evidence disks in October of 2012. PCR p. 134. Trial Counsel noted Fite's testimony indicated he did not have some of the material, but Trial counsel asserted everything he had been provide was sent to Fite. PCR p. 134. Trial Counsel referred to page 548 of the trial transcript, in which Fite testified he had not reviewed the DNA report regarding ballistics evidence, but Trial Counsel reaffirmed he had a copy of that DNA report in his discovery and sent a copy of everything in discovery to Fite. PCR p. 135. To summarize, Fite testified investigators failed to test the ballistics evidence for DNA but then admitted on cross-examination after being shown a report that they did attempt to do what he had testified they should have done. PCR p. 135. Trial Counsel had actually considered not calling Fite because he felt the jury had heard "about enough" and knew the scene was chaotic from just about every other witness. PCR p. 136. Trial Counsel's notes reflect he felt the jury was losing interest. PCR p. 136. Given the jury's lack of interest at that point in time, Trial Counsel explained, if he had a regret in this

case, it was using Fite, with the hindsight of knowing how the testimony went, but noted Fite is "heralded by all." PCR p. 137. Having heard Tressel testify at the PCR hearing years after the trial, Trial Counsel opined in hindsight he would have preferred Tressel's testimony over Fite's. At that point in the trial, he wanted to move on to Gidron's testimony. PCR p. 137. Trial Counsel testified he thought Fite was going to create a crime scene reconstruction, but Fite did not, and Trial Counsel wished he would have been more precise in what he asked him to do. PCR p. 138, p. 142. Trial Counsel clarified he did not feel Fite's testimony was necessarily harmful to the case. PCR p. 138. Furthermore, Trial Counsel reasserted that while he would have liked to have Tressel's testimony at trial, "it goes back to the change in our defense approach due to the testimony of Mr. Haggood ... it created a major roadblock for us and a major impediment to the type of defense we were going to present. PCR pp. 142-143. As he explained, a chaotic crime scene was not going to change the testimony and believability of Haggood's testimony that Applicant went to the car and retrieved a .45 and returned to the club before the incident. PCR p. 166.

Haggood made an excellent witness for the State according to Trial Counsel. PCR p. 158. After watching Haggood's interviews with law enforcement, Trial Counsel did not feel Haggood would make a very good witness for the State, but then Haggood put on a different persona in the courtroom once he was able to plead guilty and testify against Applicant. PCR p. 158. Trial Counsel testified Haggood presented incredibly well and was charismatic. PCR p. 158. Trial Counsel felt the jury found Haggood credible. PCR p. 158.

Trial Counsel recalled great difficulty in securing Gidron prior to trial. Trial Counsel personally visited the scene ten to twelve times and visited the scene with his private investigator as well. PCR p. 139. In fact, Trial Counsel testified the best he could do with Gidron was two telephone conversations as Gidron was difficult to locate and even had a physical altercation with

his investigator. PCR p. 139. Although Gidron did not want to be involved, Trial Counsel was able to go over his trial testimony by phone. PCR p. 139; p. 169. Trial Counsel testified Gidron's testimony at the PCR hearing was more on-point at trial as Gidron was calm, cool, and collected at the PCR hearing. Trial Counsel noted he wished Gidron would have presented himself in that same fashion at trial. PCR p. 141. Instead, Trial Counsel testified Gidron's nervousness during his trial testimony made him seem hostile. PCR p. 168.

Trial Counsel recalled he considered calling Nayrone Shivers as a defense witness, but ultimately decided he was too tied in "to that Elloree crew," based on his conversation with his investigator. PCR p. 144. Trial Counsel felt Shivers would not have presented anything useful. PCR p. 144. Trial Counsel did elicit testimony about a positive GSR test and the potential that Shivers was the one shooting from the road. PCR p. 145.

Trial Counsel testified that although the diagram was poorly drawn, he knew the scene well and it was troubling that when considering where the trees, cars, and people were located, there was a direct line from where Applicant allegedly fired from to where the victim was shot. PCR p. 145. Trial Counsel explained that while he thinks the shot did come from a different direction, the jury would find anything other than that direct shot to be farfetched. PCR p. 146. This is partially why Trial Counsel did not request the jury go to the scene, as he felt the point from where Applicant was to where the victim was to appear to be the most logical shot and he thought the jury would think that as well. PCR p. 146. Not only did the orientation of the scene most logically suggest the shot came from where Applicant was standing, but also Trial Counsel felt the trial judge would not permit the jury to visit the scene. PCR p. 146.

