THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-000528

David Jamar Benjamin, Petitioner,

vs.

State of South Carolina Respondent.

APPENDIX
VOLUME III OF III

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

Alan Wilson
Attorney General

Megan Harrigan Jameson
Senior Assistant Deputy
Attorney General

Benjamin Limbaugh
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorneys for Respondent

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Q Do you think ---

A --- probably why he's a changed person.

Q Do you think he would then do anything he could to help his friend?

A I think he would tell the truth because he is torn between a relative and his friend. And I think that, you know -- that he's here to tell the truth about what happened.

Q Okay. And now, you testified that Mr. Gidron placed himself in the position that he was at the crime scene when y'all were out there?

A Yes.

Q Okay. Do you have any personal knowledge, other than what Mr. Gidron told you, as to where he was located in the crime scene?

A No. Mr. Gidron and I have had multiple conversations about this. And his story has stayed constant the whole time. So I have no reason to doubt, when we went out to the scene, that he was telling me the truth.

Q Yes, sir. And when did your conversations with him begin?

A Ooh. Probably well over a year ago.

Q Okay. So about four years after the trial occurred?

A That's correct.

Q All right. That's all I have. Thank you.

A Thank you.

THE COURT: Okay. All right, sir. Thank you. You can step down.

THE WITNESS: Thank you ---

THE COURT: Appreciate you ---

THE WITNESS: --- sir.

THE COURT: --- being here, sir.

(Whereupon, the witness exited the witness stand.)

THE COURT: All right. Ms. Blanchette, how many more witnesses do you intend to call?

MS. BLANCHETTE: Your Honor, I was going to say I have exceeded the amount of time that I told you that we would utilize in chambers. The next witness would be Mr. Thomas, the trial attorney. And I assume he would be the lengthiest -- lengthiest witness. So I ---

THE COURT: Okay.

MS. BLANCHETTE: --- just wanted to let Your Honor know before I did call him.

THE COURT: Okay. And then, is Mr. Thomas the last witness you intend ---

MS. BLANCHETTE: I ---

THE COURT: --- to call?

MS. BLANCHETTE: --- will briefly call my client. And ---

THE COURT: Okay.

MS. BLANCHETTE: --- when I say briefly, I actually mean it this time.

THE COURT: Okay. And, Mr. Saville, you don't -- after Mr. Thomas is called, you don't intend to call any -- any witnesses on behalf of the state?

MR. SAVILLE: Your Honor, I don't -- I don't plan to. But I would respectfully ---

THE COURT: Sure. I won't ---

MR. SAVILLE: --- request ---

THE COURT: --- foreclose ---

MR. SAVILLE: --- your permission ---

THE COURT: --- you from ---

MR. SAVILLE: --- to reserve ---

THE COURT: --- doing it.

MR. SAVILLE: --- the right.

THE COURT: I won't foreclose you from doing it.

MR. SAVILLE: Thank you, Your Honor.

THE COURT: Let's take a -- let's take a short break and let's go ahead and call Mr. Thomas and we can conclude the testimony in this case. Okay. So let's take about five minutes, and then we'll come back on the record. All right?

MR. SAVILLE: Thank you, Your Honor.

THE COURT: Thank you.

(Off the record from 12:38 p.m. until 12:58 p.m.)

THE COURT: Okay. Ms. Blanchette?

MS. BLANCHETTE: Your Honor, I'd call Nicholas Thomas to the stand.

THE COURT: Okay.

(Whereupon, the witness came forward.)

DEPUTY CLERK OF COURT: Stand right here for me please.

THE WITNESS: Of course.

DEPUTY CLERK OF COURT: Raise your right hand.

THE WITNESS: (Complied.)

DEPUTY CLERK OF COURT: State your full name for the record.

THE WITNESS: Nicholas Gray Thomas.

NICHOLAS THOMAS, having been first duly sworn, testified as follows:

DEPUTY CLERK OF COURT: Thank you. Have a seat, please.

THE WITNESS: (Complied.)

(Off the record briefly.)

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Thomas, before I begin, I believe there's a copy of the trial transcript or you have a copy yourself ---

A I have ---

Q --- is that ---

A --- a copy myself.

Q Okay. Very good. I just wanted to ask before we began.

What is your current profession, Mr. Thomas?

A I'm an attorney in the state of South Carolina.

Q And how long have you been an attorney?

A Since May of 2010.

Q Okay. And since May of 2010, what type of cases have you been handling?

A I've been -- probably 80 percent criminal defense; 15 percent plaintiff's work; and 5 percent wills and estates.

Q Okay. And do you recall being retained to represent Mr. Benjamin?

A I do.

Q Okay. And how was it that you were retained?

A I believe his mother, Beverly, had contacted me -- myself or Attorney Ronnie Hutto, one of the two; might've contacted Attorney Ronnie Hutto first. Attorney Hutto and I went to the jail in Bamberg to meet with -- with David Benjamin.

Q Do you remember approximately how many times you got to meet with Mr. Benjamin prior to his trial?

A I do. Do you mind if I look at my notes briefly?

Q Please.

A Thank you.

Q Go right ahead.

A Approximately 21 times.

Q And during those 21 meetings, did you have the opportunity to review the discovery with him?

A I did.

Q Did you have the opportunity to discuss with him the possible defenses and trial strategy in this case?

A Yes, I did.

Q And did you have the opportunity to talk with him about any pleas that had been offered?

A I had.

Q Now, referencing the transcript, beginning on page 12, there's some discussion regarding a plea that was on the table. And it appears that plea was to voluntary manslaughter and assault and battery of a high and aggravated nature. It was for 15 years. And the state was offering to allow Mr. Benjamin to plead under *Alford*. Do you recall explaining that plea offer to Mr. Benjamin?

A I do recall explaining it.

Q And do you recall explaining to him what it meant to be able to plea under *Alford*?

A I do.

Q And what did you explain to him regarding that?

A Well, you know, I -- I briefly -- and as -- as layman's terms, the best way possible, explained to him

North Carolina v. Alford, in which the Court said that, you know, it's an -- an acknowledgment -- it's not necessarily an acknowledgment of guilt but an acknowledgment that the state had enough evidence to convict; that the defendant may, what, knowingly, understandably =- knowingly, understandably may consent to an imposition of a sentence without having to make any statement against interests.

Q And when did you explain that to Mr. Benjamin? Was that the day where there -- the -- it's being discussed at trial, or was that prior to that time?

A That was at the day. That was in the Calhoun County Courthouse.

Q Okay. So the option of pleaing under *Alford* wasn't discussed prior to trial date?

A No, it wasn't. There wasn't -- I -- I don't believe we had that offer on the table until that point. I'd have to check my time line. But I don't -- I can't remember exactly what date that that offer came forward. But it was really -- it was based after the testimony of the -- the plea of Josh Haggood.

Q And how did that come into play?

A Well, with -- it was crucial. It changed the entire approach of the defense strategy for Mr. Benjamin's case. There was great strength in unity. And -- and there was havoc in division.

Once I understood and heard -- Mr. Benjamin and I both heard what Mr. Haggood's testimony was going to be, it changed the face of the case in the fact that it opened up accomplice-liability theory, when without -- without Mr. Haggood's testimony, the state had no case. As we've heard here, it was a terrible investigation. No witnesses could -- could demonstrate decisively Mr. Benjamin's involvement.

Mr. Haggood's testimony changed the face of the case for the defense.

Q Now, I know I'm talking about pleas, but I also want to ask you about your directed-verdict argument here. Because I think they tie in together. You made a directed-verdict argument. And in response Judge Goodstein asked the state to essentially connect the dots under the accomplice liability or "hand of one/hand of all."

MS. BLANCHETTE: And for Your Honor, the state's response is reflected on page 535 of the transcript.

THE COURT: Okay.

Q Starting there on page 535, the solicitor goes through and connects the dots, essentially, for Judge Goodstein, as she had requested. Did you explain in that detail to Mr. Benjamin how the state could essentially prove "hand of one is the hand of all" or accomplice liability before he decided to reject that plea offer?

A I remember telling him specifically this: I was

scared they were going to convict him of something. I said, "I don't know if it's going to be murder." But I -- I said, "Mr. Benjamin," I said, "you know, our problem is under the "hand of one is the hand of all," I'm afraid they're going to find you guilty of something."

I didn't believe they'd be able to find him guilty of murder. I wasn't sure. But I -- I had a feeling -- and expressed that -- that -- that gut feeling to Mr. Benjamin that it was certainly a very big risk and that the plea was a much safer option, and especially under *Alford*, for us to go.

Q So you encouraged him to take the plea?

A I did. I wish I would've encouraged him further. I'd -- you know, I still thought that the chaotic scene that was the Piggy Park that night could've -- could've had a == had enough -- there was enough there perhaps for the jury to find him not guilty of all the charges.

Q Now, during -- it's page 12 through 18, as cited on the amendment, but that's where the discussion of this plea offer happens on the record. During that time the solicitor indicates that he's been trying to contact Lexington County to see if they would run the charges in concurrent or, at a minimum, at least get life without parole off the table. Did you do any negotiations with Lexington County to try to resolve all of his pending

charges?

A It was really with the AG's office. He was with the AG's office. Let's see his name. I -- I've actually seen him a couple times since then. Curtis Pauling was with the AG's office. He had taken over that case, the Lexington County case.

I got to know the Lexington County case because that was holding us up from getting a bond on this current case. And I went up there. He had an attorney retained on that case in -- in Lexington County. This attorney was completely inactive on it.

I petitioned to -- to step in as his attorney, and I went up there and argued a motion for a speedy trial. That case was seven years old. And it was preventing him from getting a bond in this trial.

And so I went up there and argued that motion before Judge Cothran and two other attorneys there for his codefendants in the Lexington County case. And I still feel I should've won that motion for speedy trial in Lexington County.

So I was familiar with the Lexington County charges. And I did have some dialogue with Curtis Pauling about this case. You know, we had some difficulty, as it's explained in here by Mr. Sorenson's testimony, of actually getting in touch with Mr. Pauling that particular day. But I didn't

perceive it as being a -- a problem.

And I did try and sell that to David -- to Mr. Benjamin at the time of -- you know, that we could get this whole thing wrapped up and be done with it. And we certainly wouldn't have to worry about the -- the risk of life without parole.

You know, it was -- it was the safest play.

Q But it wasn't wrapped up, correct, at the time that this ---

A No. We ---

Q --- was being ---

A --- didn't ---

Q --- discussed?

A We didn't have it in writing. But I -- unfortunately, I didn't get any indication -- you know, we -- we had a -- Mr. Benjamin's longtime girlfriend, mother of his kids, and -- and mother -- his mother, who's present here, came back in -- into -- we weren't in chambers back there. But we were in -- I think we were in the jury room in Calhoun County. And I -- you know, and I told as well, too, what we're facing. But, you know, Mr. Benjamin was adamant that he did not shoot anyone and that he -- he wasn't going to take that plea.

Q And on page 717 in the transcript, you say that, that Mr. Benjamin has never wavered from ---

A He has not.

Q --- the fact that he did not shoot anyone in this case?

A That's correct.

Q Okay. One more question about this guilty-plea issue: On page 18 Judge Goodstein actually asks the state to leave the plea offer open until the jury is selected. And it's somewhat confusing. She says that (As read): ". . . I would push him up until the time the jury is selected, to leave it open to that point. But I think once the jury is selected, it'd be time for us to proceed . . ."

So was it your understanding the plea was on the table until the jury selection was complete?

A That's correct. And I had the opportunity after the jury selection -- you know, I'm -- I'm fairly familiar Calhoun County, not as intimately as I am with Orangeburg County. But I still know a lot of people there.

The paralegal working with me is native of -- of Calhoun County. And in the courtroom also was Martin Banks, attorney for defendant Kevin Frazier. And Martin Banks is the master-in-equity and the chief public defender for Calhoun County.

And we did not -- the three of us did not like that jury makeup at all. And I did express that to Mr. Benjamin and said, "I -- you know, I think this jury stinks." I

didn't -- I didn't like the looks of it at all.

And I did have Mr. Banks speak briefly to Mr. Benjamin about this jury. And I did not like the looks of it. I did not like the makeup of it.

And even going back and reviewing this file and looking at their names, I -- I still don't like it. I still wouldn't want to try a case of this nature in front of that jury again.

Q And was that conveyed to him before the final point where he could've accepted or rejected the plea ---

A It was ---

Q --- offer?

A --- after we had picked the jury. That -- that conversation took place at the bench -- or -- excuse me -- at the defense table, not at the bench.

Q And, Mr. Thomas, I do not intend to go through this 700-page transcript with you. I'd just like to address the issues that are raised in the amendment.

So I'd like to ask you about the utilization of Kelly Fite in this case.

A Sure.

Q Can you explain to us how it came to be that you obtained the services of Kelly Fite?

A Kelly Fite was referred to me by two of my very good friends who are very successful criminal defense attorneys

in Savannah. One of them, Jennifer Harris-Burn, she was the assistant public defender for Chatham County. They had had great success with Mr. Fite. And that's how I got in touch with Mr. Fite, and that's how I contacted him.

Q From there, what transpired, once you contacted him?

A I do have notes on that too.

THE WITNESS: Court's indulgence, please.

A I know I have it close by. Oh, here it is.

I telephoned him in September of 2012. And I mailed the entire discovery package to him, hard copies, as -- which is what he preferred, and hard copy -- copies of the evidence disks to him in October of 2012.

