

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CALHOUN COUNTY  
Court of Common Pleas  
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2019-000528

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David Jamar Benjamin,

Petitioner,

vs.

State of South Carolina

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Respondent.

PETITION FOR  
WRIT OF CERTIORARI

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RECEIVED

JUN 28 2019

S.C. SUPREME COURT

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## 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).

## 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 Calhoun County Clerk of Court. He was indicted during the February 2013 term of the Calhoun County Grand Jury for one count of murder (2013-GS-09-0051) and two counts of attempted murder (2013-GS-09-0052, 0053).

On March 4, 2013, Petitioner proceeded to trial in front of the Honorable Diane S. Goodstein and a jury. He was represented by Nicholas Thomas, Esquire. On March 7, 2013, the jury returned a verdict of guilty on all charges, and the Honorable Diane S. Goodstein sentenced Petitioner to a term of forty (40) years for murder and concurrent terms of thirty (30) years for each count of attempted murder.

A timely Notice of Appeal was filed. The direct appeal was perfected by Wendy Keefer, Esquire, James Lee Goldsmith, Esquire, and Robert L. Sirianni, Jr., Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an opinion filed on December 16, 2015. State v. Benjamin, Op. No. 2015-UP-554 (S.C. Ct.

App. 2015). On December 21, 2015, a Petition for Rehearing was filed, which was denied on January 20, 2016. The Remittitur was issued on May 27, 2016.

An Application for Post Conviction Relief was filed on April 20, 2016. The State filed a Return and Motion for More Definite Statement on or about January 18, 2017. Petitioner, through counsel, filed an Amendment on June 18, 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. He also amended his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial counsel:

1. Ineffective assistance of trial counsel for failure to fully and properly advise and advocate for Applicant prior to the rejection of the fifteen year plea offer. Transcript pp. 12-18.
2. Ineffective assistance of trial counsel for 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.
3. Ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense.
4. 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).
5. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

An evidentiary hearing was convened on July 12, 2018 at the Dorchester County Courthouse in front of the Honorable Robin B. Stilwell. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. During the course of the evidentiary hearing,

Petitioner testified and called Antonio “Tony” Gidron, Robert Tressell, Pete Skidmore, and Nicholas Thomas, Esquire, to the stand. Respondent also called Nicholas Thomas, Esquire, to the stand.

At the conclusion of the evidentiary hearing, the court requested proposed Orders and allowed time for the parties to obtain the evidentiary hearing transcript. In accordance with the court’s instructions, proposed Orders were submitted by both parties. On February 1, 2019, an Order of Dismissal was issued. Petitioner timely submitted a Motion, pursuant to Rule 59, SCRPC, on April 14, 2019. An Order denying Petitioner’s motion was issued on February 26, 2019, from which this appeal follows.

#### 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 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.

- A. Summary of the Evidentiary Hearing Testimony

1. Robert Tressell

At the evidentiary hearing, Robert Tressell was qualified as an expert in the area of homicide investigation and crime scene reconstruction. App. p. 924. He detailed his familiarity over the last forty years with Kelly Fite, the defense expert at trial, and he explained that he became involved in Petitioner's PCR case at the recommendation of Mr. Fite, who is now retired. App. pp. 924-5. He acknowledged that he had reviewed Mr. Fite's testimony, along with all the discovery files. App. pp. 925-6. He detailed going to the South Carolina Court of Appeals, Calhoun County Clerk of Court's Office and Calhoun County Sheriff's Department to review evidence and exhibits. He explained that he wanted to see the diagram utilized at trial, but he found it "not very helpful." App. p. 927, ins. 7-17, p. 949. He further explained there was a "somewhat better" diagram in the discovery, but it was copied in black and white despite indicating it was color coded.

App. pp. 927-28. While at the Calhoun County Sheriff's Department a color copy was requested, but it had not been produced prior to the evidentiary hearing. App. p. 928.

