THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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.

BRIEF OF PETITIONER

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

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ISSUE PRESENTED

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

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Calhoun County Clerk of Court. Petitioner was indicted during the February 2013 term of the Calhoun County Grand Jury for one count of murder (2013-GS-09-0051) and two counts of attempted murder (2013-GS-09-0052, 0053).

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

A timely Notice of Appeal was filed. The direct appeal was perfected by Wendy Keefer, Esquire, James Lee Goldsmith, Esquire, and Robert L. Sirianni, Jr., Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an opinion filed on December 16, 2015. *State v. Benjamin*, Op. No. 2015-UP-554 (S.C. Ct. App. 2015). On December 21, 2015, a Petition for Rehearing was filed, which was denied on January 20, 2016. The Remittitur was issued on May 27, 2016.

An Application for Post Conviction Relief was filed on April 20, 2016. The State filed a Return and Motion for More Definite Statement on or about January 18, 2017. Petitioner, through counsel, filed an Amendment on June 18, 2018, which alleged that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. He also amended his Application

for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial counsel:

1. Ineffective assistance of trial counsel for failure to fully and properly advise and advocate for Applicant prior to the rejection of the fifteen year plea offer. Transcript pp. 12-18.

2. Ineffective assistance of trial counsel for failure to effectively and fully utilize the services of Kelly Fite or an expert in his or a similar capacity prior to and at trial.

3. Ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense.

4. Ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016).

5. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

An evidentiary hearing was convened on July 12, 2018 at the Dorchester County Courthouse in front of the Honorable Robin B. Stilwell. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. During the course of the evidentiary hearing, Petitioner testified and called Antonio "Tony" Gidron, Robert Tressell, Pete Skidmore, and Nicholas Thomas, Esquire, to the stand. Respondent also called Nicholas Thomas, Esquire, to the stand.

At the conclusion of the evidentiary hearing, the court requested proposed Orders and allowed time for the parties to obtain the evidentiary hearing transcript. In accordance with the court's instructions, proposed Orders were submitted by both parties. On February 1, 2019, an Order of Dismissal was issued. Petitioner timely submitted a

Motion, pursuant to Rule 59, SCRCP, on April 14, 2019. An Order denying Petitioner's motion was issued on February 26, 2019.

On April 1, 2019, Petitioner, through counsel, filed a Notice of Appeal in the South Carolina Supreme Court. On June 29, 2019, the Petition for Writ of Certiorari and Appendices were filed. On December 3, 2019, Respondent filed the Return to Petition for Writ of Certiorari.

On December 16, 2019, the appeal was transferred from the South Carolina Supreme to the South Carolina Court of Appeals. On January 5, 2022, an Order was issued denying and granting certiorari in part, from which this Brief follows.

ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (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, 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. 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, 467 S.E.2d 926 (1996); *see also Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

A. Summary of the Evidentiary Hearing Testimony

1. Robert Tressell

At the evidentiary hearing, Robert Tressell was qualified as an expert in the area of homicide investigation and crime scene reconstruction. App. p. 924. He detailed his familiarity over the last forty years with Kelly Fite, the defense expert at trial, and he explained how he became involved in Petitioner's PCR case at the recommendation of Mr. Fite, who is now retired. App. pp. 924-5. He acknowledged that he had reviewed Mr. Fite's testimony, along with all the discovery files. App. pp. 925-6. He detailed going to the South Carolina Court of Appeals, Calhoun County Clerk of Court's Office and Calhoun County Sheriff's Department to review evidence and exhibits. He explained that he wanted to see the diagram utilized at trial, but he found it "not very helpful." App. p. 927, lns. 7-17, p. 949. He further explained there was a "somewhat better" diagram in the discovery, but it was copied in black and white despite indicating it was color coded. App. pp. 927-28. While at the Calhoun County Sheriff's Department a color copy was requested, but it had not been produced prior to the evidentiary hearing. App. p. 928.