His testimony reflected that he did not have some of that material. Everything that I had been provided by the state was mailed in hard-paper form to Kelly Fite, every bit of it. But -- but that's all the material that I had. And -- and that was mailed to him.

Q And from providing him the materials, then did you consult with him or did he provide you a report? What happened next?

A I -- we exchanged a couple of e-mails, but not with any -- anything of great detail, besides what I thought the state's theory would be, which I -- I proved to be correct, that I thought they were going to try and put a .45-caliber-automatic in his hand and that shell casings that

were scattered everywhere, they were going to try and attribute to this .45-automatic.

Q And he testifies specifically, after he makes that reference, that he got some of the discovery items on page 547. He testifies that actually had not reviewed, on 548, the DNA report when he had been testifying about the ability or lack of ability to get DNA off of ballistics evidence.

A Well ---

Q Do you recall providing him that DNA report?

A Not specifically. But it -- I had a copy of that DNA report in my discovery, and he received a copy of everything in my discovery. I took my entire package to Staples, separated it, copied the entire thing, put it in a -- in a box, and mailed it to him.

Q And I'm just summarizing his couple pages of direct testimony. But essentially ---

A Sure.

Q --- you put him on the stand, and he testified that they failed to test this ballistics evidence for DNA with the size of a .45-caliber that could be done or the different ballistics evidence. And then, he's shown this report on cross. And he admits, at the bottom of page 548, that they did attempt to do what he was saying they should've done.

A No.

Q Is that correct?

A That is correct.

Q How -- how did that kind of fall -- or how did you feel that affected the defense at that point when Mr. Fite's testimony turned out that way?

A Well, I already -- you know, going back over my work product on it, I already had some reservations about using Mr. Fite at that point in time. My read from the jury was the jury had heard about enough. They knew that the -- the -- the -- the scene was chaotic. They'd heard that from just about every witness.

The one theory that I beat up on with the SLED agent about the diameter of the entry wound and the exit wound on Dominique Lawton was fairly spot-on. You know, I'm very confident with my cross on him. You know, I don't believe a .45-automatic round killed Dominique Lawton. I never have. And I certainly didn't after his testimony.

And so reading the jury, the -- you know, it -- it's hard to convey, when you see that in the jury, and you can pick up -- you know, I -- I -- in my notes it said -- it said there -- the large white man -- I think it was a note I must've passed -- I can't -- so I said the large white man has no interest in this case.

And I can't remember which juror he was. But I -- I

passed that note. I saw it in my notes. He had zero interest in this case at that point in time.

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 you presented earlier today. And -- and it -- I -- I almost wish I had presented -- I wanted to get to Mr. Gidron. And I wanted the jury to hear Mr. Gidron.

Q Let me ask you a little bit more about Kelly Fite.

A Sure.

Q I'm going to read to you your closing argument, because it's really brief. You say (As read): My client's expert, Kelly Fite, came in to talk about firearms."

MS. BLANCHETTE: I apologize. I'm on page 606 at the bottom.

THE COURT: Okay.

Q (As read): "My client's expert, Kelly Fite, came in to talk about firearms. Extensive experience. Y'all heard it from him. I mean, he had an entire career of doing nothing but this kind of stuff.

"He talked about DNA and the state talked about DNA

with him too. He talked about why there weren't fingerprints. But when asked about DNA, is it possible to get DNA from these shell casings, he said it was, but you don't see any. It's not here. It's not here."

Is that essentially all that you were left with after Kelly Fite testified?

A Yeah. I really -- I had barely wanted to touch on him in closing. I really -- barely wanted to touch on him. It -- I didn't feel it was necessarily harmful to the case. But it didn't feel like it was beneficial.

Q Now, he was qualified in the area of crime-scene reconstruction -- many areas, where he was duly qualified. And that was on page 543 and 544. Did you ever ask him to attempt to reconstruct this crime scene?

A Initially, that's what I thought he was going to do when I sent him the package. You know, I do wish I had been in more constant communication with him or more regular communication with him. Because that was my initial belief. And that's what Mr. Benjamin and I had talked about a trial tactic.

I believe I had told Solicitor Sorenson at one point that that's how I planned on using him. But then, that changed on -- on game day.

Q Did he -- did you ever discuss with him about going to the scene?

A No, I did not.

Q Did you ever discuss with him about communicating with Mr. Gidron as an eyewitness who was at the scene?

A No. Because we had great difficulty in securing Mr. Gidron. I had personally been to the scene ten times -- twelve times. Been there with my -- my private investigator, Danny McDaniel as well.

Q Did you ever go to the scene with Mr. Gidron?

A I did not. We weren't able to secure Mr. Gidron until this case was on -- on the trial list that we were the number-one position. I mean, I'm -- I mean, the Friday prior to starting trial. I had two telephone conversations with him, was the best I could do.

He was -- he was difficult to locate. He -- he did want to appear. He -- he did want to share his information with us. But it -- you know, it resulted in conflict with -- my private investigator. It -- it became physical between the two when he was served with a subpoena.

Q Did you ever have the chance, then, to go over his potential testimony with him?

A Only by phone. And -- and I -- I -- I believed him by phone. My investigator believed him when he spoke with him. And he really wasn't combative until Mr. McDaniel presented him with a subpoena. Then he became combative -- literally combative.

Q But he did appear under the subpoena ---

A He did ---

Q --- is that ---

A --- appear ---

Q --- correct?

A --- on the -- under the subpoena.

Q Okay.

A Reluctantly so, but prior to that point, he had shared crucial information to us, which, of course, I found to be very believable. Again, I found his testimony here today to be believable.

I -- you know, he -- as he said to me, he -- to my investigator and -- and to me, he said he was trying to live a good life; he didn't want to get involved with this. He didn't want to get involved with family. But he wanted to do the right thing. And that's why he wanted to come forward.

And I'm -- you know, I'm still glad that he did. And I'm very -- very glad to see him present himself today.

Q So you had no reason to question the veracity of his testimony at trial or here today?

A I did not. Absolutely not.

Q Okay.

A I wish it would've carried more weight.

Q Based upon what you heard him testify today, do you

think the additional testimony he offered would have carried more weight with the jury?

A His presentation today ---

MR. SAVILLE: Objection: Speculation.

THE COURT: Okay. Overruled.

THE WITNESS: Yeah.

THE COURT: Go ahead.

Q You may answer, Mr. Thomas.

A 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.

Q And -- and he detailed, as well as Mr. Skidmore and Mr. Tressel detailed, that he went out to the scene, explained these things to the investigator, to Mr. Tressel, so he could formulate his expert opinions. How do you think that would've benefitted your case?

A Well, it slightly contradicted information I received from my client.

Q And now I want to jump back to Kelly Fite, because we went down the road to Mr. Gidron there. But I was still asking you about Kelly Fite.

On page 551, if you could turn there, he's being examined by the state. And the solicitor says == part of this is line 7, 551 (As read): "Part of your field of

expertise deals with, you know, reconstructing crime scenes and angles people were shooting and things of that nature?"

Answer: "Yes."

"Mr. Thomas, did he ask you to do any of that with regards to the pictures and stuff in this case?"

"No, sir."

What is your response to that ---

A Yeah.

Q --- testimony ---

A I had ---

Q --- Mr. Thomas?

A --- that highlighted -- yeah -- in trial transcript myself and my notes. And I remember when he said "No, sir," on that. And even going back over -- over my e-mail correspondence with it -- not in detail and I wish I would've asked him in -- in precise detail what I wanted him to do.

Q And you alluded it -- to it in a prior answer about the testimony of Mr. Tressel here today. If you had had the opportunity to work with Mr. Tressel and somebody in his capacity and had the opinions expressed to you that he expressed today and the testimony expressed to you -- that he expressed today, would you have utilized him or someone in that capacity at trial?

A I would have. But again, it goes back to the change

in our defense approach due to the testimony of Mr. Haggood for the state. It -- it created a major roadblock for us and a major impediment into the type of defense we were going to present.

Q Now, you argued in closing -- and I can give you the cites if you need it -- that essentially, Mr. Haggood was a liar. I would say it teetered on the edge of a third-party-guilt defense without declaring it such.

If that was your strategy, wouldn't it have been vital to have an expert that could testify that the .45 that Mr. Haggood admits shooting was more likely to cause the fatal injury to the victim?

A I don't know if it would've been vital. It would've been helpful.

Q I appreciate that.

Let me ask you this -- and I may have already asked it, and I apologize if I have. But the testimony that you heard from Bob Tressel and Pete Skidmore and Tony Gidron regarding their interaction, would you have wanted your expert to have that interaction with both your investigator and Mr. Gidron in formulating his opinions?

A Yes.

Q And like I said, I may have already ask that, so I'll move on.

A All right.

Q Now, we touched on Mr. Gidron. Were there any other witnesses you considered calling for the defense?

A There was. Nayrone Shivers.

Q And why was Mr. Shivers not called?

A I didn't believe, courtesy of his statements and I believe his conversation with Danny McDaniel, my investigator, that he was going to offer -- he was too tied in to that Elloree crew. He wouldn't have presented us with anything we could've used, I think because he would've found it damning, I think because he was a shooter involved in this case.

There was GSR residue found on Mr. Shivers. I think he was shooting from the roadway. And so he was not going to cooperate with us. And ---

Q And that's ---

A --- I don't ---

Q --- what I ---

A --- think there's ---

Q --- was ---

A --- anything I could've elicited from him that would've helped us. And instead, he meant -- might've hurt us.

Q And that's what I was going to ask you. You did elicit testimony about the positive GSR and the potential that he was the one ---

A Yeah.

Q --- shooting from the road; is ---

A Yeah.

Q --- that correct?

A That's correct.

Q Okay. Would the testimony today that has been offered from Mr. Gidron and from the expert regarding the fatal shot coming from the road been helpful to your defense?

A Possibly. Possibly. You know, even with the state -- my apologies to the artist, of course. But the state's poorly-drawn chart, having been familiar with the scene, having been familiar with the sketch that -- that I -- that myself and Mr. Benjamin had made, even with that, it's very troubling when -- if you're at the scene, if you know where that car is parked, you know where that tree is, you know where the -- the decedent is, a layman, in my -- my opinion, as the trial attorney in the case, a layman is going to see it's the direct line from Point A to Point B.

Whether or not the shot came from the road, according to -- you -- you know, had Mr. Fite or -- had your expert, Mr. Tressel testified, the Point A from Point B, from the driver's side of that vehicle to where that tree was, to the layman on the jury, anything outside of that was going to be farfetched to them. And I think that's how they absorbed it.

If -- any -- anything said differently, I don't think -- you know, and that's my speculation -- but they -- that they would have felt any differently. I mean, I think I know more. I think it came from a different direction. I -- I agree with your witness that it did.

Q Now, you keep talking about how -- or -- or responding about how you went to the scene and your familiarity with the scene.

A Uh-huh.

Q Why did you not request that the jury go to the scene?

A One, I don't think Judge Goodstein would've permitted it. Two, for the exact reason I talked about there: that if you put your mind in -- in -- you know, your head inside the mind of a juror, when you see a basic distance, when you see a -- a -- a line from Point A to Point B, it makes the most logical sense, even though I don't believe that's how it occurred. It would -- it makes the most logical sense. If you're there, if you saw approximate location of the vehicle, approximate location of that tree, it would seem as though -- I mean, you know, and I think that's what the jury thought too.

It would seem as though a shot came from the direction of Mr. Benjamin would've been standing. Again, I -- you know, I will gladly say for the record I don't believe that's where the shot came from. And I don't believe the

shot was a .45-automatic that ---

Q Now ---

A --- killed ---

Q --- you ---

A --- Mr. Lawton.

Q Oh, sorry. Were you finished?

A The -- please. Go ahead.

Q You've -- I understand your response about going to the scene. But as far as the diagram that was shown today, which was the diagram utilized at trial, is there any reason why you did not produce your own diagrams or aerial photographs or anything regarding the scene to clarify or to demonstrate that what the state was putting up was potentially not accurate?

A I did have some exhibits that were being prepared at a printer for posterboard that were different and were live photographs. And they were not prepared in time. Especially -- there were two items that I wanted for closing that were not prepared in time. And that stuff wasn't ready until that Friday morning.

Judge Goodstein ended that trial early. Mr. Sorenson and I believed that -- that we were going to close on Friday morning.

And Judge Goodstein, knowing full well that I -- it was my first big general-sessions trial -- and she said,

"Mr. Thomas, we're closing. You need to prepare. You're going to close in 20 minutes."

And that most certainly put a damper on us. And I know you -- you know, you have -- you have to come prepared and you operate as -- as prepared as you can at the time. But it most certainly hindered me on exhibits I wanted to use.

Q And you indicated this was your first general-sessions trial?

A That's correct.

Q Okay. And you had not tried any charges -- lesser charges?

A Well, I -- I had tried jury trials on summary-court charges.

Q Okay.

A Four/five -- undefeated on those charges. But -- but first general-sessions charges. But I -- I most certainly had my head wrapped around this case.

Q And how many murder charges have you handled since for trials?

A Two.

Q Okay. And just to be completely fair to you: Did you have experience as a law clerk, though, prior to becoming a attorney?

A I had 16 months as a law clerk prior to that. I ran a

bail-bonds company for two years prior to that, not that it gave me trial experience. But I was in court. In Orangeburg the bail bondsmen sit in court.

