

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Jan 28 2021**

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas  
Post Conviction Relief

S.C. SUPREME COURT

Honorable William H. Seals, Jr., Circuit Court Judge

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Appellate Case No.: 2020-000590

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Tamar Yaron Bryant,

Petitioner,

vs.

State of South Carolina

Respondent.

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PETITION FOR  
WRIT OF CERTIORARI

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ISSUE PRESENTED

- I. Whether the lower court erred in failing to grant a new trial due to 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.

## STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Georgetown County Clerk of Court. He was indicted during the May 2011 term of the Georgetown County Grand Jury for one count of murder (2011-GS-22-00495). App. p. 334. Petitioner was represented by Ronald W. Hazzard, Esquire. Respondent was represented by Erin Bailey, Esquire.

On September 2, 2012, Petitioner appeared before the Honorable Steven H. John for a hearing on defense counsel's motion for a mental health evaluation pursuant to *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981) and *M'Naughten's Case*, 8 Eng. Rep. 718 (1843). App. p. 337. After questioning Petitioner, Judge John denied counsel's request for a mental health evaluation. App. p. 342-343. At the close of the hearing, the court addressed bond being set and the scheduling of the case for trial. App. pp. 343-345.

On December 17, 2012, Petitioner appeared in front of the Honorable Benjamin H. Culbertson for a hearing on defense counsel's motion for bond reduction and a renewed request for mental health evaluations. App. p. 347. During the hearing, Judge Culbertson agreed with Judge John that there was not a need for a mental evaluation. App. p. 362. Then, he addressed the bond issue and the scheduling of the case for trial. At the conclusion of the hearing, Judge Culbertson set a surety bond with conditions. App. p. 371.

On March 18, 2013, Petitioner proceeded to trial in front of the Honorable Larry B. Hyman, Jr. and a jury. App. p. 1. On March 20, 2013, the jury returned a guilty verdict, and the Honorable Larry B. Hyman, Jr. sentenced Petitioner to a term of thirty-five (35) years. App. pp. 325, 331.

A timely Notice of Appeal was filed. The direct appeal was perfected by David Alexander, Esquire. The Brief of Appellant addressed the following issue:

Whether the trial court's refusal to order a mental competency examination was erroneous since it was based on an improper consideration, a mistake of fact and the State consented to the evaluation?

App. p. 373, 376. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an opinion filed on December 3, 2014. *State v. Bryant*, Op. No. 2014-UP-440 (S.C. Ct. App. filed on December 3, 2014); App. p. 418. The Remittitur was issued on December 19, 2014. App. p. 420.

An Application for Post Conviction Relief was filed on December 9, 2015. App. p. 421. The State submitted a Return on February 5, 2016. App. p. 428. Petitioner, through counsel, filed an Amendment on August 27, 2018, which alleged that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. App. p. 434. He also amended his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly advise Applicant regarding and utilize Applicant as a witness at the *Jackson v. Denno* hearing.
2. Ineffective assistance of trial counsel for the handling of the witness, Shaquetta Holmes.
3. 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).
4. Ineffective assistance of counsel for failure to enter an objection or exception to the Court's comments, specifically, but not limited to comments regarding searching for the truth to the jury.

5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, specifically, but not limited to:
  - a. The admissibility of Applicant's interrogation / confession.
6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

App. pp. 434-435.

An evidentiary hearing was convened on March 15, 2019 at the Georgetown County Courthouse in front of the Honorable William H. Seals, Jr. App. p. 436. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Johnny Ellis James, Jr., Assistant Attorney General. During the course of the evidentiary hearing, Petitioner testified and called Ronald W. Hazzard, Esquire, and David Alexander, Esquire, to testify. Petitioner introduced three exhibits. App. p. 502-503.

On December 5, 2019, an Order of Dismissal was issued and filed on December 20, 2019. App. p. 504. Petitioner timely submitted a Motion, pursuant to Rule 59, SCRCP, on January 28, 2020. App. p. 531. An Order denying Petitioner's motion was issued on March 6, 2020 and filed on March 9, 2020, from which this appeal follows. App. pp. 536-537.

## ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel 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." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989).

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18.

- I. The lower court erred in failing to grant a new trial due to 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.