He recounted his interaction with Tony Gidron, defense trial witness, that included going to the scene. App. pp. 928-932. He detailed how Mr. Gidron walked him through the scene while conveying his eyewitness account. He deemed Mr. Gidron helpful in showing him where people and vehicles were located. App. pp. 929-30, 971. Mr. Gidron depicted his vantage point to him, and he recalled Mr. Gidron being adamant that "the gunshots that was fired when Mr. Lawton fell came from the roadway," not from the direction of Petitioner. App. p. 930. He agreed that he would have been willing to assist Petitioner prior to trial, and he opined that it would have been vital to meet with Mr. Gidron at the scene prior to trial. App. p. 931.

At to his expert work and findings, he explained that he was unable to produce a diagram or reconstruct the scene since there were no measurements or proper documentation taken at the scene during the original investigation. App. pp. 933, 937, 963, 970-71. He further opined that that investigation fell "well below the standards for a murder investigation." App. p. 934, Ins. 17-20. In detail, he explained how he reached that conclusion. App. pp. 934-37, 943.

Despite the below standard investigation, he was able to determine that there were at least five firearms used at the scene, but he was unable to determine from the investigation which was fired first. App. p. 933. He was also able to ascertain the caliber of the weapons that left behind ballistic evidence and/or were recovered. App. pp. 938-39. After taking measurements at the scene and reviewing the discovery, he attempted to determine which of the weapons could have caused the injury to Mr. Lawton. App. p.

940. He detailed how he reached his expert opinion that of the weapons known to be at the scene the .40 caliber weapon most likely fired the fatal shot.<sup>1</sup> He stated:

So if I had to pick a weapon fired at a distance of in excess of 60 feet that could go through the hardest bone in the body and then exit the second hardest bone at the back of the head, it would be the .40 caliber. I don't believe the .45 would penetrate all the way through."

App. p. 941, ins. 1-6. He specifically opined that the .45 caliber weapon attributed to Petitioner by trial witness Hampton would not have caused the fatal injury to Mr.

Lawton. App. p. 941, p. 953, ins. 9-18. He further opined that Mr. Hampton's testimony was contradicted by the ballistics evidence that was recovered at the scene. App. p. 942.

Regarding Mr. Haggood's testimony that Petitioner fired two shots while running, Mr. Tressell opined that no forensic evidence substantiated or corroborated Mr. Haggood's testimony. App. pp. 953-54.

Finally, Mr. Tressell addressed the trial testimony of Kelly Fite. Having already explained that he had worked with Mr. Fite on cases during his career, he acknowledged that Mr. Fite was qualified at the trial in a very similar area in which he was qualified at the evidentiary hearing. App. p. 945. Mr. Tressell addressed the testimony offered by Mr. Fite on touch DNA, Mr. Fite's concession that he had not reviewed the DNA report prior to cross examination, and Mr. Fite's concession that the testing he was proposing should have been done was actually done in the case. App. pp. 544-45, 548-49, 945-46. He acknowledged Mr. Fite's testimony on cross and redirect that touched on the caliber of bullet that could penetrate the victim's skull, and Mr. Fite's concession that a .45 caliber could penetrate a skull. App. pp. 947-48. In response, he raised concern with Mr. Fite's

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<sup>1</sup> Mr. Tressell also discussed his findings regarding the 9mm projectiles found at the scene. App. p. 944.

testimony since he did not address the proper distance and opined it was “very unlikely” at the distance involved. App. p. 948, lns. 4-21.

## 2. Peter Skidmore

When Peter Skidmore took the stand, he detailed his background and work history as a licensed investigator in North and South Carolina for twenty-five years. App. 973. He recounted being contacted by counsel and being retained to work on Petitioner’s case. PCR p. 104. He detailed his work on the case, which included reviewing the evidence at the South Carolina Court of Appeals, Calhoun County Clerk and Sheriff’s Office, working with Robert Tressell, locating and interviewing Tony Gidron and visiting the scene with Petitioner’s counsel, Robert Tressell and Tony Gidron. App. pp. 974, 978-9.

Regarding the discovery, he noted that there was not a thorough investigation conducted on the witnesses at the scene. App. p. 975. He explained that there were seven witnesses listed in discovery but no corresponding witness statements. App. p. 975. Beyond Mr. Gidron and Mr. Haggood, he was unable to locate any additional eyewitnesses listed in the discovery. App. pp. 975-78. He addressed how Mr. Gidron would have been an asset prior to trial in locating additional witnesses. App. pp. 977-78.