And my brother's been an attorney for 30 years. I've -- he's a criminal-defense attorney as well. So I'd been around it quite some time. And, you know, I believe I was prepared for the case. That's for sure.

Q And ---

A You know ---

Q --- with that ---

A --- there are things you learn, of course, you know, as you go on in the practice of law. You learn something new every day.

Q And in this case you learned that you needed to have those exhibits ready sooner; is that correct?

A Oh, yes, indeed. And you -- you can't count on, if you think that there's -- you're going to be able to come back on Friday, even though, again, it makes logical sense to come on Friday. I needed to hustle to be prepared to close that Thursday. And it most certainly hurt my closing.

Q Now I wanted to ask you about the final allegation in Mr. Benjamin's amendment in that you were ineffective for not entering an objection or an exception to the jury instruction on malice for lacking the general permissive-

inference instruction on malice. That's on page 684 ---

A Sure.

Q --- lines 3 through 4. Is there any reason you didn't object or enter an exception at the conclusion of ---

THE COURT: What page is that again, Ms. Blanchette.

MS. BLANCHETTE: I apologize, Your Honor. It's 684.

THE COURT: No. You said it. I just didn't catch it.

MS. BLANCHETTE: And it's line 3 and 4.

THE COURT: Okay. Go ahead.

Q Is there any reason you did not request the general permissive-inference language, as set forth in *Elmore* in 1983? You did not object, or you did not except to this instruction?

A One second. I do have something on it.

Q And I think I've covered all the bases of objection there.

A Yeah. Oh, I do have some notes on that as well. Without finding those, I think, though, my notes were -- I believe the testimony reflected that there was ill will between Mr. Benjamin and Mr. Lawton in the club prior to, even though it's conflicting. There's some people said that -- that Mr. Lawton had a problem with Mr. Benjamin but Mr. Benjamin didn't have a problem with Mr. Lawton. And I think there -- there are at least two witnesses that -- that -- that expressed that.

But there were others that -- that certainly made it sound -- and -- and I would -- I'd say the reason why I didn't object is I felt that there was possibly ill will between the two parties in there. And the -- the testimony of Mr. Haggood that the defendants went and retrieved firearms from their car and then returned to the club for a two-hour period knew that some type of malice must have existed in their minds.

But I -- I should have objected to that, knowing what I now and knowing, you know, at -- after your -- your -- your positive ruling in the Supreme Court. I wish I had objected to it.

Q So you would agree, under *Gibson v. State* ---

A Under *Gibson* ---

Q --- it's ---

A --- yeah.

Q --- deficient performance, as the Supreme Court held, to not object.

A Yeah.

Q But what you would be referencing, as far as the prejudice ---

A Is ---

Q --- prong in ---

A Yeah.

Q --- not giving ---

A Yes.

Q --- the instruction?

Okay. So you would agree that post *Elmore*, when they gave the instruction, which Judge Goodstein did not give, and says (As read): "We caution the bench that hereinafter, only slight deviations from this charge will be tolerated," you should've insisted she gave the complete inferred-malice instruction?

A Yes.

Q And are you also saying, though, that you think that this was an express-malice case?

A Possibly.

Q But does that mean it also possibly could've been that the jury inferred malice?

A Possibly. There was conflicting testimony throughout. Some would say that there was; some said that there wasn't. And a lot of that was what was formed in -- in -- in my mind, unfortunately, perhaps to -- to Mr. Benjamin's detriment of how I envisioned how this entire evening transpired ---

Q Okay.

A --- and the best manner in which to present it.

Q Now, would you agree, though, that the state was not able to show definitively that Mr. Benjamin was the fatal shooter in this case?

A Correct.

Q And the instruction, as given by Judge Goodstein, says (As read): "Malice be inferred from conduct showing a total disregard for human life."

Would you agree that they potentially showed they met their burden in showing that he acted in a way that had total disregard for human life, based upon the state case?

A No. I don't believe that they did. I -- I believe, to -- to clarify that, you're asking me whether or not the state -- that I -- I feel the state proved that -- that they demonstrated that to the jury?

Q Correct. The inference of malice that she explains it as, a -- a total disregard for human life.

A Yeah. I don't -- I don't -- I don't believe they were able to prove that to the jury, that Mr. -- Mr. Benjamin acted in that manner.

Q Okay. And you said there's -- there was inconsistent testimony. For instance, Michael Bullock testified, on page 362, that the victim was the one watching Mr. Benjamin and Mr. Benjamin wasn't even interested ---

A Yes.

Q --- in the ---

A Exactly.

Q --- victim?

A Yeah. I do recall that. Without even looking, I

remember that.

Q So there ---

A Sure.

Q --- was testimony in the record that would refute any ill will or hatred on the part of Mr. Benjamin?

A There was.

Q And you reference Mr. Haggood several times. On page 304 he's very clear in his testimony that the victim was the aggressor in this case, and he even called it an ambush. Do you recall that?

A I do.

Q So would those be examples of the inconsistent testimony, as far as ill will or hatred on behalf of Mr. Benjamin?

A Yes. I do believe it would be conflicting.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.

THE COURT: Yes, ma'am.

(Off the record briefly.)

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Okay. Cross-examination, sir?

CROSS-EXAMINATION

BY MR. SAVILLE:

Q Good afternoon, Mr. Thomas. How you doing?

A Good afternoon. I'm fine. How are you?

Q Now, as a matter of quick housekeeping, I might just go in reverse order here real quick. If I could draw your attention to page 689 of the transcripts, this is during Judge Goodstein's jury charge.

A (Complied.)

Q And I was wondering if you could read for me from lines 3 to 11, please, whenever you get there.

A Certainly. (As read): "Now, malice, as we have talked about, may be expressed 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.

"A specific intent to kill is not an element of attempted murder. But there must be a general intent to commit serious bodily injury. Intent means the intending" ---

Q I'm sorry, Mr. Thomas. You -- you can -- you can stop there. I -- I appreciate it, though.

Now, is -- is that not the permissive-inference language that is directed by the Supreme Court?

A Yes.

Q Okay. And did -- do you recall that Judge Goodstein did, on multiple occasions, stress that it's the state's burden of proof beyond a reasonable doubt?

A Can you repeat the question, please?

Q I'm sorry. Do you recall that on multiple times, Judge Goodstein instructed the jury that it's the state's burden of proof to prove its case beyond a reasonable doubt?

A I do slightly recall.

Q Okay. But we -- do we agree that that is the correct permissive-inference instruction?

A I believe it does meet that.

Q Okay. Now, Mr. Thomas, I know this was your first general-sessions case. So I imagine you put a lot of work into this one?

A A tremendous amount.

Q Did you feel that you had a firm grasp on the facts of the case?

A Definitely.

Q Now, was the testimony at trial that Mr. Lawton bumped in -- Mr. Lawton being the murder victim, bumped into Mr. Benjamin on the dance floor at the Piggy Park?

A Yes.

Q Okay. And there was testimony that Mr. Benjamin

glared at the victim throughout the night?

A There was that testimony.

Q Okay. So much so that the club staff acknowledged the problem?

A It does appear that the club staff acknowledged the problem.

Q Okay. And do you recall the testimony of DJ Haynes, who said he approached Mr. Benjamin to calm the situation and applicant said that, "I'm Killa," meaning Mr. Benjamin is Killa?

A Unfortunately, I do recall that.

Q And after they were initially separated after the scuffle on the dance floor, do you recall testimony that Mr. Benjamin and his codefendants then left the club to get guns and then came back into the club?

A I do recall that testimony.

Q Okay. And do you recall the testimony that applicant had remarked that he did not want to get caught slipping?

A I do recall that.

Q Okay. And then, they willingly returned to the club?

A That's correct.

Q Now, Mr. Thomas, you testified that once Josh Haggood decided to testify, that kind of -- that kind of threw things into a redirection. What kind of -- what kind of witness do you think Mr. Haggood made for the state?

A He made an excellent witness for the state.

Q Why -- why do you feel that way?

A Well, you know, I didn't know exactly what type of witness he would make, having watched, you know, his interrogations by law enforcement. He didn't seem like he would make a -- a positive witness for the state.

However, once he was able to enter his own plea and describe the testimony that he was going to provide at trial, I find that it was most reflective of the "Fresh Prince of Bel-Air," of Carlton, if you recall Carlton.

Q Yes, sir.

A He put on a different persona in that courtroom. You know, he was a -- either an E-4 or an E-5 in the Army. He presented incredibly well. He was handsome and charismatic. And that's how he delivered it. He was not the same person that he was on the interrogation videos.

Q Yes, sir.

A And it concerned me greatly. Whether he was telling the truth or not, his ability to present was of great concern.

Q Yes, sir. Do you think the jury found him credible?

A I do.

Q Okay. Now, do you recall, sort of, the story of the night, as presented by Mr. Haggood?

A (No audible response.)

Q Did Mr. Haggood testify that he had known Mr. Benjamin all his life?

A I believe that's correct. But if you could refer me to ---

Q I'm sorry.

A --- page.

Q Most -- most of his life. I apologize. Page 261, line 15. I know it's tougher up there. Can't control-F through the transcripts.

A (As read): "Most of my life." Correct.

Q And on page 266, line 19, Mr. Haggood testified that he believed Mr. Benjamin had a gun when Mr. Haggood picked him from another house and that Mr. Benjamin put it in the trunk?

A Yes.

Q Okay. And that he had seen Mr. Benjamin with a chrome .45 pistol before?

A Yes.

Q Okay. And on page 275, line 7, you'll see where Mr. Haggood testified that Mr. Benjamin had pointed at two people and told him to look out for them? And he was -- and on page 275, line 17, he was agitated?

A I do recall that. I had it underlined in my notes.

Q Yes, sir. And then, on line -- page 276, line 7, he actually says that -- this -- this is where he Mr. Benjamin

said he was not trying to get caught slipping. And Mr. Haggood took that to mean he wanted to get his gun. Presumably, the one that he put in the trunk, would you agree?

A Presumably.

Q So the -- so according to Mr. Haggood's story, they all go to the car -- Mr. Haggood, Mr. Benjamin, and Mr. Kevin Frazier -- and they get the guns and they go back inside? Is ---

A That's correct.

Q --- everything is -- okay.

And now, there was testimony that -- from -- from Mr. Haggood that the victim, Dominque Lawton, did have a gun when he walked out of the -- the Piggy Park, correct?

A Correct.

Q Okay.

A I believe he was the instigator.

Q Did Mr. Haggood testify that he shot the gun at that time?

A I'm -- if you could refer me to the page, but I believe that he did say that -- that ---

Q Sure. I would -- I would go to page 281.

A Sure. Yeah. I -- I remember that testimony was a little contradictory. But ---

Q Contradictory?

A Well, he said that he had discharged a round, but a round ejected from the top of -- of his pistol.

Q Right. Correct. It was a live ---

A Yeah.

Q --- from the -- yes, sir.

A So it was -- already had a round chambered and he chambered a new round.

Q And then, on line 19 of page 281, he's asked (As read): "So he didn't actually fire a round at that point in time?"

A Correct.

Q Mr. Haggood said: "No."

And then, while Mr. Haggood did not -- did not testify that his buddy Kevin Frazier fired the first shots -- I mean, you -- you might recall Mr. Haggood purported not to know who fired the first shots.

A Correct.

Q But there was testimony from various other witnesses that Kevin Frazier fired the first shots?

A That's correct.

Q Okay. And this is the same -- I just want to make sure -- this is the same Kevin Frazier that was with them earlier when they left the club to get guns and came back in, correct?

A That is correct.

Q Okay. And then, did Mr. Haggood testify that Mr. Benjamin fired shots from a stationary position at first?

A (No audible response.)

Q This is on page 285, line 2. I'm sorry.

A Okay.

Q This -- I know this ---

A Did ---

Q --- was a long ---

A --- yes.

Q Okay. And then, on page 262 -- I'm sorry -- 286, line 1, Josh Haggood testifies that Mr. Benjamin started on the passenger's side of the car and moved to the driver's side as he shot.

A Yes.

Q Okay. And now, in all fairness, did -- did Mr. Haggood say that Mr. -- say that he saw Mr. Benjamin shoot ---

A He did ---

Q --- Mr. Lawton?

A --- not?

Q He didn't?

A He said he did not see Mr. Benjamin shoot.

Q Right. And on page 291, line 17, there's testimony that Kevin Frazier said he had to let off a few shots in the air to, quote, let them know what time it was?

A That is correct.
Q Okay. And the testimony supports that they were all standing at this same car, right?
A That is correct.
Q Okay. Now, was Mr. Haggood's car, the car that they were all at, was that ever -- was that struck by any bullets?
A I do not believe it was.
Q Okay. Now, Mr. Thomas, how did the -- how did the "hand of one/hand of all" play into this case?
A Well, I mean, to -- to members of the bar and trial attorneys and judges, I think it's -- it's fairly clear how it played out that way: that they saw there was a threat; they left the club; retrieved weapons, according to the testimony of Mr. Haggood ---
Q Right.
A --- retrieve said weapons; and returned to the location where there was a potential for altercation; and remained in that location for an additional period of time. And then, according to the testimony, Mr. Frazier fired a shot in the air after being confronted by a pistol already, and it -- and it -- it led to an exchange of gunfire.
Q Yes, sir. And Mr. Benjamin was driving that night, right?
A That's correct. From ---

Q Okay.
A --- what I understand.
Q And Mr. Haggood was not the only witness to testify that guns were present among the group of three codefendants, was he?
A He was not.
Q Okay. And a Mr. Hampton, who also happened to be shot, he also testified that he saw applicant shooting?
A He did.
Q Okay. And there were five .45-caliber shells located in the vicinity of where Mr. Benjamin was alleged to have been at the scene?
A That's correct.
Q Okay. And what was your understanding of where the murder victim was in relation to Mr. Benjamin? Did you testify earlier it was a -- kind of a straight shot?
A Straight shot to the tree.
Q Okay.
A A straight line to the tree, not necessarily a shot. A straight line to the tree.
Q And could you tell me: What's the relevance of this -- this green mark on the automobile that they were in? Do you recall?
A The green mark?
Q Yes, sir.

