STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2019-000528

DAVID JAMAR BENJAMIN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SARA ELYSSA GUNTON
S.C. Bar No. 103525
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES PRESENTED

I. Whether the lower court erred in failing to find that the proper utilization of a lay witness and an expert was absent from trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense.

II. Whether the lower court erred in failing to find ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016).

RESPONDENT'S STATEMENT OF ISSUES PRESENTED

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

Antonio Gidron

Antonio Gidron was present at the Piggy Park nightclub when the shooting occurred and testified at Petitioner's trial. According to Gidron, he did not have time to prepare for his testimony with trial counsel before testifying at trial. Nevertheless, Gidron also testified he went out to the scene with trial counsel, but "don't know who that guy was from." (App'x p. 882, ll. 2). Further, Gidron never spoke to or gave a statement to law enforcement because he didn't "meddle in people business." (App'x p. 912, ll. 18-19). At the evidentiary hearing, he testified the victim, Dominique Lawton, had a gun in his hand when he was shot, but never thought to mention it at Petitioner's trial. (App'x p. 904).

Gidron testified the crime scene was handled poorly, and law enforcement was having difficulty locking down the scene. (App'x p. 898). Gidron could not recall the difficulty the solicitor had in contacting him prior to the trial. (App'x p. 919).

Gidron recalled his trial testimony that he was "99% sure" Petitioner didn't do anything. (App'x p. 910). Gidron claimed he was able to see Petitioner and Lawton at the same time, "like a big-screen tv" when Lawton was shot. However, when asked why he would not say he was one-hundred-percent sure Petitioner did not shoot Lawton, he responded, "you can never be exact." (App'x p. 910).

Robert Tressel

Petitioner called Robert Tressel, an expert in homicide investigations and crime scene reconstruction, to testify at the evidentiary hearing regarding his review of the case. Tressel was qualified, without objection, as an expert in the area of homicide investigation and crime-scene reconstruction. Tressel explained he felt the preservation and investigation of the crime scene by

law enforcement was substandard for a homicide case and had a problem reviewing this case because the crime scene photographs were taken after virtually all of the cars had left the parking lot where the shooting occurred. (App'x p. 929). Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to reconstruct the crime scene. (App'x p. 932). Tressel likened the chaotic shooting scene in this case to "a shootout at the O.K. Corral." (App'x p. 938). He was aware Kelly Fite was offered as an expert by the defense at trial, and had known Fite for over forty years, and the two often referred each other. As Tressel explained, he went in March 2018 to review the exhibits which were presented at trial.

Tressel stated he had a problem reviewing this case because all of the photographs were done after virtually all of the cars had scattered from the crime scene. (App'x p. 929). Also, he claimed there was no documentation in the investigative file of where certain vehicles were parked. (App'x p. 929).

Based on Gidron's representations made to Tressel when they visited the scene, Tressel testified Gidron was able to see Petitioner and the victim at the same time during the shooting. (App'x p. 930). As Trial Counsel's investigator was unable to meet with Gidron at the scene prior to trial, Tressel testified, now years later, it would have been vital to do so.

Although Tressel was able to go to the scene and take measurements, he conceded he himself was unable to produce a diagram. He explained outside crime scenes are difficult to work. Furthermore, Tressel opined there were not enough measurements taken when law enforcement responded for him to make a diagram. (App'x p. 932). It was Tressel's opinion the investigation of the crime scene by law enforcement fell "well below" the standards for a homicide investigation, and he understood it was the investigator's first homicide investigation. (App'x p. 934; p. 943).

Tressel also reviewed Kelly Fite's testimony in the trial transcript. According to Tressel,

he did not remember Fite offering an opinion regarding the level of investigation in the case. (App'x p. 946). Tressel testified that if he would have been retained at trial, he would have been more adamant that the defense offer the other diagram into evidence which contained the location of shells. However, the diagram he was speaking of was color-coded and only the black and white copy has been able to be located, and therefore Tressel has not seen what the colors would indicate. (App'x p. 949-50; p. 969). On cross-examination, Tressel testified he did not consult with Fite regarding this case, and conceded he did not speak with any eyewitnesses other than Gidron. (App'x p. 960; p. 957). Tressel did not think Fite could have reconstructed the crime scene with the materials available. (App'x p. 963).