As to Mr. Gidron, he explained his understanding of Mr. Gidron’s negative experience with trial counsel’s investigator. App. p. 989. He further explained how he approached Mr. Gidron and advised counsel on how to as well. App. pp. 976, 988-89.

He also explained how Mr. Gidron’s interviews and time at the scene would have opened up the door to an investigation into a third party guilt claim involving the shot he saw coming from the road. App. pp. 977-79, 982-83. He agreed that the diagram used at

trial was inaccurate and explained how he could have been utilized to properly depict the scene as it appeared at the time of trial.<sup>2</sup> App. pp. 976, 981, 987.

### 3. Tony Gidron

When Tony Gidron took the stand, he explained that he was present on the night in question and testified at trial. He agreed with his trial testimony that he was very good friends with the victim's brother and friends with Petitioner. App. p. 882. He explained that he was closer to the victim's brother than Petitioner. App. p. 913. Turning to the night in question, he described the scene as chaotic, and reiterated his trial testimony that the investigation was poorly handled.

Regarding his interaction with counsel or an investigator prior to trial, he recalled a guy popping up on his doorstep before trial and then just having to take the stand. App. p. 881. He also recalled going to the scene with a guy he did not know before trial. App. pp. 881-83. He acknowledged that he went to the scene with counsel, Pete Skidmore and Robert Tressell prior to the evidentiary hearing and walked them through the scene. App. pp. 886, 901. When shown the diagram utilized at trial, he indicated that he was not given any visual aids at trial, and he attempted to explain the scene and the inaccuracies in the trial diagram. App. pp. 887-890. When trying to utilize the diagram from trial, he concluded: "I just can't get it right." App. p. 899.

Turning to his trial testimony, he affirmed it, and he reiterated that he did not see Petitioner with a gun and saw him keeping to himself. App. pp. 882-83. When asked, he further explained his eyewitness account from start to finish. App. pp. 882-897. He explained that he was nervous at trial and clarified what he meant when he testified that

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<sup>2</sup> Mr. Skidmore also detailed attending the meeting at the Sheriff's Office where a color diagram was requested and not provided with the explanation that the retired lead investigator had files in his garage, which greatly concerned him. App. p. 980.

victim appeared on a hook, and he added that he saw victim fall back with a gun in his hand. App. pp. 891-93.

On cross-examination, he agreed that he testified that the victim had a gun in his waistband, but he explained that he did not testify about the gun in victim's hand since he was not directly asked, was nervous, and he had not gone through his eyewitness account before trial. App. pp. 904-905. When asked on cross-examination about whether Petitioner shot the victim, he responded: "I know he didn't." App. p. 910, ln. 24 – p. 911, ln. 8. He further testified that from his vantage point no one at the vehicle with Petitioner could have shot victim. App. p. 911, lns. 4-8. He explained that the gunfire that killed victim came from a person standing behind a tree near the road. App. pp. 894-895.

#### 4. Nicholas Thomas, Esquire

When called to the stand at the evidentiary hearing, Mr. Thomas was asked about his utilization of Kelly Fite as an expert. He explained that he received a referral from several lawyers and reached out to Mr. Fite. App. pp. 1003-4. He copied and mailed a hard copy of the discovery to Mr. Fite, which he admitted contradicted Mr. Fite's trial testimony. App. pp. 1004-5. He exchanged a couple of emails with Mr. Fite about the theory he expected the State to pursue, but they did not discuss anything in great detail. App. pp. 1004-5.

When asked about his decision to utilize Mr. Fite at trial, he recalled having reservations about using Mr. Fite. App. p. 1006. He further explained:

And if I – if I had a regret, I don't think I would've used Mr. Fite, especially knowing how poorly his testimony went in my case. And I know he's – he's heralded by all, did such a great job. I – I don't know if it's because he was close to his retirement at that point. I know he was coming from a case in Fulton County.

You know, I would've much preferred the witness that was presented earlier today.