By way of the Amendment and at the evidentiary hearing, Petitioner alleged that trial counsel was ineffective for failing to object and/or enter an exception to the inferred malice instruction for lacking the general permissive inference instruction. At trial, the court charged, in pertinent part, as follows:

Malice aforethought may be express or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist, that is either by direct evidence or by inference from the facts and the circumstances which are proved. Expressed malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished; for example, lying in wait for a person or any other acts of preparation going to show that the deed was in the Defendant's mind would be express malice. Malice may be inferred from conduct showing a total disregard for human life.

App. p. 316, ln. 18 – p. 317, ln. 5. As the record reflects, counsel did not object to this portion of the charge or enter an exception to the jury charge. App. pp. 316-317, 320.

An inferred malice charge has two components, the charge detailing the circumstances from which malice can be inferred and the general permissive malice instruction. The trial court's charge on murder lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice:

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.

*State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810, fn. 9 (2009). While *Belcher* deals specifically with a charge that permits the inference of malice from the use of a

deadly weapon, this Court has stated that all inferences should be accompanied by the general permissive inference instruction. *See State v. Mattison*, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) (“[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it”), *overruled on other grounds by Belcher*.

Dating back to 1983, in *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), this Court set forth a standard permissive inference charge to be used when instructing the jury on the inference of malice:

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.

After promulgating the standard charge, the following warning was issued: “We caution the bench, that hereafter only slight deviations from this charge will be tolerated.” *Id.*

In *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), this Court explained that *Elmore*’s first sentence constituted “[t]he standard implied malice charge” whereas the second sentence constituted “the general permissive inference instruction.” 385 S.C. at 612, 685 S.E.2d at 811, fn. 9. Since *Elmore*, South Carolina’s appellate courts have repeatedly instructed trial courts to give the general permissive inference charge when the standard implied malice instruction is given. *See State v. Lewellyn*, 281 S.C. 199, 201, 314 S.E.2d 326, 327 (1984) (“The trial bench is reminded that the proper charge on implied malice is that suggested in *Elmore*.”), *State v. Peterson*, 287 S.C. 244, 247, 335 S.E.2d 899, 802 (1985) (“The judge should make it clear to the jury that it is free to

accept or reject these permissive inferences depending on its view of the evidence.”); *Belcher*, 385 S.C. at 612, 685 S.E.2d at 811, fn. 9 (2009) (distinguishing the standard implied malice charge from the general permissive inference charge); *State v. Wilds*, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) (“In a charge to the jury, the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence.”).

Also, in *Belcher*, this Court concluded that the inference of malice from the use of a deadly weapon is a “half-truth” because “[o]ther facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of [malice’s] component parts” which “include the absence of justification, excuse and mitigation.” *Belcher*, 385 S.C. at 609-10, 685 S.E.2d at 808. Similarly, the blanket instruction that malice can be inferred from conduct that shows a total disregard for human life conveys a half-truth because there are circumstances where an individual would act in such a way with justification, excuse or mitigation. Accordingly, Petitioner submits the permissive inference instruction is required when the “total disregard” inference charge is given.

By way of the Order of Dismissal, the lower court erroneously determined:

The general permissive inference of malice portion of the *Elmore* is only necessary and required as part of a complete instruction on the inference of malice from the use of a deadly weapon, and there had never been any requirement to charge the language in a stand-alone fashion. The language of the *Elmore* charge is specifically tailored to deal with the perceived and real dangers in instructing the jury that inference may be inferred from the use of a deadly weapon, and represents a solution to then-recurring problem of jury instructions which provided for burden-shifting presumptions in violation of the United States Constitution. The second part of the *Elmore* charge serves as a cautionary restraint on the first part, and is of little instructional value standing alone. Standing alone, the instruction demanded would be confusing.

App. p. 524.

Contrary to the lower court's findings, Petitioner has not alleged that the instruction should have been given standing alone, but that it should have been given in conjunction with the instruction on the inference of malice. Interestingly, trial counsel did not dispute that the permissive inference instruction should have been given and acknowledged that he was aware of the case law addressed above while on the stand at the evidentiary hearing. App. pp. 454-455. Specifically, he testified: "I cannot think of why I didn't ask him for that further charge."<sup>1</sup> App. p. 455, ln. 9-10.