Trial Counsel recalled both he and the solicitor thought the trial would close on a Friday, but were told they would have to close on Thursday. PCR p. 149. As a result, Trial Counsel was

unable to use some visual aids he was preparing for closing. He felt this hurt his closing. PCR p. 149. Nevertheless, Trial Counsel summarized, "I most certainly had my head wrapped around this case ... I believe I was prepared for the case. That's for sure." PCR pp. 148-149.

Regarding Applicant's allegation that Trial Counsel failed to request the general permissive-inference language as set forth in Elmore, Trial Counsel noted the transcript reveals the trial judge actually did in fact instruct the jury using the general permissive-inference language on pg. 689 of the trial transcript. PCR p. 155. Trial Counsel testified he believes that met the requirement. PCR p. 156. Furthermore, Trial Counsel recalled there was testimony at trial reflecting ill will between Applicant and the victim in the club prior to the shooting. PCR p. 150. As Trial Counsel recalled, at least two witnesses expressed this. PCR p. 150. Trial Counsel recalled testimony that Applicant glared at the victim throughout the night, so much so the club staff acknowledged the problem. PCR pp. 156-157. Trial Counsel also testified he unfortunately recalled testimony revealing Applicant told the DJ, "I'm killa" when the DJ tried to calm diffuse the situation. PCR p. 157. Furthermore, Trial Counsel noted the testimony that Applicant and his codefendants went and retrieved firearms from their car and returned to the club revealed some type of malice must have existed. PCR p. 151.

As to accomplice liability, Trial Counsel testified he thinks it is fairly clear to members of the Bar and judges how it played out. PCR p. 163. Trial Counsel recalled there was a threat, Applicant's group exited the club, retrieved weapons, returned to the location where there was potential for an altercation, remained in that location, then codefendant Frazier fired a shot in the air and it led to an exchange of gunfire. PCR p. 163. Trial Counsel recalled Applicant was also the driver of the group that night. PCR p. 164. Trial Counsel agreed accomplice liability would be "extremely difficult" to overcome in this case. PCR p. 174.

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IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

This Court finds Applicant has failed to prove he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. This Court finds Trial Counsel rendered competent and calculated representation before and during Applicant's trial, and Applicant has failed to satisfy his burden of proving prejudice from Trial Counsel's performance. Furthermore, after observing the witnesses and closely passing on their credibility, this Court finds Trial Counsel's testimony to be credible whereas Applicant's testimony lacked credibility. This Court also finds Gidron's testimony to be not entirely credible.

"Failure to fully and properly advise and advocate for Applicant prior to the rejection of the fifteen year plea offer."

Applicant alleges Trial Counsel was ineffective for failing to properly advise and advocate for Applicant prior to the rejection of the fifteen year plea offer. This Court finds this allegation to be meritless. The record as well as testimony from the PCR hearing reveals Trial Counsel adequately advised and represented Applicant regarding the plea offer. The trial transcript reveals the parties put the plea offer on the record to demonstrate Applicant's and the State's understanding of the plea offer. Tr. p. 12. The State offered to allow Applicant to plead to voluntary manslaughter, ABHAN, and the dismissal of one of his attempted murder charges with a recommended sentencing cap of fifteen years. Tr. p. 13. Applicant would have also been able to plead under Alford. Tr. p. 13. At the PCR hearing, Trial Counsel credibly testified he explained to Applicant what it meant to plead under Alford. As Trial Counsel explained, this discussion took place at the Calhoun County Courthouse because there was no offer available until that point. PCR p. 127.

Trial Counsel also recalled telling Applicant the problem with the trial was going to "hand of one, hand of all," and he was therefore afraid Applicant would be convicted of at least some charge. PCR p. 129. Therefore, Trial Counsel encouraged Applicant to plead guilty. Trial Counsel credibly testified that he as well as the Honorable Martin R. Banks spoke with Applicant about what they felt to be an unfavorable jury, yet Applicant still chose to proceed to trial. PCR p. 133.