App. p. 1007, lns. 3-10.<sup>3</sup>

Regarding his closing, he remembered barely wanting to “touch on him” since his testimony was not beneficial. App. p. 1008, lns. 7-10. He also remembered initially planning to utilize him for crime scene reconstruction, but he did not go to the scene or speak with any witnesses, including Mr. Gidron. App. pp. 1008-9. When asked about Mr. Fite's answer at trial that he had not been asked to review the discovery or reconstruct the crime scene, Mr. Thomas responded that he wished he would have “asked him in – in precise detail what I wanted him to do.” App. p. 551, p. 1011, ln. 20 – p. 1012, ln. 17.

While discussing Kelly Fite, Mr. Thomas explained it was difficult to secure Mr. Gidron and the service of his subpoena resulted in an altercation with his investigator. App. p. 1009. He went to the scene himself, but he never went with Mr. Gidron. He admitted that he would have wanted Mr. Gidron to interact with an investigator and expert as was done prior to the evidentiary hearing. App. p. 1013. From the time he got notice of trial, the best he remembered being able to do was speak with Mr. Gidron on the phone twice on the Friday before trial. App. p. 1009.

On cross-examination by Respondent, Mr. Thomas was asked why he thought Mr. Gidron was not a good witness at trial. App. p. 1038, lns. 7-8. He responded that Mr. Gidron's nervousness on the stand came across as hostility. App. p. 1038, lns. 7-17. He noted the contributing factors he identified were Mr. Gidron's negative interaction with his investigator and his own failure to communicate to Mr. Gidron that he would be

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<sup>3</sup> When asked about his closing argument that Mr. Haggood was a liar, he responded that it would have been helpful to have an expert testify that it was more likely that the .45 that Mr. Haggood admitted shooting caused the fatal injury to the victim. App. p. 1013, lns. 5-14.

needed in court to testify. App. p. 1038. He stated: “It’s just unfortunate that his persona on the stand came off – in a cloud of negativity.” App. p. 1039, Ins. 8-9. After being interrupted, he further stated: “Because he was my most important witness. And to me, he was more important than Kelly Fite.” App. p. 1039, Ins. 11-12. He also explained that based upon a conversation with a juror after trial, he realized he should have prepared with Mr. Gidron better and located him earlier. App. p. 1040.

Regarding Mr. Gidron’s trial and evidentiary hearing testimony, Mr. Thomas concluded that he had no reason to question his veracity and found him very believable. App. p. 1010. Yet, he opined that the jury did not find him believable. App. p. 1048, Ins. 8-15. When asked about Mr. Gidron’s evidentiary hearing testimony, he concluded:

His presentation today was much more on-point. He was calm, cool, and collected today, even though he did – did describe being nervous. I wish he would’ve presented himself in the same fashion at trial.

App. p. 1011, Ins. 9-12.

Regarding the diagram and the scene, he acknowledged that the diagram was “poorly drawn,” but he explained that he had his own pictures of the scene that he wanted on poster board for closing argument. App. pp. 1017-18. Unfortunately, he did not have enough time prior to closing argument to get them completed. App. pp. 1017-18. He admitted it was his first murder trial, and he learned that you need to be prepared and not expect a break before closing. App. pp. 1017-19. He readily admitted that “it most certainly hurt my closing.” App. p. 1019, Ins. 20-21.

#### 5. David Benjamin (Petitioner)

When Petitioner took the stand, he acknowledged that he was aware that counsel was utilizing the expert services of Kelly Fite to address the investigation, crime scene

and ballistics. App. pp. 1059-60. He explained that he understood part of the defense strategy to be attacking the poor investigation and chaotic crime scene. App. pp. 1060-61. When asked about the work and testimony of Robert Tressell, he was adamant that he would have wanted an expert utilized in his capacity prior to and at trial because Mr. Tressell's testimony helped support his defense. App. pp. 1060-62.

Regarding Mr. Gidron, Petitioner explained that he provided Mr. Gidron's name to counsel prior to trial. App. p. 1063. When asked if he was aware of the hostility counsel described with Mr. Gidron, he recalled counsel telling him that counsel's investigator had a "little altercation" with Mr. Gidron, but that was all. App. p. 1063, Ins. 12-20. He agreed that he wanted Mr. Gidron's utilized at trial in the capacity he was prior to and at the evidentiary hearing. App. pp. 1063-64.