Tressel testified there was no ballistics evidence to corroborate codefendant Haggood's testimony at trial that Petitioner fired two shots on the move to his car due to the absence of shells to the right and rear of where Petitioner would have been. However, Tressel later conceded the resting place of the shells after being ejected from the gun would "absolutely" depend on what angle Petitioner was holding the gun. (App'x p. 958). Furthermore, Tressel conceded he had no way of determining how Petitioner was holding the gun. (App'x p. 958). Tressel also conceded that the problem with shell casings is they are very movable, and he recalled testimony from trial and the PCR hearing that there was a large group of people coming and going at the scene. (App'x p. 958).

Tressel acknowledged there was a positive gunshot residue result in the apex of the driver door of the car in which Petitioner was allegedly standing during the shooting. (App'x p. 958). He also acknowledged a group of .45 caliber shell casings in the general vicinity of the rear of Petitioner's car. (App'x p. 966). Tresssel was unable to determine what caliber bullet caused the

fatal wound to Lawton. (App'x p. 966). Tressel speculated a .40 caliber bullet was more likely to have caused the fatal injury in this case than a .45 caliber bullet. (App'x p. 941).

Trial Counsel

According to trial counsel, the testimony of codefendant Josh Haggood changed the entire approach of the defense strategy, as before there had been "strength in unity," but it became "havoc in division" once Haggood decided to testify. (App'x p. 997). This is because, as trial counsel explained, it gave rise to accomplice liability. (App'x p. 998).

Trial counsel testified Kelly Fite came highly recommended by two "very good friends who are very successful criminal defense attorneys ... They had had great success with Mr. Fite." (App.x p. 1003, ll. 24-25). Trial counsel's notes revealed he spoke with Fite in September 2012, and mailed the entire discovery package to him with copies of the evidence disks in October 2012. (App'x p. 1004). He noted that although Fite's testimony at trial indicated Fite did not have some of the discovery material, like the DNA report regarding ballistics evidence, trial counsel explained he had given Fite everything he had been provided in discovery. (App'x p. 1004). As the trial progressed, trial counsel had actually considered not calling Fite because he felt the jury was losing interest and had heard "about enough" and knew the scene was chaotic from just about every other witness. (App'x p. 1006). Given the jury's lack of interest at that point in time, trial counsel explained, if he had a regret in this case, it was using Fite, with the hindsight of knowing how the testimony went, but noted Fite is "heralded by all." (App'x p. 1007, ll. 5-6). After hearing Tressel's testimony, trial counsel mentioned that, in hindsight, he would have preferred Tressel's PCR testimony over Fite's trial testimony. Trial counsel believed Fite was going to create a crime scene reconstruction, but Fite did not, and trial counsel wished he would have been more precise in what he asked him to do. (App'x p. 1008; p. 1012). Further, trial counsel stated he "barely wanted to

touch on him [Fite] in closing – I didn't feel it was necessarily harmful to the case. But I didn't feel it was beneficial." (App'x p. 1008, ll. 8-10).

Furthermore, trial counsel reasserted that while he would have liked to have Tressel's testimony at trial, "it goes back to the change in our defense approach due to the testimony of Mr. Haggood ... it created a major roadblock for us and a major impediment to the type of defense we were going to present. (App'x p. 1012-13). As he explained, a chaotic crime scene was not going to change the testimony and believability of codefendant Haggood's testimony that Petitioner went to the car and retrieved a .45 caliber pistol and returned to the club before the incident. (App'x p. 1036).

Haggood made an excellent witness for the State according to trial counsel. (App'x p. 1028). After watching Haggood's interviews with law enforcement, trial counsel did not feel Haggood would make a very good witness for the State, but then Haggood put on a different persona in the courtroom once he was able to plead guilty and testify against Petitioner. (App'x p. 1028). Trial counsel testified Haggood presented incredibly well, was charismatic, and felt the jury found Haggood to be credible. (App'x p. 1028).