Certainly, this Court observes accomplice liability was arguably an insurmountable obstacle in this trial, as the testimony from Applicant's codefendant Haggood and numerous other witnesses revealed the group with whom Applicant arrived to the party briefly exited the party together to retrieve firearms from the vehicle Applicant drove to the party. Then, after the group had returned with their firearms, a shootout later ensued outside in which the individual with whom Applicant had been in conflict with throughout the night ended up shot dead directly in front of the car Applicant and his group were at during the shooting. Even if a jury were to somehow believe the actual shooter was Haggood or another member of the group, Applicant would still have been guilty under accomplice liability. While this Court acknowledges it would have been wise for Applicant to accept the plea offer given the facts of this case and "the hand of one, the hand of all," this Court nevertheless finds it was Applicant's decision to proceed to trial and Applicant was properly advised and represented regarding the plea offer. Therefore, Applicant has failed to prove Trial Counsel was deficient regarding this allegation, or that he was prejudiced by any alleged deficiency as it was his informed decision to proceed to trial. Accordingly, this allegation is denied and dismissed with prejudice.

"Failure to effectively and fully utilize the services of Kelly Fite or an expert in his or a similar capacity prior to and at trial"

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Applicant also alleges Trial Counsel was ineffective for failing to effectively and fully utilize the services of Kelly Fite or an expert in his or a similar capacity prior to and during trial. This Court finds this allegation also to be meritless. To support this allegation, Applicant called Robert Tressel, who testified as an expert in homicide investigations and crime scene reconstruction. Tressel testified he felt the preservation and investigation of the crime scene by law enforcement was substandard for a homicide case. Tressel explained he had a problem reviewing this case because all of the photographs were done after virtually all of the cars had scattered from the crime scene. PCR p. 59. Also, he claimed there was no documentation in the investigative file of where certain vehicles were parked. PCR p. 59. Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to reconstruct the crime scene. PCR p. 62. Tressel likened the chaotic shooting scene in this case to "a shootout at the O.K. Corral." PCR p. 68. Tressel testified he has known Fite for over forty years and the two often refer each other.

As to this issue, Trial Counsel testified Fite came highly recommended. Trial Counsel's notes revealed he called Fite in September of 2012 and mailed the entire discovery package to him as copies of the evidence disks in October of 2012. PCR p. 134. Trial Counsel noted Fite's testimony indicated he did not have some of the material, but Trial Counsel credibly testified everything he had been provide was sent to Fite. PCR p. 134. Trial Counsel referred to page 548 of the trial transcript, in which Fite testified he had not reviewed the DNA report regarding ballistics evidence, but Trial Counsel reaffirmed he had a copy of that DNA report in his discovery and sent a copy of everything in discovery to Fite. PCR p. 135. Trial Counsel recalled he had actually considered not calling Fite because he felt the jury had heard "about enough" and knew the scene was chaotic from just about every other witness. PCR p. 136. Moreover, Trial Counsel's

notes reflect he felt the jury was losing interest. PCR p. 136. Given the jury's lack of interest at that point in time, Trial Counsel explained, if he had a regret in this case, it was using Fite, with the hindsight of knowing how the testimony went, but noted Fite is "heralded by all." PCR p. 137. Having heard Tressel testify at the PCR hearing years after the trial, Trial Counsel opined in hindsight he would have preferred Tressel's testimony over Fite's. At that point in the trial, he wanted to move on to Gidron's testimony. PCR p. 137. Trial Counsel testified he thought Fite was going to create a crime scene reconstruction, but Fite did not, and Trial Counsel wished he would have been more precise in what he asked him to do. PCR p. 138, p. 142. Trial Counsel clarified he did not feel Fite's testimony was necessarily harmful to the case. PCR p. 138.

This Court finds Applicant has failed to prove Trial Counsel's performance was deficient regarding Fite or the use of a crime scene reconstruction expert. Trial Counsel's performance was adequate as to his decision to retain Fite as an expert and also in his use of Fite as an expert. As Applicant's own expert witness testified at the PCR hearing, he himself was unable to reconstruct the crime scene in this case. The fact the crime scene was allegedly too inadequately documented to give rise to a reconstruction was no fault of Fite or Trial Counsel. Nevertheless, Trial Counsel credibly testified he provided Fite with all the materials available to him. Moreover, Trial Counsel credibly testified Fite came highly recommended, and Tressel himself testified he has known Fite for forty years and the two often refer each other. This Court also finds Trial Counsel was able to effectively use Fite to further demonstrate how chaotic and poorly documented he felt the crime scene was in this case, which was a strategy at trial to raise reasonable doubt. Tr. p. 544. For these reasons, Applicant has failed to satisfy his burden of proving Trial Counsel was deficient as to this allegation.