#### B. Discussion

At trial, the defense called Kelly Fite and Tony Gidron. App. pp. 542-582. In summary, Kelly Fite was called to the stand and qualified in the area of "firearms examination and homicide crime scene investigation and crime scene reconstruction." App. p. 544, Ins. 1-7. Thereafter, he explained how DNA is collected from ballistics evidence and addressed the circumference of a .45 caliber round, which was the caliber of the weapon attributed to Petitioner. App. pp. 544-6.

On cross-examination, he was questioned about reviewing "some of the discovery," and he agreed with the Solicitor that you need to review "everything you can get." App. p. 547, Ins. 9-20. He was provided the DNA report and admitted he had not reviewed the DNA results. App. p. 548. He further admitted that the report showed that

the ballistics evidence had been tested for DNA, as he previously testified should have been done. App. pp. 548-9.

On redirect, he was briefly asked about the entry and exit impact of a .45 caliber round. App. pp. 552-3. On recross, he stated: "...you don't expect a large caliber hollow point bullet to penetrate a person's head, but it does happen." App. p. 554.

Following Kelly Fite, Tony Gidron was called to the stand. He explained that he was close friends with the victim's brother and the victim's nickname was "killa." App. p. 557. He also explained that he had known Petitioner since sixth grade. App. p. 557.

He provided information about the club and the type of situations/people that frequent it. App. pp. 560-61. He also provided his account of the night in question, which included details regarding his interaction with Petitioner and victim, his knowledge that victim had a gun, and his attempt to get Petitioner and his friends out of the club safely and to their car. App. pp. 558-65. He explained how the car was stuck and the shooting he had witnessed. App. pp. 562-65. He detailed how he was trying to get the car out when the gunfire went off "from here" and he was ninety nine percent sure he saw victim get hit. App. p. 562, ln. 10 – p. 563, ln. 6. He was asked if he saw Petitioner shoot him, and he responded no and explained what he saw Petitioner doing. App. p. 563, lns. 7-19. He explained his vantage point and how he was able to see both Petitioner and victim when victim was shot. App. p. 564, lns. 6-18. He stated that he did not see Petitioner point a gun at victim and that he saw shots from the road. App. p. 564.

He recalled when law enforcement arrived, and he provided his opinion that the scene was "handled poorly" by law enforcement. App. p. 566, lns. 5-9. When asked if he

spoke with investigators, he recalled speaking with “someone.” App. p. 566, Ins. 17-19. He said that he did not want to testify, but he had to do the right thing. App. pp. 566-67.

By way of his Amendment, Petitioner alleged: 1) Ineffective assistance of trial counsel for 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; and 2) Ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense. As was argued by Petitioner via proposed Order and filed motion, these issues are so interrelated it is necessary to address these allegations as one. Therefore, Petitioner submits that the lower court erred in failing to find that the proper utilization of Mr. Tidron and an expert was absent from Petitioner’s trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense.

Obviously, Tony Tidron was called at trial, along with expert Kelly Fite, but trial counsel was deficient in calling Mr. Tidron without proper preparation and without the proper utilization of an expert. At the evidentiary hearing, Petitioner carried his burden and demonstrated how Mr. Tidron should have been utilized in conjunction with an expert with the qualifications of Mr. Tressell or Mr. Fite. Additionally, at trial the state exposed how Mr. Fite should have been properly utilized and turned his testimony into a glaring weakness for the defense, as was explained by counsel at the evidentiary hearing.

Even though, Mr. Tidron was called at trial, Petitioner submits the instant case is analogous to Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), wherein this Court addressed whether trial counsel was ineffective for failing to call a witness at trial. This Court reasoned as follows:

This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in

accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, S.C. at 498-99, S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809.

Here, Petitioner called Mr. Gidron to the stand and carried his burden in demonstrating how counsel was deficient in his utilization of Mr. Gidron prior to and during trial. While on the stand at the evidentiary hearing, Mr. Gidron reiterated his trial testimony, but he provided additional testimony and explanation of the scene, addressed above, that was tantamount to Petitioner's defense. Notably, he placed a gun in the victim's hand when he was shot, provided further detail of the scene and provided explicit detail of seeing the fatal shot come from the roadway at the same time he saw Petitioner without a gun in hand. He, along with trial counsel and Mr. Skidmore, addressed the way he was not properly prepared prior to trial, and counsel explained how his nervousness on the stand came across as hostility. Trial counsel said that Mr. Gidron was the most important witness and he came across in a cloud of negativity due to his encounter with counsel's investigator and lack of preparation with counsel, which was

affirmed by a juror. Counsel further explained how Mr. Gidron's demeanor and testimony was different, in a positive way, at the evidentiary hearing.