A On the vehicle?

Q Yes, sir.

A It's from a sign thrown on the car ---

Q Yes, sir.

A --- I believe.

Q Was the testimony that Mr. Hampton, upon seeing his friend, Mr. Lawton, get shot, threw a post at Mr. Haggood's car?

A I believe so. I mean, at -- someone threw some type of object at the vehicle.

Q Okay. He didn't throw a post at anybody else's car, did he?

A Not that I'm aware of.

Q Okay. Sure.

MR. SAVILLE: Beg the Court's indulgence.

THE COURT: Yes, sir.

(Off the record briefly.)

Q Do you recall that there was bullet damage to the van, the side that was facing the vehicle that they were all located at?

A I believe so.

Q Okay. And all the testimony was that their car was to the side of the van?

A Well ---

Q Lined up -- lined up with the van. I apologize.

A To -- to some degree, yes.

Q Okay. Now, moving on to a little bit about Mr. -- Mr. Fite, you said that really, the purpose of Mr. Fite changed a bit when Josh Haggood decided to testify. Could you elaborate on why that was the case?

A Because a chaotic crime scene was not going to change the testimony of Mr. Haggood or the believability of Mr. Haggood. A chaotic crime scene was not going to change Mr. Haggood's testimony that my client went to the car and retrieved a .45-automatic and went back into the club for another two hours.

Q Sure.

A It may have added some confusion, which -- which may have assisted us. But I felt that it couldn't get away from -- it wasn't going to help us get away from the elephant in the room.

Q Sure. Do you think Mr. Fite could have created some confusion by creating a crime-scene reconstruction?

A Quite possibly.

Q Okay. Did you -- were you -- were you here earlier when Mr. Tressel actually testified that -- I -- I -- I -- I know we -- we all think very highly of him. Were -- were you -- were you there when he said that he was not able to create a crime-scene reconstruction himself, based on this -- whatever?

A I did notice that when he said that too. And -- and I think that's very important to note as well, too, that == that he said he couldn't because of the poor police work on the scene.

Q Right.

A And I -- I have to agree with him in that aspect. And again, without the testimony of Mr. -- Mr. Haggood, you know, as I said, strength in unity -- I think the state's case was awful.

Q Right. Now, you actually -- this may seem like a silly question, but I ask a lot of silly questions. Now, you didn't have anything to do with the preservation of the crime scene in this case, did you?

A I did not.

Q Okay. Now, when discussing Anthony [sic] Gidron's testimony with Ms. Blanchette, you noted that some things that Mr. Gidron had testified to ran in contradiction with some things that Mr. Benjamin had told you. What is the substance of that conversation?

A Slightly out of where the vehicles were positioned.

Q Okay. Do you feel that -- what you were told from your client was more damning?

A More accurate, not necessarily more damning.

Q Okay. And with respect to Mr. Gidron, were you actually able to have him testify that he did not think

that Mr. Benjamin shot Mr. Lawton?

A Can you repeat the question?

Q Sure. Were you able to elicit testimony from Mr. Gidron that he did not think that Mr. Benjamin shot Mr. Lawton?

A Yes.

Q Okay. Why do you think -- why -- why don't you think he was a very good witness for you?

A His level of nervousness, I think, created more of a sense of hostility out of him. He was nervous. And I don't think that he -- he meant to be hostile. But he conveyed a -- that sense of a hostile witness that -- you know, that I had certainly seen before and a lot of us have seen before. And it doesn't present well to a jury.

But again, I -- I will clearly state that I believe he was telling the truth. His personality in the stand and that nervous energy, it == it came off as hostility.

Q Yes, sir.

A It was very fresh for me. He'd been contacted by Danny McDaniel, my investigator. You know, they had a physical confrontation, you know, which is very unfortunate.

Because I had spoken with him on the phone. I don't think he understood that he was going to have to come to court and testify to what he told us.

Q Sure.

A He didn't want to be involved. I think, you know, as he testified, that he was nervous about the people in Elloree, his -- his family members that he was going to have speak against them. But I believe that he was telling the truth.

Q Okay.

A It's just unfortunate that his persona on the stand came off in a -- in a cloud of negativity.

Q Yes, sir.

A Because he was my most important witness. And to me, he was more important than Kelly Fite.

Q I hear you.

A And certainly, on our conversations, I -- at -- at a -- at a peaceful tone in his voice, would -- would've played much better in court than the hostility that I believe resulted from his nervousness.

Q Yes, sir. Now, does your investigator regularly engage in physical altercations with ---

A No.

Q --- your witnesses?

Okay. That would be a rare instance ---

A I believe ---

Q --- to have ---

A --- so.

Q Yeah. And you testified that the jury just kind of looked disengaged by the time that Mr. Fite was testifying?
A Very much so.
Q Okay. Now, Mr. -- Mr. Thomas, do you recall -- were -- were -- did you ever have an opportunity to speak to someone from the jury after the conclusion of this case?
A I have.
Q Okay. As a result of those conversations, do you think there's something you could've done differently with Mr. Gidron to have secured a different verdict?
A I do. I -- I -- if I could have found him earlier and had additional time to prep him, even going as far as -- as having him go into either courtroom or mock courtroom, to have a better understanding of what it was going to be like for him, I think he may have presented himself better.
Q Okay. But once again, you -- you would agree that you had substantial difficulty in procuring his testimony?
A I did.
Q Okay.
A My client and I had talked about Mr. Gidron for quite some time. My notes -- and we had difficulty finding him. And I have great faith in my private investigator.
Q Sure.
A And -- and it was my understanding, too, the solicitor's office had tried at some point to contact him.

They -- I don't think they pressed as hard as I did. But the had difficulty locating him as well, too.

He didn't -- he doesn't hang out. He doesn't want to be at clubs. He doesn't want to get in trouble. He's a family man. He had gone to this birthday party.

Q Yes, sir.

A I -- I do wish I could've prepped him more. But still, even when you've done that -- because I've since done that before. And sometimes, when people get in front of a microphone or get in front of an audience, they shut down.

Q Yes, sir.

A And they all react to it differently. Some go into complete silence. And others, you know, have different emotional reactions to it.

Q And do you recall that the state attempted to contact him as well?

A I do.

Q Were they successful, to ---

A They ---

Q --- your knowledge?

A --- were not.

Q Okay.

A No.

Q And do you also recall that Mr. Gidron also testified

at trial that he had -- that he thought Mr. Lawton had been shot from someone on the road?

A Yes.

Q Okay. And did you elicit testimony from Mr. Gidron that he never saw Mr. Benjamin get out of the car and, if he stood up, he would've been hit by the bullets being fired by Mr. Frazier?

A I do recall that.

Q Okay. And now, we spoke about the scheduling issue with Judge Goodstein, where she wanted to conclude the trial by -- wrap -- wrap it by Thursday. That was not your choice to wrap up the trial Thursday, was it?

A Most definitely not.

Q Okay. Now, are -- is what the attorneys say during closing arguments evidence in a trial?

A No.

Q Was the visual aid purporting to show that Josh Haggood was actually the shooter in this case?

A Yes.

Q Okay.

A I believe it would've been helpful, especially a quality visual aid. I -- it's my belief -- and from everything that I've read and CLEs I've attended -- that it certainly conveys better to a jury.

Q Okay.

A We respond better. I mean, it's just the direction our culture has been leaning. We respond better to visual stimuli.

Q Yes, sir. And you testified that you actually had the Honorable Martin Banks discuss with Mr. Benjamin ---

A They -- they ---

Q --- and to ---

A --- knew each other. That's why I -- I wanted somebody else that perhaps that -- that Mr. Benjamin knew ---

Q Okay.

A --- to tell him -- give his own opinion of what he thought of that jury.

Q Sure.

A I remember the conversation well.

Q Did you -- did you do the best you could do with the jury?

A Oh. I certainly believe so. I Facebooked every single member of that jury panel. I had looked them up and cross-checked them against Republican Party lists. I am -- one -- I can't -- I think I had one other factor on there too. But -- and a lot of the -- the folks that were on that jury list, they didn't show up at all that day at court. And a lot of those that I -- I felt were more in his genuine peer group, you know, 18 to 35.

Q Yes, sir.
A We just didn't have them.
Q And would you agree that the "hand of one/hand of all" or accomplice liability was going to be extremely difficult to overcome in this case?
A I do. Did -- I did believe it was very difficult to overcome.
Q And can you elaborate on why for us?
A On why?
Q Yes, sir.
A I will. I -- I believe I covered it already. But I'm happy to do it again for you ---
Q Yes, sir.
A =-- because ---
Q I appreciate that.
A --- it -- because the testimony reflected that they knew that there was a conflict; that -- that Mr. Lawton had -- had started the conflict with Mr. Benjamin; and that there were signs of trouble; and that they went to the vehicle, retrieved firearms, concealed those firearms, went back into the club, remained for a period of approximately two hours, based on -- as I said, based on Mr. Haggood's testimony.
Q And was the -- was the wound on the inside of the left elbow to attempted-murder victim James Hampton consistent

with a gunshot being fired from the vehicle that applicant was present?

A I believe it was consistent being fired from -- from the .40-caliber weapon of Mr. Haggood.

Q Right. Correct. Correct. In fact, Solicitor Sorenson even stated that they were pursuing that on the "hand of one/hand of all"?

A I believe so.

Q Okay. And do you recall the gunshot-residue exam in this case that was performed on the vehicle?

A Vaguely. But if you could direct me to it in the record =--

Q Sure.

A --- it would be of assistance. Thank you.

Q 467, line 1, Mr. Thomas. I suppose we could back up to 465 -- I mean -- I'm sorry -- 467 [sic], line 21. I apologize. I'm having some -- some PDF issues on the computer.

But suffice to say, do you recall that the gunshot-residue tests revealed gunshot residue inside the driver door of the vehicle?

A I do.

Q And this is where applicant was alleged to have been standing by multiple witnesses?

A It is alleged.

Q Okay.
A Correct.
Q Okay. Now, Mr. Thomas, you testified earlier that you did not believe that the state had proven a disregard for human life to warrant inferred malice. Would -- would you not agree that shooting into a crowd of people multiple times would show a disregard for human life?
A I think there's some doubt whether or not Mr. Benjamin was shooting into a crowd of people.
Q Okay. What about one of his codefendants?
A I believe there was testimony that the codefendant was shooting into the crowd and -- and put human life at risk.
Q In fact, did anybody testify that none of them did?
A (No audible response.)
Q That ---
A Could you ---
Q --- I -- I just ---
A --- rephrase ---
Q --- I could spoil ---
A --- that in ---
Q --- it for you.
A --- in greater ---
Q It's ---
A --- detail, because ---
Q I ---

A --- there were some said that some did; some said they didn't.

Q Did ---

A That's a ---

Q --- any witnesses testify that neither Mr. Benjamin nor Mr. Haggood nor Mr. Frazier ---

A To my ---

Q --- fired any ---

A --- recollection ---

Q --- shots?

A --- I don't remember anyone saying that -- that no one fired.

Q Okay. And you recall that there no bullet imprints found on the building behind the vehicle they were all stationed at?

A Yes.

Q And you recall that there was no bullet damage found on Mr. Haggood's vehicle?

A I believe that's correct.

Q Okay.

A I do believe my investigator and I may have found what we thought possibly was a -- an impact on the building. But this hadn't been the first shootout at the Piggy Park.

Q Understandable.

A You know, Mr. Lawton allegedly had been involved in

another shootout there recently and had injured someone else.

Q Yes, sir.

A Uh-huh.

MR. SAVILLE: Beg the Court's indulgence.

Q Almost done, Mr. Thomas.

(Off the record briefly.)

Q Now, you did testify multiple times that you thought Mr. Gidron was a believable witness, despite his nerves ---

A I do.

Q --- and presentation?

Okay. But it is not your opinion that the jury found him believable.

A It's not my opinion they found him believable. No. I -- I don't believe the jury found him believable.

Q Okay. Now -- I'm sorry. With respect to Mr. Haggood, were you able to bring out the fact at trial that he had a deal with the solicitor's office?

A Yes.

Q Okay. And you were also able to suggest to SLED Agent Green that perhaps they were up to nine guns involved in this incident now?

A Yes. I -- I heard a -- Ms. Blanchette's expert testimony that there were at least five. I believe that there were at least nine.

Q Sure. So you sort of -- you were able to paint the scene of a -- you were able to paint a chaotic scene for the jury?

A Certainly. I certainly ---

Q Okay.

A --- have it well-painted in my mind.

Q Yes, sir.

A Sometimes it's more difficult to express that outward to a jury but . . .