Notwithstanding Trial Counsel's lack of deficiency, Applicant has also failed to satisfy his burden of proving he was prejudiced regarding Trial Counsel's use of Fite as an expert witness. Even if Trial Counsel would have been able to force Fite to review every piece of material provided, and even if Trial Counsel would have been able to allow Fite to visit the crime scene with the then-uncooperative Gidron, Fite still would not have been able to reconstruct the crime scene. This is evidenced by Tressel's own admission that after reviewing the materials and visiting the scene he was unable to reconstruct the crime scene. Tressel opined the crime scene was not well preserved, but this merely mirrors the testimony of Fite and is cumulative to the numerous other witnesses at trial who testified to the chaotic nature of the crime scene. Therefore, Applicant has failed to prove there is any reasonable probability the outcome of the trial would have been different had Trial Counsel utilized Fite differently. As Trial Counsel credibly explained, a chaotic crime scene was not going to change the testimony and believability of codefendant Haggood's testimony that Applicant went to the car and retrieved a .45 and returned to the club before the shooting which left the victim, with whom Applicant had been in conflict throughout the night, dead directly in front of Applicant's car. PCR p. 166. Furthermore, the merely cumulative testimony about the chaos of the crime scene would have paled in importance next to the larger problem for Applicant's defense, accomplice liability given the testimony of his codefendant Haggood and other witnesses who witnessed their group the night of the shooting. For these reasons, there is no probability the result of the proceedings would have been different had Trial Counsel performed any differently regarding this allegation, and this allegation is denied and dismissed with prejudice.

"Failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense"

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Applicant also alleges Trial Counsel was ineffective for failing to utilize witnesses called for the defense, and Applicant specifically called Gidron to testify at the PCR hearing to support this allegation. This Court finds this allegation also to be meritless.

First, Applicant has failed to satisfy his burden of proving Trial Counsel was deficient regarding this allegation. This Court notes Trial Counsel's substantial difficulties with Gidron prior to Applicant's trial. At the PCR hearing, Gidron himself testified he is a "changed man" from who he was five years ago, the approximate time of Applicant's trial. PCR p. 32. As Trial Counsel credibly testified, Gidron was uncooperative with him and his investigator prior to Applicant's trial as he was difficult to locate and did not wish to appear. PCR p. 139. The trial transcript reveals the solicitor was completely unable to contact Gidron. Tr. p. 568. In fact, as Trial Counsel explained, Gidron engaged in a physical altercation with his investigator. PCR p. 139. Of course, Trial Counsel credibly testified his investigator does not regularly engage in physical confrontations with his witnesses. PCR p. 169. Trial Counsel noted he was able to speak with Gidron on the phone prior to trial, despite Gidron's hostility. Trial Counsel also explained that Gidron's demeanor at trial was markedly different from his demeanor at the PCR hearing. Trial Counsel testified Gidron's testimony at the PCR hearing was more on-point than at trial as Gidron was calm, cool, and collected at the PCR hearing. Trial Counsel noted he wished Gidron would have presented himself in that same fashion at trial. PCR p. 141. Instead, Trial Counsel testified Gidron's nervousness during his trial testimony made him seem hostile. PCR p. 168. This Court finds Trial Counsel made reasonable and adequate efforts to effectively utilize Gidron as a witness at trial, despite Gidron's hostility which was no fault of Trial Counsel. Indeed, Trial Counsel was able to elicit from Gidron at trial that he never saw Applicant leave the car and he did not want to see Applicant "go down" for something he was "99% sure" Applicant did not do. Tr. p. 564, p.

567. While Gidron did not exhibit a hostile demeanor at the PCR hearing, this Court finds Trial Counsel's testimony regarding Gidron credible and notes Gidron's own admission he is a "changed man." For these reasons, Applicant has failed to satisfy his burden of proving Trial Counsel was deficient regarding the use of Gidron.

Notwithstanding Trial Counsel's adequate performance regarding this allegation, Applicant has also failed to satisfy his burden of proving prejudice from Trial Counsel's performance with Gidron. While this Court notes Trial Counsel would have preferred the calmer demeanor of Gidron exhibited at the PCR hearing, this Court also observes Gidron's substantive testimony at the PCR hearing was not significantly different from his testimony at trial. At trial, Despite Gidron's lack of cooperation, he still testified at trial that Applicant never left the vehicle the group left in and the "rain of fire" came from Haggood, not Applicant. Tr. pp. 576-577. Gidron testified at the PCR hearing the shots he believe shot the victim came from the road, which is what he had already testified at trial. Tr. p. 562. Of course, this Court notes Trial Counsel's credible testimony that while he believed Gidron, the path from where Applicant was standing to the dead body was of such a straight shot that it would be difficult to persuade the jury as they wished. PCR p. 164. Clearly, the jury heard significantly similar testimony from Gidron at trial, but did not believe it. There is no reasonable probability Trial Counsel could have handled Gidron any differently to achieve a different outcome.