At the evidentiary hearing, Mr. Gidron also addressed his concern with the investigation, which was further explored by Mr. Skidmore and Mr. Tressell. Regarding the diagram provided to the jury, he found it to be inaccurate and struggled to utilize it to explain the scene. Mr. Tressell also explained how the diagram was not helpful but how vital it was to go to scene with Mr. Gidron. Mr. Tressell also provided his opinions, which were absent from the testimony of Mr. Fite at trial. Petitioner submits that his expert opinions would have aided the defense to the point that outcome of his trial cannot be relied upon as having produced a just result.

In McKnight v. State, 661 S.E.2d 354, 378 S.C. 33 (S.C. 2008), McKnight argued that counsel was ineffective in calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense. In granting relief, this Court addressed counsel's decision to not utilize a defense expert utilized in McKnight's first trial and to call an expert that essentially bolstered the State's theory of the case. This Court noted:

This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation." See Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (quoting Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). Although we accept counsel's assertion that she was pressed for time in preparing for the second trial, in light of counsel's familiarity with the first trial and the relative ease with which counsel could have procured favorable expert testimony at the second trial, we conclude that counsel's decision to call Dr. Conradi alone to testify at the second trial was unreasonable. See Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding ineffective assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case).

Id. at 359.

This Court further reasoned:

In our opinion, counsel's two-fold error in calling an expert witness whose testimony was known to have previously been used to bolster the State's case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available, represents counsel's inadequate preparation for trial rather than a valid trial strategy. Accordingly, we find that counsel's performance in this regard was deficient. Because we further find that this deficient performance prejudiced McKnight's case, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.

Id. at 360.

In the instant case, the record is absent of evidence of reasonable professional judgment exercised by counsel that limited his investigation and utilization of Mr. Fite. At trial, Mr. Fite told the jury that he was not provided the complete discovery and his expert testimony was rendered moot when he admitted the testing he was addressing had been attempted, as reported in discovery he had not reviewed. At the evidentiary hearing, counsel readily admitted that he did not properly communicate with Mr. Fite prior to trial, he should have asked him to go to the scene, he knew he should not have put him on the stand, and he tried to mention him as little as possible in closing argument. As a result, it is incredulous that the lower court found counsel's decision to utilize Mr. Fite in the capacity he did prior to and during trial amounts to a valid strategic decision. At the evidentiary hearing, counsel made it clear that he would have much preferred the testimony of Mr. Tressell at trial. Based upon the record and the above, Petitioner submits there is ample evidence of prejudice.

In sum, trial counsel called Kelly Fite, an expert with the qualifications who could have done the expert work Mr. Tressell conducted and Mr. Gidron at trial, but, as counsel

admitted, Mr. Fite offered regrettably poor testimony and Mr. Gidron was hostile and not believed by the jury. Mr. Fite and Mr. Gidron were Petitioner's only witnesses and counsel admittedly tried to avoid even mentioning Mr. Fite in closing, a closing for which he failed to complete his exhibits of the scene. As counsel stated, he should have had an expert at trial testify in the capacity Mr. Tressell did at the evidentiary hearing, yet somehow the lower court ignored this clear admission of ineffective assistance.

Therefore, Petitioner urges this Court to find that the proper utilization of Mr. Gidron and an expert was absent from trial, which amounts to deficiency in the presentation and preparation of the defense. As a result of this deficiency, Petitioner was clearly prejudiced and a new trial is warranted, wherein a jury could hear from a properly utilized witness and expert as was demonstrated at the evidentiary hearing. The testimony offered at the evidentiary hearing could amount to a viable defense in the eyes of a jury considering the above discussion. Mr. Tressell and Mr. Gidron's testimony regarding the caliber of the bullet and location of the shooter, in conjunction with testimony calling the investigation into question and accuracy of the testimony provided by the State, call the performance of counsel and the outcome of the trial into unavoidable question. In sum, Mr. Gidron and an expert were not properly utilized at trial and this prejudicial deficiency requires a new trial. Therefore, Petitioner has met both prongs of the Strickland analysis, and the lower court must be reversed.