Trial counsel recalled great difficulty in securing Gidron prior to trial. Trial counsel personally visited the scene ten to twelve times and visited the scene with his private investigator. (App'x p. 1009). In fact, trial counsel testified the best he could do with Gidron was two telephone conversations as Gidron was difficult to locate and even had a physical altercation with his investigator. (App'x p. 1009). Although Gidron did not want to be involved, trial counsel was able to go over his trial testimony by phone. (App'x p. 1009; p. 1039). Trial counsel testified Gidron's testimony at the PCR hearing was more on-point at trial as Gidron was calm, cool, and collected at the PCR hearing. Trial counsel noted he wished Gidron would have presented himself in that

same fashion at trial. (App'x p. 1011). Instead, trial counsel testified Gidron's nervousness during his trial testimony made him seem hostile. (App'x p. 1038).

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

Petitioner argues trial counsel's decision to employ the services of Fite over those of Tressel, or another expert witness, prejudiced Petitioner's defense at trial and that, had counsel obtained a different expert witness, Petitioner would have been acquitted. In making this assertion, Petitioner relies exclusively on *McKnight v. State*, 661 S.E.2d 354, 378 S.C. 33 (2008). However, this reliance is misplaced.

In *McKnight*, this Court was asked if trial counsel was ineffective for calling an expert witness whose testimony was known to undermine the defense without calling another expert witness who could provide favorable testimony. In that case, McKnight proceeded to trial in January 2001 regarding the death of her nearly full-term stillborn baby girl, after an autopsy report concluded the death had occurred due to McKnight's cocaine use and was labeled a homicide. McKnight's counsel called two expert witnesses, Dr. Conradi and Dr. Karch, to testify as to possible alternative causes of death. Dr. Conradi provided testimony that essentially ruled out any natural causes of death, which severely undercut McKnight's defense. Dr. Karch's testimony rebutted the State's experts' testimony and bolstered McKnight's defense. This trial ended in a

mistrial. During the second trial in May 2001, McKnight's counsel again used Dr. Conradi, fully aware that her testimony had undermined the defense. Dr. Karch was unavailable, and McKnight's counsel made no attempt to secure another expert witness who could effectively rebut the State's expert testimony. This Court found that "it was unreasonable for counsel to produce a single expert witness at the *second trial* whose testimony had clearly benefited the State's case in the *first trial*" and granted McKnight relief. *McKnight*, at 44, 661 S.E.2d at 359 (emphasis added).

Here, *McKnight* is clearly distinguishable from the instant case. Trial counsel was completely unaware of the quality or clarity of the testimony Fite would provide, and took all reasonable measures in selecting and preparing Fite for Petitioner's case. Review of the record does not provide a single clear instance where Fite's testimony "undermined" the defense. Furthermore, unlike in *McKnight* where counsel called Dr. Conradi at the second trial *knowing* her testimony would bolster the State's case, because her testimony did exactly that during the first trial, Petitioner's trial counsel had no way of predicting exactly how Fite would testify, and it is clear *McKnight* is not applicable to the case at bar. Although trial counsel did state, after hearing Tressel testify, that his only potential regret at trial was calling Fite because in hindsight, trial counsel would have preferred Tressel's testimony over Fite's, this admission from trial counsel in no way suggests he was unreasonable in deciding to use Fite as an expert witness. Furthermore, trial counsel clarified that Fite's testimony was not "harmful to the case." (App'x p. 1008, ll. 8-10).

Trial counsel emphasized Fite came highly recommended from other criminal defense attorneys, who had great success using Fite, adding Fite was "heralded by all, did such a great job." (App'x p. 1004, ll. 24-25; p. 1005, ll. 1-4; p. 1007, ll. 5-6). Referring to his notes at the

evidentiary hearing, trial counsel testified that in September 2012 he called Fite about the case, and in October 2012, mailed Fite all discovery materials he had been given. (App'x p. 1004).

Much of Petitioner's argument centers on Petitioner's alleged use of a .45 caliber weapon when the evidence suggests that a .40 caliber weapon inflicted the fatal injury to Lawton. It is Petitioner's assertion that Fite was defective in his capacity as an expert witness because he did not clearly draw the distinction between the likelihood of a .40 caliber round being able to penetrate through the skull compared to the likelihood of a .45 caliber round. Indeed, trial counsel noted Fite testified he was not able to explicitly rule out a .45 caliber round as the cause of the fatal injury to Lawton. "Usually you don't expect a large caliber hollow point bullet to penetrate a person's head, but it does happen." (App'x p. 554, ll. 3-4). However, Tressel, the expert witness used by Petitioner to establish Fite's testimony as subpar, was also not able to rule out the possibility of a .45 caliber round causing the fatal injury to Lawton. (App'x p. 941, ll. 13-16). All Tressel could state was that of all the weapons known to be present at the time of the shooting, the .40 caliber weapon attributed to Petitioner's codefendant, Joshua Haggood, most likely fired the fatal shot, but was not able to affirmatively state with one-hundred-percent certainty that Lawton was killed by a .40 caliber round.