Q And, Mr. Thomas, do you remember being kind enough to speak with me on the phone in anticipation of the hearing?

A I do.

Q Okay. Do you remember, when asked if there was anything you would've done differently in this trial, that you wish you would've forced him to take the plea?

A I do. I wish I -- I would've been more heavy-handed about it. But in Mr. Benjamin's defense, he was adamant and has remained adamant that -- that he was not shooting.

Q Yes, sir. That's all I have. Thank you very much.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: Thank you, Your Honor.

THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Thomas, throughout your testimony, at times it

appeared in your answers that you were discounting the chaotic-scene defense because you couldn't get rid of the elephant in the room. Was the elephant in the room that you're referring to Mr. Haggood?

A Yes.

Q Okay. I just wanted to be clear on that.

What, if you were discounting the chaotic-scene defense or the lack of investigation or whatever you'd like to call it -- I felt at times you were saying that was a good defense; at other times, you were discounting it. What was the better defense?

A Not having Mr. Haggood's testimony was the ideal defense.

Q But you didn't have that defense either?

A We did not. That was taken from us.

Q Okay. Now, at the very beginning of your testimony, the state had you look at page 689 of Judge Goodstein's jury instructions?

A Yes.

Q And if you need a minute to review, that's fine. But is she giving that instruction in connection with the attempted-murder charges?

A I believe she is.

Q And was the evidence regarding the attempted-murder charges, such as the evidence of Mr. Haggood admitting that

he fired the shots, as the state's already alluded to, was it different than the evidence regarding the murder charge?

A Yes.

Q And even looking at the -- the instruction given on 689, it is still the complete instruction that the Court is supposed to give under *Elmore*; is that correct?

A It's not the complete.

Q And it is in no way connected back to the malice instruction given on the murder charge, of which he was convicted?

A No, it's not.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Okay. Yes, sir.

MR. SAVILLE: Just briefly.

RECROSS-EXAMINATION

BY MR. SAVILLE:

Q Mr. Thomas, at -- it -- it was funny that Ms. -- Ms. Blanchette mentioned the elephant in the room being Mr. Haggood. Do you also recall explaining to me that the elephant in the room was accomplice liability?

A He led to -- his testimony led to accomplice-liability ---

Q Sure.

A --- argument for the state.

Q So there were a couple elephants in the room?
A I'd still say Mr. Haggood was the elephant in the room.
Q Okay. Fair -- fair enough.
A Yeah.
Q Now, when Judge Goodstein gave the permissive-inference instruction, which was on page 689, line 6 -- and it was after attempted murder -- had she just said, actually looking at page 689, line 3 ---
A Uh-huh.
Q --- (As read): "Now, malice, as we have talked about, may be expressed or inferred. Again, the same definitions apply as before."
A That's what the record states.
Q Would it not be a reasonable interpretation that that's tying it all -- that's tying all the malices together?
A Possibly. To a -- to a layman, I'm not so sure. But to an attorney, I think so.
Q Okay. And are you familiar with case law that says that jury instructions must be regarded as a whole, rather than isolated portions ---
A I am.
Q --- to determine ---
A Yeah.

Q --- if they're a correct statement of law?

A Uh-huh.

Q Okay. That's all I have. Thank you.

THE COURT: Okay. All right. Thank you, Mr. Thomas. I appreciate it.

THE WITNESS: Thank you, Judge.

THE COURT: You can step down. I appreciate it.

(Whereupon, the witness exited the witness stand.)

THE COURT: All right. Any objections to Mr. Thomas being excused?

MS. BLANCHETTE: None ---

THE COURT: Okay.

MS. BLANCHETTE: --- Your Honor.

THE COURT: All right.

MS. BLANCHETTE: Sorry.

THE COURT: Have a great day -- great weekend.

THE WITNESS: Thank you, Judge.

MR. SAVILLE: Your Honor, I would ---

THE COURT: Yes, sir.

MR. SAVILLE: --- reserve the right to recall him.

THE COURT: All right. All right. He -- if you recall him, he ---

THE WITNESS: Thank ---

THE COURT: --- may wring ---

THE WITNESS: --- thank you ---

THE COURT: --- your neck.

THE WITNESS: --- for trying, Judge.

THE COURT: But go ahead. You do ---

MS. BLANCHETTE: I said ---

THE COURT: --- so at ---

MS. BLANCHETTE: --- no.

THE COURT: --- your own peril.

MS. BLANCHETTE: Your Honor ---

THE COURT: Yeah.

MS. BLANCHETTE: --- my final witness would be Mr. Benjamin. I didn't know if the Court wanted me to proceed at this time.

THE COURT: Yes. Yes, ma'am, I do.

MS. BLANCHETTE: Your Honor, I'd call David Benjamin to the stand.

(Whereupon, the witness came forward.)

DEPUTY CLERK OF COURT: Please raise your right hand.

THE APPLICANT: (Complied.)

DEPUTY CLERK OF COURT: State your full name for the record.

THE APPLICANT: David Jamar Benjamin.

DAVID BENJAMIN, having been first duly sworn, testified as follows:

DEPUTY CLERK OF COURT: Thank you. Have a seat, please.

THE APPLICANT: (Complied.)

DEPUTY CLERK OF COURT: Make sure you speak into the microphone, okay?

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Can you please state your name clearly, for the record?

A David Jamar Benjamin.

Q And, Mr. Benjamin, you are the applicant that filed the PCR application that we're here about today. It's docketed at 2016-CP-09-00085; is that correct?

A Yes, ma'am.

Q And by way of that application and, then, the amendment that I did on your behalf, you're bringing forth allegations of ineffective assistance of counsel; is that correct?

A Yes, ma'am.

Q And as a result of those allegations, what are you asking the Court to give you today?

A Be granted a new trial.

Q And we have met a number of times, and I've explained to you that a new trial is kind of a funny term. What it actually means is that we're here in civil court today. The Court could set aside your convictions; you'd be placed back in the position you were before you were convicted,

with no guarantee of less time. Do you understand that?

A Yes, ma'am.

Q And knowing that there's risk involved, because you're not serving the maximum sentence, would you still like to go forward today?

A Yes, ma'am.

Q All right. Let's talk a little bit about how Mr. Thomas was involved your case. You retained his services?

A Yes, ma'am.

Q And do you agree with his testimony that you guys met a number of times?

A We met a number of times.

Q And you reviewed the discovery with him?

A Somewhat. Not everything.

Q Okay. And leading up to trial, what was your understanding of your defense in this case? Did you -- did he convey to you that he thought that you had a good opportunity to get a favorable outcome in this case?

A Yes, ma'am. The whole time he -- his -- basically, it was he knew for sure that he would've beat the murder charge; it's no way that they was going find me guilty of murder.

And then, me being -- knowing what actually happened, I wasn't trying to plead to nothing that I know I didn't did. And he was constantly on that. He knew he would be

the murder charge.

Q Okay. And he talked a little bit about the guilty plea that came up at the beginning of your trial. Is there still a trial transcript there in front of you?

A Yes, ma'am.

Q Okay. If it would be helpful, the section I'm referring to starts on page 12 of the transcript there. And it's discussed that there's a 15-year plea offer on the table; that it would be to voluntary manslaughter and ABHAN, which is assault and battery of a high and aggravated nature; and that you could plea under *Alford*.

What was communicated to you by Mr. Thomas regarding that plea offer?

A I never really got the plea until the day of the trial. And far as *Alford*, I didn't even know what that meant. I never knew about a *Alford* plea. So the ---

Q And at ---

A --- the only plea ---

Q Oh, go ahead.

A The only plea that had came was right before trial.

Q Okay. And you heard him explaining *Alford* today. I explained it to you at the prison. And did I have to explain it several different ways before you finally had an understanding ---

A Yeah ---

Q --- of what it was?

A Yes, ma'am. Because I didn't -- didn't -- that was my first time hearing it.

Q Okay. Did you all have a thorough discussion of the likelihood of being convicted under the "hand of one/hand of all" when you were discussing this guilty plea?

A He came across with it. But that still just stuck on the basis of he knew how to beat the murder charge. And he said "hands of one/hands of all," but all that came the day of, before -- right before trial.

I, like, had -- it was nothing previous before the trial. The day of trial, right before the trial started, that's when I was getting knowledge of that, of the "hands of one/hands of all."

Q And there's some discussion on the record there that the solicitor had actually engage in trying to reach out to Lexington County to see if your charges could be run concurrent and to ensure that life without parole would be off the table if you pled guilty. Were you of any -- aware of any joint negotiations going on with Lexington County?

A No, ma'am.

Q Okay. Would you have wanted Mr. Thomas to advocate with the Lexington County solicitor, if it was handled by the attorney general's office -- whomever, on your Lexington County charges, to see if it could all be handled

together?

A Yes, ma'am.

Q Okay. If you would've had a proper understanding of the "hand of one and the hand -- is the hand of all," and *Alford*, would you have considered entering a guilty plea, based upon your attorney explaining "hand of one/hand of all" to you?

A Under *Alford*, yes, ma'am.

Q Okay. You're maintaining your innocence today; is that correct?

A Yes, ma'am.

Q But you would have considered taking plea if you would've been properly advised?

A Yes, ma'am.

Q Okay. I want to ask you a little bit about Kelly Fite, who testified at trial, and Bob Tressel, that testified here today. You are not a lawyer, so I'm not going to ask you too many questions about it.

Were you aware that you're attorney was utilizing the services of an expert?

A Yes, ma'am.

Q And was it your understanding he was going to have the capability to reconstruct the crime scene?

A Yes, ma'am.

Q What all did you know about this expert and what he

was likely going to do?

A As far -- he was supposed to -- he would just tell them he was an expert on ballistics, really, on -- well, he didn't really know he was going to reconstruct the crime scene, because all I knew, he was a expert on ballistics and dealing with shell casings. That's what I knew.

Q Okay. And you retained the services of Mr. Tressel. And he testified here today. Would you have wanted him utilized at your trial the way he was utilized here today?

A Yes, ma'am.

Q Okay. And you would've wanted an expert in his capacity to testify at your trial?

A Yes, ma'am. Because it would've showed, like, what he said today: It would've showed more favor, like there's no way possible what -- they way they -- what they're saying is if you put a .45 in my hand and which I wasn't having a -- didn't have a .45 and then they showing more light on the reconstruction of the scene of how he broke down of what actually happened. It's ---

Q And there was a lot of questions and answers about the defense and this issue of a chaotic crime scene either being a good defense or not being a good defense. Was it your understanding that part of your defense was the faulty investigation and chaotic crime scene?

A Yeah. It was -- you say -- say that again?

Q Let me repeat my question. I -- I carried on a bit long there.

Was it your understanding, part of your defense was going to be how poorly this crime scene was handled?

A Oh. Yes, ma'am.

Q Okay. And the chaos of the scene that night?

A Yes, ma'am.

Q Okay. So you would've wanted an expert utilized to address the things that Mr. Tressel addressed today that go to the chaotic crime scene and the poor handling of the scene ---

A Yeah. It ---

Q --- by law ---

A --- just showed ---

Q --- enforcement?

A --- how everything was mishandled. Yes, ma'am.

Q Okay. And we also talked quite a bit with him, with other witnesses, about the diagram that you -- was used and how inaccurate it was. Would you have wanted that addressed as well?

A Yes, ma'am.

Q Okay. He also testified -- Mr. Tressel testified about how he felt that the forensic evidence did not support some of the testimony offered by the state. Would you have wanted that testimony offered?

A Yes, ma'am.

Q Okay. Is there anything else regarding Mr. Fite or Mr. Tressel that you would like to offer today?

A Well, if Mr. Fite just would've -- if he would've did what Mr. Tressel, I don't think we would've been this far today. Because it would've had more for the jury -- to go off of.

Q And when you say that, it makes me think of this: Would you have wanted the jury to go to the scene?

A Yes, ma'am.

Q Okay. And that leads to Tony. Do you feel like his testimony was properly conveyed to the jury without them seeing an accurate portrayal of the scene or going to the scene?

A Yes, ma'am. Because the way he explained it, he was letting them know that he was basically family members with them and he was going against all -- all ours, just coming from me. We went to school together. But it's not like he see me on a everyday basis and anything.

But all he knew was the people was telling him just to speak the truth. He spoke ---

Q Okay.

A --- to the brother and all of this keep constantly telling him to speak the truth. So yeah.

Q And I -- you provided a very good answer, but it -- it

didn't quite answer the question that I asked, so I'll reask it. Okay?

Would you have wanted the jury to go to the scene or to have a better depiction of the scene to go along with Tony's ---

MR. SAVILLE: Objection, Your Honor ---

Q --- testimony?

MR. SAVILLE: --- leading.

THE COURT: Okay. Overruled.

Q You can answer.

A Yeah. Of course.

Q Okay. Now, you were spoken -- you were speaking before about Tony's testimony. I want to ask you a little bit about that. Were you aware of the hostility, as Mr. Thomas described it, between himself or his investigator and Mr. Gidron?

A He told me about it, but not firsthand. He told me about it when he was trying to reach out to him. And with the private investigator it was a little altercation. That was all.

Q Okay. And you gave him Tony's name, right, as an eyewitness to contact?

A Yes, ma'am.

Q Okay. Would you have wanted Tony to testify in the capacity that he did here today?

A Yes, ma'am.

Q Would you have wanted your attorney to object to the malice instruction if it was not properly given to the Court?

A Yes, ma'am.