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016). Petitioner submits that the general permissive inference instruction should have been given during the murder charge when the trial court instructed the jury that "malice may also be inferred from conduct that shows a total disregard for human life." App. p. 317, lns. 4-5. At the evidentiary hearing, counsel did not make the erroneous legal conclusions made by the lower court and admitted that he had no reason for not requesting the charge. Therefore, Petitioner submits that the lower court erred when he failed to find that counsel was deficient when he did not enter an objection or exception when the trial court failed to give the complete and proper instruction to the jury.

Turning to the question of prejudice, the court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." *Gibson* at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice

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<sup>1</sup> The Order of Dismissal misstates this testimony as follows: "At the evidentiary hearing, Trial Counsel could not think of any reason to request any further jury instructions regarding the inference of malice." App. p. 524.

considered by the jury without the erroneous malice charge.” *Id.* Here, the lower court did not conduct the analysis set forth in *Gibson* but concluded:

The Court finds there is no reasonable probability the outcome of trial would have been different if only Counsel had requested, and the trial court had charged the jury with a naked general permissive inference instruction. Thus, Applicant cannot meet his burden of showing *Strickland* prejudice.

App. p. 525.

Regarding the evidence offered at trial, Deon Myers (victim) was shot and killed in a club called the Ghost Den in Plantersville on March 15, 2011. App. pp. 90, 97. As highlighted by defense counsel and addressed in the appellate brief, the State offered only three of the twenty people in the club as witnesses at trial, and each of the witnesses were inconsistent and had some family or longstanding connection to each other and the other parties involved.<sup>2</sup> Nevertheless, the three witnesses all agreed that Lavern Holmes (Lavern) came into the club with a shotgun threatening victim. From there the details were inconsistent, especially regarding Petitioner’s level of involvement and the witnesses’ ability to identify Petitioner as the one that shot victim in the club.

Terrell Myers testified he was working at the Ghost Den, and victim (his brother) came in with two females. App. p. 91. Twenty to twenty five minutes later, Lavern came in with a shotgun, went straight for his brother, his brother worked his way to the bathroom to get away, and Shaquettia Holmes broke it all up. App. pp. 91-92. As his brother was leaving the bathroom and was midway through the club, a short guy with a

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<sup>2</sup> The three witnesses were Shaquettia Holmes, Cameron Green and Terrell Myers. As came out at trial and was addressed in the appellate brief, Terrell Myers worked at the club and had known Lavern Holmes his entire life. App. pp. 90-91. Terrell’s cousin (Kawaun Myers) was with Lavern, he was related to Cameron Green and victim was Terrell’s brother. App. pp. 90-91, 102-103, 128. Shaquettia Holmes was Lavern’s niece and she said she had grown up with Cameron Green. App. pp. 128-129. Cameron Green believed he was but could not say exactly how he was related to Lavern Holmes and Kawaun Meyers. App. p. 156-157.

red bandana covering his face entered the club with a handgun and shot his brother. App. pp. 92-93.

On cross-examination, he testified that the person that shot his brother came in two to three minutes after Lavern.<sup>3</sup> App. pp. 106-107. He also testified that Lavern drew a shotgun at his brother and that Shaquettia stopped Lavern prior to his brother entering the bathroom. App. p. 107-108. When asked again, he explained Lavern had his gun aimed in the bathroom towards his brother, Shaquettia broke it up, and she escorted him out before the second person came in the club. App. p. 108-9, 113-15. He testified that he did not speak with law enforcement that night, but they came to his house the next day. App. pp. 115-116. He testified that he did not provide law enforcement with any information or give a recorded statement. App. p. 116.

Shaquettia Holmes testified that she was at the club with friends and described what happened as follows:

What happened from the incident that happened in the club to my knowledge is whenever my uncle came in the club he did have a big gun, and with him having the gun I was at the bar. With me being at the bar I felt as though I wasn't going to sit there and just let him do nothing stupid. So I went in the bathroom behind him and told him he need to leave him alone and go. So me telling him that, he left, but with him leaving Tamar came in the bathroom.