Curiously, Petitioner went on to question Tressel on the trial testimony of witness James Hampton, asking "And he is one of the witnesses that testifies about seeing Mr. Benjamin shooting is that correct? A: That's correct" (App'x p. 941, ll. 17-23). Tressel went on to add, "well, Mr. Hampton testified that ... Mr. Benjamin was laying down cover fire as he ran to the vehicle. Yet there's no .45 shell casings in front of the club." (App'x p.942, ll. 7-10). However, review of James Hampton's trial testimony clearly refutes this claim by Petitioner. James Hampton explicitly stated that he did not remember anything about the gun Petitioner had, and further, did not see Petitioner,

nor Haggood fire their weapons. (App'x p. 212, ll. 18-20; p. 214, ll. 5-8; p. 225, ll. 16-18). Petitioner's rabid argument surrounding the quality of Fite's trial testimony for lack of preparation appears to have overshadowed the preparation of their own. Here, there is nothing in the record to indicate that trial counsel failed adequately to prepare Fite to testify at trial. Trial counsel provided Fite with all discovery materials available to him. Moreover, Fite came highly recommended, and Tressel himself testified he has known Fite for forty years and the two often refer each other. As Petitioner's own expert witness testified at the PCR hearing, Tressel himself was unable to reconstruct the crime scene in this case. The fact the crime scene was allegedly too inadequately documented to give rise to a reconstruction was no fault of Fite or trial counsel.

Here, trial counsel's decision to retain Fite was based on the strong recommendations he received from other members of the profession. Trial counsel had no reason to suspect Fite would appear at trial relatively unprepared, as he provided Fite with all relevant discovery, and nothing in the record indicates trial counsel failed to adequately prepare him. To the extent that Fite was unprepared to testify, it was not because trial counsel was ineffective, but rather because Fite was, and our Federal Courts have consistently held that there is no constitutional right to effective assistance of an expert witness. *See, e.g., Thomas v. Taylor*, 170 F.3d 466, 472 (4th Cir. 1999) (trial counsel cannot be held ineffective for preparing an expert witness to testify); *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir.1998) (holding that the Constitution does not entitle a criminal defendant to the effective assistance of an expert witness); *See also Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008) (counsel is not ineffective for structuring a case on the basis of opinion received at the time counsel consulted expert). Moreover, contrary to Petitioner's assertion that trial counsel should have found an expert willing to give more favorable ballistics testimony, it was unnecessary for trial counsel to shop for a contrary and more favorable opinion because *Strickland* does not

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

Notwithstanding trial counsel's lack of deficiency, Petitioner has also failed to satisfy his burden of proving he was prejudiced regarding trial counsel's use of Fite as an expert witness. Even if trial counsel could have forced Fite to review every piece of material provided, and give a better explanation of the ballistic evidence in this case, the outcome of trial would remain unchanged. Petitioner's largest problem at trial was not the quality of an expert witness, but rather, accomplice liability. Unsurprisingly absent from Petitioner's argument is any mention of the enormous burden Petitioner faced at trial given the testimony of codefendant Haggood and other witnesses, which clearly placed Petitioner, codefendant Haggood, and codefendant Fraizer together as a group the entire night. The record is clear that all three codefendants acted together and each possessed and fired a weapon that night. Petitioner's group exited the club, retrieved weapons, returned to the location where there was potential for an altercation with Lawton, remained in that location, then codefendant Frazier fired a shot in the air and it led to an exchange of gunfire. (App'x p. 1033-32). Codefendant Haggood explicitly stated that he carried a .40 caliber semiautomatic pistol. (App'x p. 265). Therefore, even if Fite did a better job at highlighting that a .40 caliber round was more likely to have inflicted the fatal injury to Lawton than a .45 caliber round from the weapon attributed to Petitioner, it would not overcome the presumption of guilt under accomplice liability. Therefore, Petitioner has not carried his burden of showing that the

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

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

Next, Petitioner alleges trial counsel was ineffective for failing to fully prepare Antonio Gidron to testify as a witness, and the lack of preparation prejudiced Petitioner at trial. This allegation is without merit.