Q Or given to the jury. I apologize.

A Yes, ma'am.

Q Okay. Like I said, Mr. Benjamin, we've been working on this a while. Your application's been filed since 2016. I have attempted to ask you about the allegations set forth in your amended application.

Is there any other testimony you'd like to offer in support of your application here today?

A I do -- I just them to let me know, because they keep making a inference on saying we left the club to go get firearms, which never took place. It's just that it was a club with no hired security, no cameras, no nothing. So when we went in the club, we never left to retrieve any firearms. The two young men must've already had their firearms on they -- on they waistband.

When we had a altercation, it was a verbal altercation inside of the club, no physical altercation. So words were said then. It was over with. It was left alone.

So the club just went on. The club didn't shut down because of the altercation. When we left out of the club,

that's when Dominique Lawton -- soon as we walked out of the door, he approached us and pull out a firearm. And he cocked his firearm and was, like, "What's up now?"

That's when Haggood got irritated and he pulled out his weapon. And he was, like, "You got a little gun." And that's when everybody came round.

It's -- it's some people grabbed Dominique, and they was trying to usher him around the other way. Then it was people over here just telling us to come this way.

Then Frazier had a -- a firearm in the air, just saying, "We just want to go home. We don't want no problems. We just want to go home." So we was just trying to get to our car.

So as we're going to our car, by the time we make it to the car, the crowd that had -- was with Dominique, they done went around another way and came through the other road. So that's when shots start firing. When shots start firing, that's when the chaos and everybody just scattered and jumped in the car, ducking down. I was holding the horn, because it was a car in front of it.

So we couldn't get out. So we just holding the horn. Then I saw somebody in the field, like waving at me, waving at me. I didn't know who it was at first. But they kept waving for me to come that way. But I couldn't get out.

So finally, when the car backed up, that's when I went

around the car and we left out.

Q And one thing I wanted to ask you, based upon the information that you just shared: Did you have any hatred or ill will towards the victim?

A No, ma'am. I didn't even know him.

Q Okay.

MS. BLANCHETTE: If I could beg the Court's indulgence one moment.

(Off the record briefly.)

MS. BLANCHETTE: Your Honor, I have no further questions of Mr. Benjamin.

THE COURT: Okay. Yes, sir.

CROSS-EXAMINATION

BY MR. SAVILLE:

Q Good afternoon, Mr. Benjamin. Now, you've just testified that y'all never left Piggy Park once y'all went inside?

A We never left out to retrieve any firearms. When we left, the club was over.

Q Okay. Do you remember a DJ testifying that y'all had walked outside together and then came back in?

A That's what he said. Yes.

Q Okay. And do you remember DJ Haynes testifying that there actually was some shoving on the dance floor?

A I mean, I don't think he never said it was no shoving.

Q It was ---

MR. SAVILLE: Just for the Court's record, it is page 132, line 7.

A What page again?

Q Page 132. I can read it.

(As read): "So after he bumped into him, what -- I mean, what happened after the bump? Were there words exchanged, and pushing, or what?"

"Yeah. It was both. It was words and a little shoving."

And it's your testimony today that Mr. Thomas told you there was no way they were going to find you guilty of murder?

A Yes.

Q That's all I have. Thank you.

THE COURT: Redirect?

MS. BLANCHETTE: Nothing, Your Honor.

THE COURT: Okay. Thank you, Mr. Benjamin. I appreciate you being here, sir.

THE WITNESS: All right.

(Whereupon, the witness exited the witness stand.)

THE COURT: Okay. Anything further from the applicant?

MS. BLANCHETTE: I'm sorry, Your Honor. His watch broke.

THE COURT: That's okay.

MS. BLANCHETTE: We were just ---

THE COURT: I understand.

MS. BLANCHETTE: No. We have no further witnesses at this time.

THE COURT: Okay. All right.

MR. SAVILLE: Your Honor ---

THE COURT: Anything from ---

MR. SAVILLE: --- the state ---

THE COURT: --- the state?

MR. SAVILLE: ---- would very briefly, I promise, recall Mr. Thomas.

THE COURT: Okay. Mr. Thomas, if you'd come up, please, sir.

(Whereupon, the witness came forward.)

THE COURT: I'll remind you to just continue under the oath that you previously took.

DIRECT EXAMINATION

BY MR. SAVILLE:

Q Welcome back, Mr. Thomas. Thank you.

A It's good to be back.

Q Did you tell Mr. Benjamin that there -- or did you promise Mr. Benjamin there was no way he was going to be found guilty of murder?

A Two things I don't do are promises and guarantees.

Q Okay. That's all I have. Thank you.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: Nothing.

THE COURT: Okay. Thank you, Mr. Thomas. I appreciate it. You can step down.

(Whereupon, the witness exited the witness stand.)

THE COURT: Anything further from the state?

MR. SAVILLE: No, Your Honor.

THE COURT: Okay. All right. Any arguments that you want to offer before we convene?

MS. BLANCHETTE: Your Honor, if -- I was going to request the opportunity to obtain the transcript from today -- I think there was a lot of detailed testimony offered by experts and other witnesses -- and then provide whatever the Court would like, whether it be a written brief or proposed orders. But I would ask for time to get the transcript if that ---

THE COURT: If ---

MS. BLANCHETTE: --- would be okay.

THE COURT: If -- if that's what -- if that's what you want, I'll certainly afford you that opportunity.

MS. BLANCHETTE: And I'm happy to answer any questions or have any discussion the Court would like to have at this time, based upon what has been presented today.

THE COURT: No, ma'am. I am -- I'm comfortable that

you've presented your case clearly and I understand the issues that you have with -- in -- in this matter. And I've had the opportunity to review the case law and it -- in particular, *Gibson*, in the context with the testimony that's been provided today.

So I -- I'm -- I'm comfortable. I mean, what I'll do is I'll extend to you some time to get a transcript and to -- and to submit a -- a brief.

I don't require it. But out of deference to you, I'll allow you to do that.

MS. BLANCHETTE: And, Your Honor, would there be specific issues that you'd like to -- I know the state they ---

THE COURT: Yeah.

MS. BLANCHETTE: --- deny all issues. But when I'm writing something, I don't want to write something, you know, on issues that aren't of interest to you. I didn't know if you had any direction in putting that brief together that ---

THE COURT: Not ---

MS. BLANCHETTE: --- you would like me to address specific ---

THE COURT: No. You ---

MS. BLANCHETTE: --- issues?

THE COURT: --- know, what -- I -- I -- and I'm not --

I'm -- I'm not necessarily projecting what my ultimate ruling will be. But I'll tell you, as I sit here, the question really in my mind is whether the facts of this case are distinguishable from *Gibson* ---

MS. BLANCHETTE: Uh-huh.

THE COURT: --- and whether, in fact, the permissive charge was required under the facts and circumstances of -- of this case or whether it is distinguishable in any substantive way. That's -- that's really where I am right now. And that's the issue that I want to look at most closely.

MS. BLANCHETTE: And I'm only smiling, Your Honor, because that issue is essentially up on appeal right now in another case where myself and Jeremy Thompson were successful. But that was the argument of the state. The judge did grant the PCR and it's now on appeal.

THE COURT: Okay.

MS. BLANCHETTE: So we'll have an answer to that question. We just -- we don't have it at ---

THE COURT: You just ---

MS. BLANCHETTE: --- this time.

THE COURT: --- don't know when, do you?

MS. BLANCHETTE: We don't know when.

THE COURT: You don't know when. Well, you know, if -- if you -- if you're telling me that that's on appeal

right now, it -- it may be that you make a suggestion that I take it under advisement until such time as there's an answer, if it's the very same issue.

MS. BLANCHETTE: There are -- it is different in the fact that that was a self-defense case. But it's ---

THE COURT: Uh-huh.

MS. BLANCHETTE: --- getting into the area of what is -- how far does the *Gibson* ruling go ---

THE COURT: Right.

MS. BLANCHETTE: --- when we have different factors and different wording used by the Court.

THE COURT: Right.

MS. BLANCHETTE: And I will say that the instruction in that case is more factually similar -- Tony is what I'm referring to -- than -- that *Gibson* and *Benjamin*, if that makes sense.

THE COURT: I understand. No. I ---

MS. BLANCHETTE: So that's just why that came to mind, is that is an issue that I believe will be sorted out on appeal ---

THE COURT: Yeah.

MS. BLANCHETTE: --- in that ---

THE COURT: I mean ---

MS. BLANCHETTE: --- case.

THE COURT: --- it -- it's -- it's -- the -- the --

the charge in this case was different on the margins than the suggested charge. And the question is: Is it so substantially different, given the context of the case, that it's prejudicial?

MS. BLANCHETTE: Correct, Your Honor. I think the analysis does come down to prejudice, so I understand.

THE COURT: Yeah.

MS. BLANCHETTE: Yes, Your Honor. I'll be happy to order the transcript and keep Your Honor informed of the status of the receipt of that.

THE COURT: Okay. All right. So let me make sure that I'm clear. You're ordering the -- you're not ordering the transcript for me; you're ordering it for you.

MS. BLANCHETTE: It's my understanding, Your Honor, that I can provide it to the Court.

THE COURT: Sure, you can.

MS. BLANCHETTE: I cannot provide it to other parties.

THE COURT: Yeah. Yeah. You can if ---

MS. BLANCHETTE: So I will ---

THE COURT: --- you want me ---

MS. BLANCHETTE: --- be happy to provide it to Your Honor upon receipt.

THE COURT: Yeah. And I don't ---

MS. BLANCHETTE: But it's my understanding I can't give it to other parties.

THE COURT: I'm with you.

MS. BLANCHETTE: Is that correct?

MR. SAVILLE: I -- I think it can be provided it to us.

THE COURT: Yeah. But it -- but my point is not whether -- whether I want to see it or not. It's just you're not ordering it so that I can go back and read it to reeducate myself on the issues. You're ordering it so that you can appropriately make arguments in your brief and/or proposed order.

MS. BLANCHETTE: With citations to the record ---

THE COURT: Got it.

MS. BLANCHETTE: --- to make sure it's completely accurate, Your Honor.

THE COURT: Sure.

MS. BLANCHETTE: Yes.

THE COURT: I'll -- I'll afford you that. Yeah.

MS. BLANCHETTE: I appreciate ---

THE COURT: Okay.

MS. BLANCHETTE: --- that, Your Honor.

THE COURT: Yes, ma'am. Okay. All right. Good enough.

Anything further from the state?

MR. SAVILLE: Your Honor, I would just submit that we do think this is distinguishable from *Gibson*, as there is

malice all over the place in this case from the testimony that they -- he brought a gun with him to the club; they left; they came back. There were multiple people that talked about them leaving and coming back.

And then, there was Josh Haggood, who implicated himself and everyone else that they brought the gun back. There is testimony that Mr. Benjamin actually said that, "I'm a killer too," in reference to the fact that the victim's nickname was Killer.

There was a -- there was a lot of trash talk. There is conversations with his codefendants about how he did not want to shoot into the air because he didn't want to waste the bullets. And I just don't -- there's just -- there's so much malice here, besides the fact that Judge Goodstein actually did give the permissive-inference charge in this case.

So that's why we would note that it was distinguishable from *Gibson*. In fact, she actually never -- never said that inferred -- that malice could be inferred from a deadly weapon. She just noted ---

THE COURT: Yeah.

MR. SAVILLE: --- that when ---

THE COURT: Well, I think -- I think y'all -- you -- you may characterize the permissive-inference charge differently than Ms. Blanchette does. I think that when

she references the permissive-inference portion of the charge, that's not the -- the substantive portion that malice can be inferred from a total disregard for -- for human life.

It's the second part, I think, that she's talking about, which says: And you can -- you know, this is an inference that you can take in your judgment, based on your review of the facts and circumstances of this case.

MR. SAVILLE: Yeah.

THE COURT: I think that's the one sentence that we're talking about is absent. Are you saying it's in there?

MR. SAVILLE: Yes, Your Honor. It's actually in there.

THE COURT: Where?

MR. SAVILLE: It's on page 689, line 6.

THE COURT: 689, line 6.

MR. SAVILLE: And I would submit that jury instructions are to be taken as a whole to see if they state a correct version of the law.

MS. BLANCHETTE: Your Honor, if I may, that was clarified with Mr. Thomas that that's the attempted-murder instruction.

THE COURT: Uh-huh. I got you.

MR. SAVILLE: But ---

THE COURT: I got you.

MR. SAVILLE: --- I -- I -- and ---

THE COURT: That -- and ---

MR. SAVILLE: --- I wouldn't ---

THE COURT: --- that's why I didn't see it, because I was looking at the other part.

MR. SAVILLE: Yes, Your Honor. And I would note that right before she gives that instruction, she says (As read): "Now, malice, as we have talked about, may be expressed or inferred. Again, the same definitions apply as before," referring to the murder. And then, she goes on to give the permissive-inference language.

THE COURT: Okay. All right. Good enough. Thank you.

MR. SAVILLE: Yes, Your Honor.

THE COURT: All right. All right. So I -- I don't -- I don't have any particular time frame. And I don't know how long it's going to take you to get the -- take to get the record back. But today is, what, July 12th. Do you think 60 days we can have it wrapped up?

MS. BLANCHETTE: Your Honor, I ---

THE COURT: It just ---

MS. BLANCHETTE: --- will ---

THE COURT: --- depends.

MS. BLANCHETTE: --- order ---

THE COURT: All right.