- II. 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).

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. 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 means 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 other acts of preparation going to show that the deed was within the defendant's mind would be expressed malice.

Malice may be inferred from conduct showing a total disregard for human life.

Now, we have talked about murder, the unlawful killing of another person with malice aforethought. We have talked about murder.

App. p. 683, ln. 15 – p. 684, ln. 7.

An inferred malice charge has two components, the charge detailing the circumstances from which malice can be inferred and the general permissive malice instruction. In State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), the South Carolina Supreme 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.”).

Here, 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.

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, the permissive inference instruction is required when the “total disregard” inference charge is given.

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. 684, lns. 3-4. At the evidentiary hearing, counsel admitted he should have objected, and he added that wished he had objected to it. PCR

App. p. 121, lns. 9-12. The record makes it clear 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.

By way of the Order of Dismissal, the lower court found that the instant case is distinguishable from Gibson since the court added the permissive inference language when charging the jury on attempted murder. App. p. 689, lns. 3-11. In support of this finding, the court reasoned: “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). App. p. 1104. Petitioner submits that this reasoning is an error of law since the murder charge, when read as a whole omits the permissive inference language required under Elmore and Gibson. Here, the later addition under a separate charge, involving separate victims and evidence, does not cure the incomplete malice instruction given during the murder charge, which was in violation of Elmore and its progeny.<sup>4</sup>

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 considered by the jury without the erroneous malice charge.” Id.

At trial, the State offered testimony that established that Petitioner’s co-defendant’s shot a weapon during the “chaos,” as defined by the Solicitor. App. p. 538,

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<sup>4</sup> As trial counsel agreed at the evidentiary hearing, the record establishes that different evidence and argument regarding express malice was offered regarding the attempted murder charge, i.e. Joshua Haggood pled guilty and admitted to shooting James Hampton. PCR pp. 1050-51.

Ins. 2-4. Several witnesses testified that Mr. Frazier shot in the air upon exiting the club, and Mr. Haggood admitted to and pled guilty to the shooting of James Hampton.

Additionally, through Mr. Haggood, the State elicited testimony that Petitioner armed himself and returned to the club, yet other witnesses stated that Petitioner was not seen with a gun that night. Mr. Haggood testified that Petitioner was “like kind of agitated” towards a group in the club before they went out to get their weapons. App. pp. 275-6. Michael Bullock testified that he saw the victim watching Petitioner, and Petitioner was not interested in him. App. p. 362. Mr. Haggood also testified that the victim was the aggressor and the shooting was an ambush. App. p. 304. If anything, it appears the State attempted to utilize Mr. Haggood to inject some form of express malice, yet his testimony clearly established that the victim was the aggressor, he was shooting in defense, and at most Petitioner shot in response to an “ambush.” Upon review of the entire transcript, Petitioner submits that the trial testimony is lacking and inconsistent in establishing malice apart from inferred malice instruction and that the lower court erred in finding otherwise.<sup>5</sup>

The lower court also erroneously found prejudice lacking because there was ample evidence of express malice and an abundance of evidence to convict Petitioner under the theory of accomplice liability. 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

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<sup>5</sup> At the evidentiary hearing, Petitioner provided a narrative of what happened on the night in question. PCR pp. 1064-65. Petitioner submits it is not proper to consider this narrative in the prejudice analysis since the proper analysis requires the court to examine the evidence considered by the jury.

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 this Court grant relief in Gibson, without discussion of the implications of accomplice liability evidence, this Court also denied certiorari, thereby upholding the relief granted, to co-defendant Adams Gibson on the exact same Elmore issue. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121, fn. 1(2016). Therefore, Petitioner submits that the lower court's justifications based upon the evidence of express malice and conviction under the accomplice liability theory are absolutely erroneous.