In support of this claim, Petitioner relies on *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1999), as analogous to the instant case. However, as Petitioner notes, this Court in *Bannister* addressed whether trial counsel was ineffective for failing to call a witness at trial. Here, it is without question that trial counsel located and prepared Gidron to testify at trial, and did in fact call him as a witness at trial. *Bannister* does not apply here. Petitioner's assertion that the inability of trial counsel to control and coach a hostile and uncooperative witness into a star performer on the witness stand should amount to the same level of ineffectiveness as failing to call a witness defies the rational bounds of reasonable performance set forth in *Strickland.*

Here, the record reflects trial counsel took reasonable steps to investigate, locate, and prepare Gidron as best he could, given Gidron's aversion to involvement in the case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel, especially when the allegation is supported only by mere speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Trial counsel explained that Gidron was extremely nervous to testify, which made him come across as a hostile witness. (App'x p. 1038, ll. 9-17). Furthermore, trial counsel had extreme difficulty locating Gidron, let alone communicating with him, and the record reflects even the solicitor was entirely unable to contact Gidron. (App'x p. 568; p. 1009). To complicate matters, trial counsel described how Gidron became combative when the private investigation came to subpoena Gidron, resulting in a physical altercation. Trial counsel noted that, despite Gidron's hostility, he was able to speak with Gidron on the phone the Friday prior to trial, adding it was the best he could do. (App'x p. 1009). Trial counsel also explained that Gidron's demeanor at trial was markedly different from his demeanor at the PCR hearing. Trial counsel testified Gidron's testimony at the PCR hearing was more on-point than at trial as Gidron was calm, cool, and collected at the PCR hearing. Trial Counsel noted he wished Gidron would have presented himself in that same fashion at trial. (App'x p. 1011).

It is clear trial counsel made reasonable and adequate efforts to effectively utilize Gidron as a witness at trial, despite Gidron's hostility which was no fault of trial counsel. Despite Gidron's demeanor, trial counsel was still able to elicit from Gidron that he never saw Petitioner leave the car and he did not want to see Petitioner "go down" for something he was "99% sure" Petitioner did not do. (App'x p. 564; p. 567). Furthermore, the fact that Gidron was more willing to cooperate with PCR counsel *five years* after Petitioner's trial, does not create a presumption that trial counsel

was ineffective. It is not incumbent upon trial counsel to ensure that a witness is likeable or completely at ease testifying during a murder trial. For these reasons, Petitioner has failed to satisfy his burden of proving trial counsel was deficient regarding the use of Gidron at trial.

Notwithstanding trial counsel's adequate performance regarding this allegation, Petitioner has also failed to satisfy his burden of showing prejudice from trial counsel's performance with Gidron. Although trial counsel stated he would have preferred the calmer demeanor of Gidron exhibited at the PCR hearing, Gidron's substantive testimony did not significantly deviate from his testimony at trial. Despite Gidron's lack of cooperation, he still testified at trial that the "rain of fire" came from Haggood, not Petitioner. (App'x p. 576-577). Gidron testified at the hearing that the shots he believe struck Lawton came from the road, which is consistent with his earlier trial testimony. (App'x p. 562). Clearly, the jury heard significantly similar testimony from Gidron at trial, but chose not to believe it. Accordingly, Petitioner failed to show any reasonable probability that trial counsel could have handled Gidron any differently to achieve a different outcome.

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

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

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

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

> "The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive ... We caution the bench, that hereafter only slight deviations from this charge will be tolerated."
>
> *Elmore*, 279 S.C. at 421.[2]

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

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

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

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

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

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

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

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

[*Conclusion and signature page to follow*]

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

SARA ELYSSA GUNTON
S.C. Bar No. 103525
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

November 27, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2019-000528

DAVID J. BENJAMIN, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

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

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

This 27th day of November, 2019.

Sara E. Gunton, AAG
Attorney for Respondent