App. p. 123, lns. 6-13. Later, she added that when Petitioner came in she told him "that they had guns." App. p. 124, lns. 9-14. In explaining what happened next in the bathroom area, she testified:

Okay, with my uncle leaving out Tamar came in, with him coming in he was saying Deon was good, I was telling Deon no because he didn't have a gun and they had guns and he was like "Yeah, he good," let him go see what they talking about. He insisted on leaving. With him leaving before

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<sup>3</sup> On redirect and recross, he testified that three minutes was a guess. App. pp. 118-119.

he got to the front door, with Tamar leaving out first and before Deon got to the door whatever happened with the gunshot that's what.

App. p. 125, ln. 17-25. When asked if she knew where Petitioner was when she heard the gunshot, she responded: "No, because he left out first." App. p. 126, lns. 17-19.

On cross-examination, she added that Cameron Green entered the club with Lavern Holmes. App. p. 128. She also recalled Lavern Holmes yelling something about victim threatening to kill his family, victim responding that he did not know what he was talking about and that she was able to get her uncle to "leave him alone and that was that." App. p. 130, lns. 18-24. She detailed that there were five people in the bathroom, which included victim, two girls, Lavern Holmes and herself, when her uncle was threatening victim with his shotgun. App. pp. 134-135. She recalled her uncle leaving first, followed by the two girls before Petitioner entered the bathroom. App. p. 135. She stated that she did not walk her uncle out of the club, but she left the bathroom after victim but he did not get to the door before he was shot. App. pp. 135-136. She could not recall how many shots she heard. App. p. 137. She explained that when she was on the phone with 911 "all I could think was it was my uncle that shot him." App. p. 138, lns. 17-20.

When Cameron Green took the stand, he recounted meeting up with Kawaun Meyers at his house and riding to a gas station. App. p. 143. He further recounted Kawaun telling him about an incident earlier in the day when victim had pulled a gun on Lavern Holmes. App. p. 148. Later, he met up with Lavern, and Lavern was not comfortable staying in Plantersville because of the incident with victim. App. p. 149. So, they went to Georgetown and met up with Petitioner and Brandon Cheeks. App. p. 149.

After Lavern told Petitioner and Brandon about the incident with victim, a twenty-two revolver was brought out by one of the two. App. p. 150.

He told them about a party in his neighborhood in Plantersville, and they wanted to go. App. p. 150. On their way, they went by Petitioner's family member's house, and Petitioner retrieved a shotgun. App. pp. 150-151. They stopped at a gas station, and they went to the Ghost Den club. App. p. 151. After arriving, he did not know where Petitioner and Brandon were, but he went to the door with Lavern. App. p. 152. He did not go in with Lavern since he chose to wait fifteen minutes for there to be no charge to go in the club. App. p. 152. While he was talking to a neighbor outside the club, he noticed a lot of commotion. App. p. 153. He recalled what happened next, as follows:

Well, as people was running out the club I was looking for, I was searching for Lavern Holmes, but I notice some people were still in the club and some people ran out, but I didn't know where he was at. So I went to the car. Kawaun Myers was still at the car when I went there and Tamar and Brandon they came before Lavern and he came last. As Lavern was coming to the car, he let off a shot with the shotgun. I don't know who had the 22 revolver at that time, and then we left.

App. p. 153, lns. 15-23.

When asked about what happened in the car before everyone was dropped off, he testified:

We was leaving the community or whatever and Lavern Holmes and Tamar was getting – they wasn't really an argument, but Lavern kept questioning him why he shot him, why he shot him, and Tamar apologized for just doing it, he said, he said, "My bad," but he couldn't explain exactly why he did it. He said he didn't know why he did it.

App. p. 154, lns. 2-7. He later characterized the shooting as an "accident." App. p. 155, lns. 7-12. On cross-examination, he was asked about the multiple stories he told law enforcement and the changes to his story on the stand. App. pp. 160-174. When asked

why he lied to police, he responded: “At that time I didn’t want to implicate anybody in the accident. I just wanted to clear my name.” App. p. 160.

At trial, Petitioner did not testify, but his recorded interrogation was introduced during the testimony of Investigator James Busbee.<sup>4</sup> App. p. 199. During Investigator Busbee’s testimony, he explained that he arrested Petitioner at 3:30 a.m., so they had to wait outside the building for his supervisor to arrive from thirty minutes away and let them in. App. pp. 194-195. During their conversation outside, he recounted how Petitioner informed him that he did not shoot the victim. App. pp. 104-195. He further recounted how Petitioner’s story evolved into the information he obtained during the recorded interrogation. App. p. 195-196. On cross-examination, he admitted that he could not verify information given by Petitioner in his recorded interrogation. He also agreed that the first statement Petitioner made to him before and after arrest was “I didn’t shoot that guy.” App. p. 202, lns. 16-23.