Petitioner also urges this Court to consider the arguments offered and findings of the trial court during the directed verdict motion. When asked by the trial court what evidence the State had to put a gun in Petitioner's hand and what evidence the State had under the accomplice liability theory, the State provided no evidence of express malice. The Solicitor explained, from his view of the evidence, that Petitioner was the only one shooting in the direction of Mr. Lawton and Mr. Defreitas and that Mr. Haggood shot Mr. Hampton. App. p. 536-7. After the court asked about "hand of one," the Solicitor responded:

These three individuals made a decision to go arm themselves after an altercation inside this club and returned to inside that club, continued drinking alcohol that spilled out when things shut down. You have – I mean – I agree, it's chaos out there, but I submit to you the three of them were part of that chaos.

App. p. 537, ln. 23 – p. 538, ln. 4. In response, the court denied the directed verdict motion finding that based upon the circumstantial evidence and **inferences** that could be

drawn, there was “evidence on each and every element of these offenses.” App. p. 541, lns. 1-12 (emphasis added).

In closing argument, the State offered the following definition of inferred malice:

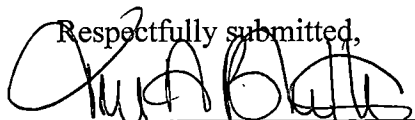
Implied malice is simply looking at the conduct of a person and seeing what that conduct tells you about what they intend. You know, arming – somebody arming themselves to prepare for a fight. Someone acting with complete disregard for the safety of those around them, shooting into a crowd, those are the actions from which you may infer malice.

App. p. 591, lns. 2-7. Throughout the argument, the evidence offered in support of Applicant’s guilt was summed up by the following question to the jury: “Do you believe that the defendant fired a gun that night? And if you believe he did, then you must return a verdict of guilty.” App. p. 599, lns. 1-4. It is clear from 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 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. Therefore, Petitioner has satisfied both prongs of the Strickland analysis, and a new trial is warranted.

#### CONCLUSION

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

Respectfully submitted,  
  
Tricia A. Blanchette  
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Leesville, SC 29070  
(803) 908-3266  
Attorney for Petitioner

June 26, 2019

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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RECEIVED

JUN 28 2019

APPEAL FROM CALHOUN COUNTY  
Court of Common Pleas  
Post Conviction Relief

S.C. SUPREME COURT

Honorable Robin B. Stilwell, Circuit Court Judge

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Appellate Case No.: 2019-000528

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David Jamar Benjamin,

Petitioner,

vs.

State of South Carolina

Respondent.

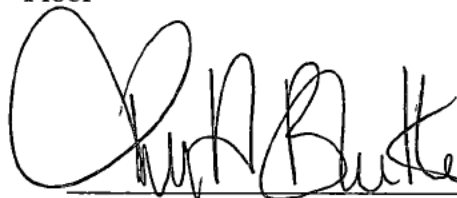
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CERTIFICATE OF SERVICE

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I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I served this 28<sup>th</sup> day of June 2019 a Petition for Writ of Certiorari, Appendix and Transportation Order to Benjamin Limbaugh, of the Attorney General's Office, via hand delivery to the Office of the Attorney General addressed as follows:

Office of the Attorney General  
Att: Benjamin Limbaugh, Assistant Attorney General  
1000 Assembly Street, 5<sup>th</sup> Floor  
Columbia, SC 29201



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Attorney for Petitioner

June 28, 2019

LAW OFFICE OF  
**TRICIA A. BLANCHETTE**

RECEIVED

JUN 28 2019

June 28, 2019

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

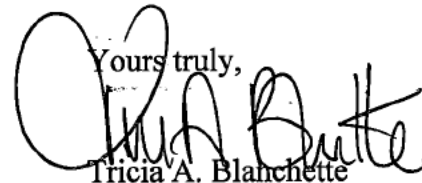
S.C. SUPREME COURT

RE: David Jamar Benjamin v. State; App. Case No. 2019-000528

Dear Sir:

Attached for filing, please find an original plus six copies of the Petition for Writ of Certiorari, an unbound and bound copy of the Appendix, and a Certificate of Service. Also enclosed please find a proposed Transportation Order for the trial exhibits utilized at the evidentiary hearing that could not be included in the Appendix.

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: Benjamin Limbaugh, Assistant Attorney General  
David Benjamin