At the PCR hearing, Trial Counsel was also questioned regarding a potential witness Nayrone Shivers. Trial Counsel recalled he considered calling Shivers as a defense witness, but ultimately decided he was too tied in "to that Elloree crew," based on the conversation with his investigator. PCR p. 144. Trial Counsel credibly testified he felt Shivers would not have presented anything useful. PCR p. 144. This Court finds Applicant has failed to satisfy his burden of proving

deficiency on Trial Counsel's part as Trial Counsel made a reasonable, calculated decision not to call Shivers as a witness. Furthermore, this Court notes Shivers did not testify at the PCR hearing and Applicant has therefore failed to establish prejudice from any failure to call him as a witness at trial.

Notwithstanding Trial Counsel's proper performance regarding the witnesses in this case, this Court also observes the testimony of Gidron, even if believed, would not likely allow Applicant to circumvent accomplice liability. "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 or purpose." State v. Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769 (Ct. App. 2010). At trial, Gidron testified Applicant pointed out the victim to him at the club and Gidron "had a feeling something was going to happen." PCR p. 13. While Gidron testified he did not personally see anyone from Applicant's group exit the party to get their guns, the DJ from the party did testify to witnessing the group leave and return after the initial confrontation but prior to the shooting. Tr. p. 134 In fact, Applicant's codefendant Haggood testified they all exited the club, retrieved their guns from the car, and returned to the party. Tr. p. 276. Trial testimony further revealed conflict originated from an altercation between Applicant and the victim when the victim bumped into Applicant on the dance floor, before the group briefly left the party. Tr. p. 130. According to the DJ from the party, he attempted to diffuse the situation when he was told by Applicant, "I'm a killa." Tr. p. 135; p. 152. Another party attendee James Hampton testified he became aware of an altercation with Applicant and talked to the victim in efforts to calm him down. Tr. p. 205. According to Hampton, both Applicant and Haggood had guns at the scene and he saw shots being fired from behind Applicant's car. Tr. p. 209; p. 213. According to Haggood, Applicant had called

him over in the party to let him know what was going on regarding the confrontation and pointed out two people while instructing Haggood to look out for them. Tr. p. 275. Another DJ, Michael Bullock testified he heard about the altercation and the victim kept watching Applicant across the dance floor, and later both parties continued glaring back and forth. Tr. p. 354; p. 355. According to Haggood, who Trial Counsel opined made a very credible witness, Applicant remarked he was "not trying to get caught slipping," and the group then went to the car for the guns before going back inside. Tr. p. 276. Haggood further testified that he and Applicant fired numerous shots during the incident, meanwhile Kevin Frazier also had his gun out with the rest of the group and fired multiple shots into the air. Tr. pp. 285-287. Trial Counsel elicited from Haggood that he had brokered a deal for his testimony but never actually saw Applicant shoot anybody. Tr. p. 307. Therefore, even if witnesses testifying that Applicant did not fire the deadly shot were to be believed, Applicant was clearly part of the group's behavior responsible for the fatal shooting, and thus guilty under accomplice liability. For this additional reason, Applicant has failed to satisfy his burden of proving prejudice from the alleged deficiencies of Trial Counsel regarding this allegation. Accordingly, this allegation is denied and dismissed with prejudice.

"Failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016)."

Applicant also alleges Trial Counsel was ineffective for failing to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. This Court finds this allegation to be me meritless as the jury instruction *did* in fact include the permissive inference instruction as enumerated in Gibson, and the jury instruction thoroughly conveyed the correct statement of law. Furthermore, there was ample evidence of express malice presented at trial.

In Gibson, the South Carolina Supreme Court noted that State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), provided for the following jury instruction:

> "The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, [sic] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive ... We caution the bench, [sic] that hereafter only slight deviations from this charge will be tolerated." Gibson, 416 S.C. at 264.

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

Applicant's case is readily distinguishable from Gibson as the trial judge in Applicant's case did in fact properly charge the jury on the permissive inference language. As Trial Counsel noted at the PCR hearing, page 689 of the trial transcript reveals the trial judge properly gave the instruction:

> Now, malice, as we have talked about, may be express or inferred. Again, the same definitions apply as before.
>
> **Now, ladies and gentlemen, if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference of malice is simply an evidentiary fact to be considered by you, along with other evidence in the case, and you give it the weight that you decide it should receive.** Tr. p. 689, ll. 3-11 (emphasis added); PCR p. 155.