During closing argument, the State attempted to explain away “all the little details” that defense counsel pushed the State’s witnesses on that were inconsistent. App. pp. 283-284. The State explained how the scene was chaotic and summarized: “[P]eople are screaming gun, everybody’s ducking behind – about 20 people in this tiny little club, they’re running every which way, ducking behind the bar. There’s two guns, there’s a big gun, people are yelling, it’s chaos and everybody’s memory of exactly how it happened and timeframe is a little bit different...” App. p. 283, lns. 19-25. As the State conceded, the scene was not one in which any form of express malice was evident between

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<sup>4</sup> It must be noted that Petitioner raised issues and offered testimony regarding the suppression of his statement and the fallacy of his statement at both the trial and post conviction relief level.

Petitioner and victim, but it was a chaotic shooting in a “tiny little club.” App. p. 283. Ins. 19-25.

In closing argument, the State also argued that the jury should find evidence of malice due to Petitioner’s statements about victim during his police interrogation and the State urged the jury to ignore defense counsel’s position that Petitioner’s statement was false. App. p. 281, App. p. 285, In. 9 – p. 286, In. 7. After arguing that Petitioner’s words during his interrogation amounted to malice, the State also argued that Petitioner’s actions of cocking and firing the gun amounted to malice. App. p. 286. Specifically, the state argued: “With the gun already cocked, he pulls it out and he fires. That is malice. That is hatred. That is ill will.” App. p. 286, Ins. 21-22.

Shaquetta Holmes 911 call reporting that her uncle Lavern Holmes committed the shooting is highly demonstrative that Lavern Holmes was the individual who may have exhibited and/or harbored express malice towards the victim, but the express malice of Petitioner’s alleged accomplice was not addressed by the lower court. Petitioner submits that any express malice attributable to Lavern Holmes is not sufficient to tip the prejudice scale in the favor of not granting relief.

Under the facts of the *Gibson* case, the jury was also charged under the theory of accomplice liability during Gibson’s joint trial with his brother Adams. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016). As the record and decision address, Gibson’s brother was the individual that was originally at the location before Gibson’s arrival, was engaged in the original aggression with the victim’s group inside the club and was involved in a fight when Gibson admittedly shot his gun in the parking lot. *Gibson*, 416 S.C. 260, 262, 266-266, 786 S.E.2d 121, 122, 124. Interestingly, not only did the Court

grant relief in *Gibson*, without discussion of the implications of accomplice liability evidence, the Court also denied certiorari and upheld the relief granted to co-defendant Adams Gibson on the exact same *Elmore* issue. *Gibson*, 416 S.C. 260, 786 S.E.2d 121, fn. 1. Even though not addressed by the lower court as a basis for denial of relief, Petitioner submits a denial of relief due to evidence of express malice under the accomplice liability theory would be erroneous.

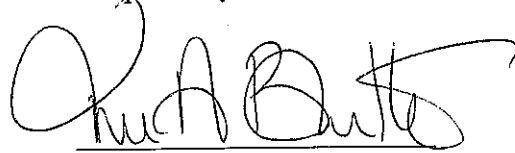
It is clear from the evidence and the State's argument that the evidence the State offered in support of a conviction was based upon inferred (implied) malice, which directly demonstrates the prejudice of the erroneous instruction. As addressed above, Lavern Holmes was the only party that the witnesses consistently testified had expressed ill will towards victim resulting from a prior confrontation that resulted in an argument and chasing after him with a shotgun. If the inconsistent evidence is believable, at most Petitioner shot a weapon in a club, which forms a total disregard for human life, which is inferred not express malice.

As a result, Petitioner urges this Court to find that the improper malice instruction contributed to the jury's verdict in light of the evidence presented. Petitioner urges this Court to find that Petitioner has satisfied both prongs of the *Strickland* analysis, and a new trial is warranted. Therefore, Petitioner would respectfully ask this Court to reverse the denial by the lower court and grant a new trial.

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court to grant certiorari, allow briefing of the issues addressed herein, and/or reverse the denial of post conviction relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

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