MS. BLANCHETTE: --- it tomorrow as soon ---

THE COURT: Yeah.

MS. BLANCHETTE: --- as I return back from McCormick Correction. And I believe the court reporter does have 60 days ---

THE COURT: Yeah.

MS. BLANCHETTE: --- to provide it to me.

THE COURT: I will -- well, then, you'll need more time after that. So I'll tell you what: I'll -- I'll defer to your time frame, okay?

MS. BLANCHETTE: I appreciate ---

THE COURT: You let ---

MS. BLANCHETTE: --- that.

THE COURT: --- me know when you get it. And then, 30 days after the time you get it will be the date on which it'll be due. Okay?

MS. BLANCHETTE: I appreciate that ---

THE COURT: All right.

MS. BLANCHETTE: --- Your Honor. And I'll ---

THE COURT: Yes, ma'am.

MS. BLANCHETTE: --- notify you as soon as it's received.

THE COURT: Okay. Thank you very much. I appreciate it.

All right. Okay. Mr. Benjamin, good luck to you,

sir.

THE APPLICANT: Thank you.

MR. SAVILLE: Thank you, Your Honor.

THE COURT: Yes, sir.

(Whereupon, the proceeding was concluded at 2:33 p.m.)

--- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT, OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR CALHOUN COUNTY, SOUTH CAROLINA, ON THE 12TH DAY OF JULY, 2018.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

DECEMBER 7, 2018

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

ORDER OF DISMISSAL

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

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

I. PROCEDURAL HISTORY

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

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

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

II. ALLEGATIONS

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

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

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

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

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

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

III. SUMMARY OF TESTIMONY PRESENTED

Antonio Gidron

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

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

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

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

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

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

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

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

Robert Tressel

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

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

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

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

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

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

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

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

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

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

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

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

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

Peter Skidmore

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

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

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

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

Applicant

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

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

Trial Counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. APPLICABLE LAW

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

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

INEFFECTIVE ASSISTANCE OF COUNSEL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

IT IS THEREFORE ORDERED:

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

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

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

ROBIN B. STILWELL
Presiding Judge
First Judicial Circuit

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN)

David Lamar Benjamin, #354583,) CASE NO.
☒ Plaintiff) 2016-CP-09-00085

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

State Of South Carolina)
☐ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Tricia A. Blanchette, Bar No. 74904 Address: PO Box 2147 Leesville, SC 29070 phone: 803-908-3266 fax: e-mail: blanchettelaw@gmail.com other:	Benjamin Limbaugh, Bar No. Address: PO Box 11549 Columbia, SC 29211 phone: 803-734-3737 fax: 803-734-4113 e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59, SCRCP, Motion
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ February 14, 2019
Signature of Attorney for ☒Plaintiff / ☐Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:
Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	)	IN THE COURT OF COMMON PLEAS DOCKET NO.: 2016-CP-09-00085
DAVID LAMAR BENJAMIN, Applicant, v. STATE OF SOUTH CAROLINA, Respondent,	)	MOTION PURSUANT TO RULE 59(a) & (e), SCRCP

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for relief as follows.

This matter comes before the Court by way of an Application for Post Conviction Relief filed on April 20, 2016. The State filed a Return and Motion for More Definite Statement on or about January 18, 2017. Applicant, 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. Applicant 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, Applicant 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 close of the evidentiary hearing, the Court took the matter under advisement and allowed the parties time to obtain the evidentiary hearing transcript. After the parties submitted proposed Order, the Court issued an Order of Dismissal on February 1, 2019. Applicant, through counsel, received a copy of the Order of Dismissal on February 9, 2010, from which this Motion follows.

GENERAL SESSIONS PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Calhoun County Clerk of Court. Applicant 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, Applicant proceeded to trial in front of the Honorable Diane S. Goodstein and a jury. Applicant 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 Applicant 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 on Applicant's behalf. The appeal was perfected by Wendy Keefer, Esquire, along with James Lee Goldsmith, Esquire, and Robert L. Sirianni, Jr., Esquire. The South Carolina Court of Appeals affirmed Applicant'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, Applicant petitioned for rehearing, which was denied by order dated January 20, 2016. The Remittitur was issued on May 27, 2016.

ARGUMENT

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that the Court ensure that specific findings of fact and conclusions of law are entered on each issue raised and the record before the Court and testimony of each witness is properly addressed in the standing Order of Dismissal. Specifically, Applicant would urge the Court to address the testimony of trial counsel that amounted to admissions of ineffective assistance of counsel that is notably absent from the standing Order and addressed in the proposed Order, attached and incorporated herein.

Applicant would further move the Court to reconsider the standing Order and reconsider the proposed Order Granting Post Conviction Relief, which is attached herein and incorporated in this argument by reference. By way of this proposed Order,

Applicant does not concede any of the issues raised as the Order was drafted based upon the remarks of the Court following the evidentiary hearing.

Specifically, Applicant would ask the Court to reconsider the amended issues involving the expert and eyewitness testimony as a whole, as presented in the proposed Order. Applicant is not asking the Court to grant relief due to cumulative error, but is asking the Court to recognize how these issues developed at the evidentiary hearing and are properly addressed in conjunction with each other. Applicant submits that relief should be granted since "trial counsel was deficient in calling Mr. Gidron without proper preparation and without the proper utilization of an expert. At the evidentiary hearing, Applicant carried his burden and demonstrated before this Court how Mr. Gidron should have been utilized in conjunction with an expert with the qualifications of Mr. Tressell or Mr. Fite." Proposed Order p. 17.

Finally, Applicant submits the way in which the malice instruction is addressed in the standing Order is in error under the controlling case law. See Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). As a result, Applicant would ask the Court to reconsider the way in which the issue is addressed in the proposed Order and ensure that the issue is properly addressed. Proposed Order pp. 22-27.

In conclusion, Applicant would request that the Court review the full record, including the evidentiary hearing transcript, reconsider the standing Order of Dismissal, reconsider Applicant's proposed Order Granting Application for Post Conviction Relief, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

I so move,

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
Attorney for Applicant

February 14, 2019

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	)	IN THE COURT OF COMMON PLEAS DOCKET NO.: 2016-CP-09-00085
DAVID LAMAR BENJAMIN, Applicant, v. STATE OF SOUTH CAROLINA, Respondent,	)	ORDER GRANTING POST CONVICTION RELIEF

This matter comes before the Court by way of an Application for Post Conviction Relief filed on April 20, 2016. The State filed a Return and Motion for More Definite Statement on or about January 18, 2017. Applicant, 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. Applicant 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, Applicant 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 close of the evidentiary hearing, this Court took the matter under advisement and allowed the parties time to obtain the evidentiary hearing transcript, from which this Order follows.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

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); Rule 71.1(e), SCRCP.

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.

As a threshold matter, this Court finds credible the testimony of the witnesses presented at the evidentiary hearing, which will be addressed as it relates to each issue raised and addressed at the evidentiary hearing below.

I. 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.

At the beginning of the trial, the State put the final plea offer on the record. Trial pp. 12-18. The offer was explained as being a plea to voluntary manslaughter and assault and battery of a high and aggravated nature with a cap of fifteen years. Trial p. 13, lns. 5-10. The State further explained that conversations were had about an Alford plea and defense counsel was informed that the State "did not personally care with regards to that." Trial p. 13, lns. 11-13. The State also explained that discussions were had regarding Applicant's pending charges in Lexington County, but no response had been received. Trial p. 14. Defense counsel advised the trial court that Applicant had discussed the offer with his family, and the court asked that the offer remain in effect until the jury was selected. Trial p. 18.

In opening argument, the State alleged Applicant was guilty under the hand of one is the hand of all theory. Trial p. 101. In response to counsel's directed verdict argument, the trial court asked the State to lay out their argument under the hand of one theory. Trial p. 535. In closing, defense counsel addressed why Applicant was not guilty as a principal or under the hand of one theory. Trial pp. 611-614.

At the evidentiary hearing, Nicholas Thomas, Esquire, took the stand and recalled being retained to represent Applicant. PCR pp. 124-5. He testified that he had record of meeting with Applicant twenty-one times, and he had the opportunity to speak with Applicant about the plea offers. PCR p. 126. Specifically, he recounted explaining the plea offer to Applicant that was on the table and discussed at trial. PCR pp. 126-7. He recalled that the option of pleading under Alford was not offered until the date of trial. PCR p. 127.

He explained that he encouraged Applicant to take the plea due to Joshua Haggood's testimony, and he wished he would have encouraged him further. Regarding Mr. Haggood and the defense, counsel offered his opinion that the State did not have a case without Mr. Haggood and his testimony "changed the face of the case for the defense" and "opened up accomplice liability theory." PCR p. 128.

He further explained that he encouraged Applicant to take the plea based upon the make-up of the jury. PCR pp. 132-3. He recalled advising Applicant, along with another local attorney, about not liking the make-up of the jury. PCR pp. 132-3.

When asked about the Lexington charges, Mr. Thomas explained his involvement in trying to get the case moved along and his attempt to "get the whole thing wrapped up and be done with it." PCR pp. 130-131. He admitted that he did not have it in writing from Lexington that life without parole would not be pursued, but he was confident it would not be a problem. PCR p. 131. He explained the reason that Applicant turned down the plea was that he was adamant that he did not shoot anyone and he was not going to take a plea. PCR p. 131, lns. 14-23.

When Applicant took the stand, he agreed that he met with Mr. Thomas a number of times and reviewed some of the discovery. PCR p. 186. He also agreed that he communicated to counsel that he did not want to enter a plea to something he did not do. PCR p. 186. He further explained that counsel advised him that he could "beat the murder charge." PCR p. 186.

Regarding the Lexington charges, he was not aware of any joint negotiations, but he indicated that he would have wanted counsel to see if all the charges could have been resolved together. PCR pp. 188-9.

Turning to the plea offer that was placed on the record, he agreed with counsel that it was communicated to him the day of trial. PCR p. 187. He remembered being told he could plea under Alford, but he did not have an understanding of what that meant. PCR p. 188. He also remembered counsel advising him about the possibility of being convicted under the "hands of one/hands of all" right before trial. PCR p. 188, lns. 4-14. While maintaining his innocence, he agreed that he would have considered a plea under Alford if he would have had a proper understanding of Alford and the hand of one accomplice liability theory. PCR p. 189.

By way of the Amendment and at the evidentiary hearing, Applicant alleged: "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." Based upon the record, testimony offered and the above discussion, this Court finds counsel did not provide ineffective assistance in advocating and advising Applicant prior to rejection of the plea offer. Both Applicant's and counsel's testimony establishes that the plea offer was conveyed to Applicant and Applicant was opposed to entering a plea to something he

did not do. As a result, the record is void of deficiency and prejudice. Therefore, this claim must fail under both prongs of Strickland.

II. 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; Ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witness (Gidron) called for 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. PCR p. 54. He detailed his familiarity over the last forty years with Kelly Fite, defense expert at trial, and he explained that he became involved in Applicant's PCR case at the recommendation of Mr. Fite, who is now retired. PCR pp. 54-55. He acknowledged that he had reviewed Mr. Fite's testimony, along with all the discovery files. PCR pp. 55-56. 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." PCR p. 57, lns. 7-17, p. 79. 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. PCR pp. 57-58. While at the Calhoun County Sheriff's Department a color copy was requested, but it had not been produced prior to the evidentiary hearing. PCR p. 58.

He recounted his interaction with Tony Gidron, defense trial witness, that included going to the scene. PCR pp. 58-62. 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. PCR pp. 59-60, 101. 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 Applicant. PCR p. 60. He agreed that he would have been willing to assist Applicant prior to trial, and he opined that it would have been vital to meet with Mr. Gidron at the scene prior to trial. PCR p. 61.

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. PCR pp. 63, 67, 93, 100-101. He further opined that that investigation fell "well below the standards for a murder investigation." PCR p. 64, lns. 17-20. In detail, he explained how he reached that conclusion. PCR pp. 64-67, 73.

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. PCR p. 63. He was also able to ascertain the caliber of the weapons that left behind ballistic evidence and/or were recovered. PCR pp. 68-69. 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. PCR p. 70. He detailed how he reached his expert opinion that of the caliber of the weapons known to be at the scene, the .40 caliber weapon most likely fired the fatal shot.[1] 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."

[1] Mr. Tressell also discussed his findings regarding the 9mm projectiles found at the scene. PCR p. 74.

PCR p. 71, lns. 1-6. He specifically opined that the .45 caliber weapon attributed to Applicant by trial witness Hampton would not have caused the fatal injury to Mr. Lawton. PCR p. 71, p. 83, lns. 9-18. He further opined that Mr. Hampton's testimony was contradicted by the ballistics evidence that was recovered at the scene. PCR p. 72. Regarding Mr. Haggood's testimony that Applicant fired two shots while running, Mr. Tressell opined that no forensic evidence substantiated or corroborated Mr. Haggood's testimony. PCR pp. 83-84.