The record therefore reveals the trial judge properly instructed the jury as to the permissive inference language pursuant to Gibson and Elmore. This Court acknowledges that the language

was not perhaps not at the optimal spot in the charge. However, when read as a whole, the charge is accurate and counsel's objection, granted or not, would not have affected the jury's deliberation. The trial judge gave the instruction following the charge for attempted murder, which followed the charge for murder. The trial judge clearly instructed the jury that the "same definitions apply as before" regarding malice for attempted murder as they apply to murder. Tr. p. 689, l. 3. A jury charge is correct if, when read as a whole, it contains the correct definition and adequately covers the law. State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003). The record reveals the trial judge clearly enumerated the principle of permissive inference in satisfaction of Gibson and Elmore, and furthermore made it clear this principle applied to both the charges of murder and attempted murder. After giving the permissive inference instruction, the trial judge then proceeded to read the charges for lesser-included offenses which did not involve malice. Tr. p. 690. This Court also notes the trial judge stressed the State's burden of proof beyond a reasonable doubt and the jury's role as the sole judge of facts throughout the jury instructions as well. As the trial judge properly instructed the jury regarding the permissive inference language, Trial Counsel is not deficient for failing to enter an objection or exception. Applicant has therefore failed to satisfy the first prong of Strickland, and because the jury was indeed properly instructed, Applicant also cannot establish prejudice from Trial Counsel's failure to object. Accordingly, this allegation is denied and dismissed with prejudice.

Notwithstanding the fact the record refutes Applicant's allegation of an improper jury instruction, Applicant would also be unable to prove he was prejudiced by an omission of the language because there was ample evidence of express malice in this case regardless of inferred malice. As Trial Counsel acknowledged at the PCR hearing, testimony at trial indicated Applicant was engaged in a confrontation with the victim when victim bumped into him on the dance floor.

PCR p. 156, l. 21; Tr. p. 130, l. 9. Then, Trial Counsel acknowledged testimony revealed Applicant glared at the victim throughout the night to the point the club staff acknowledged the problem. PCR p. 156, l. 25; pp. 354-355. Trial Counsel testified he, unfortunately, recalled testimony that when DJ Haynes approached Applicant to calm him down and ask him not to follow around the victim, Applicant said, "I'm killa." PCR p. 157; Tr. pp. 135-136. Testimony revealed Applicant and his group then left the club to retrieve their guns from Applicant's car. PCR p. 157; Tr. p. 134; p. 276. In fact, codefendant Haggood testified Applicant was agitated and said he "wasn't trying to get caught slipping" before they all went to get their guns. Tr. p. 276. After retrieving the guns, the group then returned to the club. Tr. p. 278. Then, not only did multiple eyewitnesses testify Applicant had a gun, but codefendant Haggood testified Applicant fired multiple shots during the chaotic shootout. Tr. pp. 286-287. As Trial Counsel explained, the location where Applicant was placed during the shooting, the driver door area of his car, had a straight shot to the location where the victim was located dead from a gunshot wound. PCR p. 164. Therefore, like the abundance of evidence in this case to implicate Applicant under accomplice liability, there was ample evidence in this showing express malice. Notwithstanding the trial judge's proper jury charge on permissive inference in this case, Applicant would not be able to show prejudice regardless due to the ample evidence of express malice. Accordingly, this allegation is denied and dismissed with prejudice.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Trial counsel's performance was not deficient by any standard. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of FEB, 2019.

ROBIN B. STILWELL
Presiding Judge
First Judicial Circuit

GREENVILLE, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CALHOUN) FILED FIRST JUDICIAL CIRCUIT
)
2019 MAR -4 P 3:21
David Jamar Benjamin, #354583,)
KENNETH RAST, CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC
Applicant,) **ORDER DENYING APPLICANT'S MOTION PURSUANT TO RULE 59(a) & (e), SCRCP**
)
vs.)
)
State of South Carolina,)
)
Respondent.) Case No.: 2016-CP-09-0085
)

This matter comes before the Court pursuant to the Applicant's Rule 59(a) and Rule 59(e), SCRCP, Motion to Reconsider the Court's February 1, 2019, Order of Dismissal, to Rehear Applicant's Case, and to Reconsider Applicant's Proposed Order Granting Application for PCR. Having carefully considered the same, this Court respectfully denies the Motion.

AND IT IS SO ORDERED.

ROBIN B. STILWELL

February 26, 2019
Greenville, South Carolina