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. PCR p. 75. Mr. Tressell addressed the testimony offered by Mr. Fite on touch DNA and Mr. Fite's concession that he had not reviewed the DNA report for the first time on cross examination and the testing he was proposing should have been done was actually done in the case. PCR pp. 75-76, Trial pp. 544-45, 548-9. He acknowledged Mr. Fite's testimony on cross and redirect that touched on his opinion about the caliber of bullet that could penetrate the victim's skull, and Mr. Fite's concession that a .45 caliber could penetrate a skull. PCR pp. 77-78. In response, he raised concern with Mr. Fite's testimony since he did not address the proper distance and opined it was "very unlikely" at the distance involved. PCR p. 78, 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 the last twenty-five years. PCR p. 103. He recounted being contacted by counsel and being retained to work on

Applicant's case. PCR p. 104. He detailed his work on the case, which included reviewing the evidence in person 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 Applicant's counsel, Robert Tressell and Tony Gidron. PCR p. 104, 108-9.

Regarding the discovery, he noted that there was not a thorough investigation conducted on the witnesses at the scene. PCR p. 105. He explained that there was a number of people at the scene and seven witnesses listed in discovery but no corresponding witness statements. PCR p. 105. Beyond Mr. Gidron and Mr. Haggood, he was unable to locate any additional eyewitnesses listed in the discovery. PCR pp. 105-8. He addressed how Mr. Gidron would have been an asset prior to trial in locating additional witnesses. PCR p. 107-8.

As to Mr. Gidron, Mr. Skidmore explained his understanding of Mr. Gidron's negative experience with trial counsel's investigator. PCR p. 119. He further explained how he approached Mr. Gidron and advised Applicant's counsel to approach him. PCR p. 106, 118-119.

Furthermore, Mr. Skidmore 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. PCR p. 107-109, 112-13. 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.[2] PCR p. 106, 111, 117.

[2] 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. PCR p. 110.

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 affirmed his testimony at trial that he was very good friends with the victim's brother and friends with Applicant. PCR p. 12. He explained that he was closer to the victim's brother than Applicant. PCR p. 43. 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. PCR p. 11. He also recalled going to the scene with a guy he did not know before trial. PCR pp. 12-13. 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. PCR p. 16, 31. 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. PCR pp. 17-20. When trying to utilize the diagram from trial, he concluded: "I just can't get it right." PCR p. 29.

Turning to his trial testimony, he affirmed it, and he reiterated that he did not see Applicant with a gun and saw him keeping to himself. PCR pp. 12-13. When asked, he further explained his eyewitness account from start to finish. PCR pp. 12-27. He explained that he was nervous at trial and clarified what he meant when he testified that victim appeared on a hook, and he added that he saw the victim fall back with a gun in his hand. PCR pp. 21-23. On cross-examination, he agreed that he testified that the victim had a gun in his waistband, but did not testify about the gun in his hand since he was not

directly asked, was nervous, and he had not gone through his eyewitness account before trial. PCR pp. 34-35. When asked on cross-examination about whether Applicant shot the victim, he responded: "I know he didn't." PCR p. 40, ln. 24 – p. 41, ln. 4. He further testified that he could say from his eyewitness vantage point that no one at the vehicle with Applicant could have shot the victim. App. p. 41, lns. 4-8. He explained that the gunfire that killed the victim came from a person standing behind a tree near the road. PCR pp. 24-5.

4. Nicholas Thomas, Esquire

At the evidentiary hearing, Mr. Thomas was asked about his utilization of Kelly Fite as an expert, and he explained that he received a referral from several lawyers and reached out to Mr. Fite. PCR pp. 133-34. He copied and mailed a hard copy of the discovery to Mr. Fite, which he admitted contradicted Mr. Fite's trial testimony. PCR pp. 134-5. He exchanged a couple of emails with Mr. Fite about the theory he expected the State to pursue, but did not discuss anything in great detail. PCR pp. 134-5.

When asked about his decision to utilize Mr. Fite at trial, he recalled having reservations about using Mr. Fite prior to calling him to the stand. PCR p. 136. 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.

PCR p. 137, lns. 3-10.[3]

Regarding his closing argument, he remembered barely wanting to "touch on him" since his testimony was not beneficial. PCR p. 138, 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. PCR pp. 138-9. 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." PCR p. 141, lns. 20 – p. 142, ln. 17, Trial p. 551.

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. PCR p. 139. 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. PCR p. 143. 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. PCR p. 139.

On cross-examination by Respondent, Mr. Thomas was asked why he thought Mr. Gidron was not a good witness at trial. PCR p. 168, lns. 7-8. He responded that Mr. Gidron's nervousness on the stand came across as hostility. PCR p. 168. 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 needed in court to testify. PCR p. 168. He stated: "It's just unfortunate that his persona on the

[3] 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. PCR p. 143, lns. 5-14.

stand came off – in a cloud of negativity." PCR p. 169, lns. 11-12. After being interrupted, he further stated: "Because he was my most important witness. And to me, he was more important than Kelly Fite." PCR p. 169, lns. 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. PCR p. 170.

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. PCR p. 140. Regarding the jury, he opined that the jury did not find him believable. PCR p. 178, lns. 11-15. 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.

PCR p. 141, lns. 9-12.

Regarding the diagram and the scene, Mr. Thomas 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 the jury. PCR p. 145, lns. 9-11, pp. 147-8. Unfortunately, he did not have enough time prior to closing argument to get them prepared. PCR p. 145, lns. 9-11, pp. 147-8. He admitted it was his first murder trial, and he learned that you need to be prepared and not expect a break before closing. PCR pp. 147-49. He readily admitted that "it most certainly hurt my closing." PCR p. 149, lns. 20-21.

5. David Benjamin (Applicant)

When Applicant 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. PCR pp. 189-90. He explained that he understood part of the defense strategy to be attacking the poor investigation and chaotic crime scene. PCR pp. 190-91. 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. PCR pp. 190-92.

Regarding Mr. Gidron, Applicant explained that he provided Mr. Gidron's name to counsel prior to trial. PCR p. 193. 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. PCR p. 193, lns. 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. PCR pp. 193-4.

B. Discussion

At trial, the defense called Kelly Fite and Tony Gidron. The testimony of these witnesses is reflected in the trial transcript and has been reviewed in its entirety by this Court. Trial 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." Trial p. 544, lns. 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 Applicant at trial. Trial 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." Trial p. 547, lns. 9-20. He was provided the DNA report and admitted he had not reviewed the DNA results. Trial p. 548. He further admitted that the report showed that the ballistics evidence had been tested for DNA, as he testified should have been done. Trial pp. 548-9.

On redirect, he was briefly asked about the entry and exit impact of a .45 caliber round. Trial 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." Trial p. 554.

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

He provided information about the club and the type of situations/people that frequent it. Trial pp. 560-61. He also provided his eyewitness account of the night in question, which included details regarding his interaction with Applicant and victim, his knowledge that victim had a gun, and his attempt to get Applicant and his friends out of the club safely and to their car. Trial pp. 558-65. He explained how the car was stuck and the shooting he witnessed. Trial 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 the victim get hit. Trial p 562, ln. 10 – p. 563, ln. 6. He was asked if he saw Applicant shoot him, and he responded no and explained what he saw Applicant doing. Trial p. 563, lns. 7-19. He explained his vantage point and how he was able to see both Applicant and the

victim when the victim was shot. Trial p. 564, lns. 6-18. He stated that he did not see Applicant point a gun at the victim and that he saw shots from the road. Trial p. 564.

He recalled being at the scene when law enforcement arrived, and he provided his opinion that it was "handled poorly" by law enforcement Trial p. 566, lns. 5-9. When asked if he spoke with investigators, he recalled speaking with "someone." Trial p. 566, lns. 17-19. He explained that he did not want to be there testifying, but he had to do the right thing. Trial pp. 566-67.

By way of his Amendment prior to the evidentiary hearing, Applicant 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. Upon hearing the testimony offered in support of these allegations and a complete review of the record, this Court finds that these issues are so interrelated it is necessary to address these allegations as one.

This Court finds that Tony Gidron was called at trial, along with expert Kelly Fite, but trial counsel was deficient in calling Mr. Gidron without proper preparation and without the proper utilization of an expert. At the evidentiary hearing, Applicant carried his burden and demonstrated before this Court how Mr. Gidron 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 regrettably explained by trial counsel at the evidentiary hearing.

Even though, Mr. Gidron was called at trial, this court finds analogous Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), wherein the South Carolina Supreme Court addressed whether trial counsel was ineffective for failing to call a witness at trial. The 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, Applicant 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 Applicant'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

Applicant 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. He deemed the diagram provided to the jury as 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 provided his opinions, which were absent from the testimony of Mr. Fite at trial, and this Court finds his expert opinions would have aided Applicant's defense to the point that this Court finds the outcome cannot be relied upon as it stands.

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, the 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. The 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.

The 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, this Court finds that 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, this Court cannot find counsel's decision to utilize Mr. Fite in the capacity he did prior to and during trial amounts to a valid strategic

decision. Additionally, counsel made it clear that he would have much preferred the testimony of Mr. Tressell at trial. Based upon the record and the above, this Court also finds ample evidence of prejudice as was found in McKnight.

Here, 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 Applicant's only witnesses and counsel admittedly tried to avoid even mentioning Mr. Fite in closing and failed to complete his exhibits of the scene for closing. As counsel stated, he should have had an expert at trial testify in the capacity Mr. Tressell did at the evidentiary hearing. This Court cannot ignore these admissions.

Therefore, this Court finds that the proper utilization of Mr. Gidron and an expert was absent from Applicant's trial, which amounts to deficiency in the presentation and preparation of the defense on the part of trial counsel.[4] As a result of this deficiency, Applicant 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. This Court finds that the testimony offered at the evidentiary hearing could amount to a viable defense in the eyes of a jury considering the above discussion. Specifically, but not limited to the following, 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

[4] This Court has considered that counsel testified about his numerous meetings with Applicant and his preparation for trial, but counsel also admitted that he did not prepare Mr. Gidron, properly utilize Mr. Fite or get his exhibits of the scene completed in time for closing arguments.

unavoidable question. In sum, Mr. Gidron and an expert were not properly utilized at trial and this prejudicial deficiency requires a new trial. Therefore, Applicant has met both prongs of the Strickland analysis, and new trial must be granted.

III. 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, Applicant 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 exists. 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.

Trial 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 Supreme Court issued the following warning: "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), the Supreme 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 (footnote 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 (2009) (footnote 9) (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 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 (2009) (footnote 9). While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, the Supreme 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, the Supreme Court concluded that the inference of malice form 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). This Court finds that the general permissive inference

instruction should have been given when the trial court instructed the jury that "malice may also be inferred from conduct that shows a total disregard for human life." Trial 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 Transcript p. 151, lns. 9-12. The record before this Court 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.[5]

Turning to the question of prejudice, this 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 Applicant's co-defendant's shot a weapon during the "chaos," as defined by the Solicitor. Transcript p. 538, lns. 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 Applicant armed himself and returned to the club, yet other witnesses stated that Applicant was not seen with a gun that night. Mr. Haggood testified that Applicant was "like kind of agitated" towards a group in the club before they went out to get their weapons. Transcript pp. 275-

[5] This Court takes note that the trial court added in general permissive inference language when charging the jury on attempted murder. Trial p. 689. This Court finds that this 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 it progeny. Furthermore, this Court has considered the additional charge being given in its prejudice analysis and finds that the record establishes that different evidence and argument was offered regarding the attempted murder charge, i.e. Joshua Haggood pled guilty and admitted to shooting James Hampton; therefore, the additional instruction in the attempted murder charge is not a deciding factor in the prejudice analysis for the murder charge. PCR pp. 180-1.

6. Michael Bullock testified that he saw the victim watching Applicant, and Applicant was not interested in him. Transcript p. 362. Mr. Hagood also testified that the victim was the aggressor and the shooting was an ambush. Transcript 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 Applicant shot in response to an "ambush." Upon review of the entire transcript, this Court finds that the trial testimony is lacking and inconsistent in in establishing malice apart from inferred malice instruction.[6]

As stated above, this Court has reviewed the testimony in its entirety, and this Court has also considered 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 Applicant'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 Applicant was the only one shooting in the direction of Mr. Lawton and Mr. Defreitas and that Mr. Haggood shot Mr. Hampton. Transcript 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.

Transcript 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

[6] At the evidentiary hearing, Applicant provided a narrative of what happened on the night in question. PCR pp. 194-6. This Court has not considered Applicant's narrative in the prejudice analysis since the proper analysis requires this Court to examine the evidence considered by the jury.

drawn, there was "evidence on each and every element of these offenses." Transcript 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.

Transcript 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." Transcript 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 omitted instruction.

Upon a complete review of the record, this Court finds that the erroneous inferred malice instruction contributed to the jury's verdict in light of the evidence presented. Therefore, Applicant has satisfied both prongs of the Strickland analysis, and a new trial must be granted.

IT IS THERFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel as detailed above, but has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel as detailed above;

2. That the Application for Post Conviction Relief be granted and the Applicant's convictions be vacated and he be granted a new trial;

3. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Dorchester County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this ___ day of _____, 201___

_____
Honorable Robin B. Stilwell
Circuit Court Judge

_____, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
David Lamar Benjamin, Applicant, v. State of South Carolina, Respondent.	2016-CP-09-00085 **CERTIFICATE OF SERVICE**

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 14th day of February 2019, a copy of a Rule 59, SCRCP, Motion to Benjamin Limbaugh of the Attorney General's Office, at:

Office of the Attorney General
Att: Benjamin Limbaugh, Ast. AG
P.O. Box 11549
Columbia, SC 29211-1549

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

February 14, 2019

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

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

AND IT IS SO ORDERED.

ROBIN B. STILWELL

February 26, 2019
Greenville, South Carolina