He recounted his interaction with Tony Gidron, defense trial witness, that included going to the scene. App. pp. 928-932. He detailed how Mr. Gidron walked him through the scene while conveying his eyewitness account. He deemed Mr. Gidron helpful in showing him where people and vehicles were located. App. pp. 929-30, 971. Mr. Gidron depicted his vantage point to him, and he recalled Mr. Gidron being adamant

that "the gunshots that was fired when Mr. Lawton fell came from the roadway," not from the direction of Petitioner. App. p. 930. He agreed that he would have been willing to assist the defense prior to trial, and he opined that it would have been vital to meet with Mr. Gidron at the scene prior to trial. App. p. 931.

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

> Well, we look at the whole totality of the incident. The crime scene, of course, is chaotic. It's outside with a multitude of people running, screaming, vehicles trying to leave. First officers who were on the scene failed to secure the crime scene. They failed to keep people from leaving. They failed to keep witnesses on the scene after they had arrived.

App. p. 934, ln. 22 – p. 936, ln. 3. He also explained that it is fundamental to try and locate and/or interview as many witnesses as possible, which was not done here. App. p. 936. He further explained how the numbering of the evidence of the crime scene resulted in duplication and confusion. App. p. 936-937.

Despite the below standard investigation, he was able to determine that there were at least five firearms used at the scene, but he was unable to determine from the investigation which was fired first. App. pp. 933, 937-938. He was also able to ascertain the caliber of the weapons that left behind ballistic evidence and/or were recovered. App. pp. 938-939. After taking measurements at the scene and reviewing the discovery, he attempted to determine which of the weapons could have caused the injury to Mr.

Lawton. App. p. 940. He detailed how he reached his expert opinion that of the weapons known to be at the scene the .40 caliber weapon most likely fired the fatal shot.[1] He explained:

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

App. p. 941, lns. 1-6. He specifically opined that the .45 caliber weapon attributed to Petitioner would not have caused the fatal injury to Mr. Lawton. App. p. 941, p. 953, lns. 9-18. Regarding Mr. Haggood's testimony that Petitioner fired two shots while running, Mr. Tressell opined that no forensic evidence substantiated or corroborated Mr. Haggood's testimony. App. pp. 953-54.

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

[1] Mr. Tressell also discussed his findings regarding the 9mm projectiles found at the scene. App. p. 944.

victim's skull since he did not address the proper distance and opined it was "very unlikely" at the distance involved. App. p. 948, lns. 4-21.

2. Peter Skidmore

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

Regarding the discovery, he noted that there was not a thorough investigation conducted on the witnesses at the scene. App. p. 975. He explained that there were seven witnesses listed in discovery but no corresponding witness statements. App. p. 975. Beyond Mr. Gidron and Mr. Haggood, he explained that seven years later he was unable to locate any additional eyewitnesses listed in the discovery since the witnesses were now out of state or deceased. App. pp. 975-78. He addressed how Mr. Gidron would have been an asset prior to trial in locating additional witnesses. App. pp. 977-78. Specifically, he testified that Mr. Gidron would have essential to an investigation and explained: "It would have been a huge help. It would've allowed me to maybe possibly track down some other folks that were there that night. He is entrenched in the community. He's well-respected in the community. And it would've been very helpful." App. p. 977, lns. 2-11. After the State unsuccessfully entered an objection regarding his

testimony that Mr. Gidron's eyewitness account could have opened the door to a third-party guilt investigation, Mr. Skidmore further explained how going to the scene with Mr. Gidron would have aided in the investigation:

> Like I said, he – he knew people at the club. He knew how people interacted with one another. That's why he was trying to diffuse the situation, based on what he told me, and felt that something was going to happen. And he probably, seven years ago, had he been talked to and interviewed several times, would've been able to give us more names and locations of where these people were.

App. p. 978, ln. 20 – p. 979, ln. 3.

Mr. Skidmore explained his understanding of Mr. Gidron's negative experience with trial counsel's investigator. App. pp. 988-989. He further explained how he approached Mr. Gidron and advised counsel on how to as well. App. pp. 976, 988-89. He also explained how Mr. Gidron's interviews and time at the scene would have opened up the door to an investigation into a third-party guilt claim involving the shot he saw coming from the road. App. pp. 977-79, 982-83.

Mr. Skidmore agreed with Mr. Tressell that the diagram used at trial was inaccurate, and he explained how he could have been utilized to properly depict the scene as it appeared at the time of trial. App. pp. 976, 981, 987. Mr. Skidmore also recalled attending the meeting at the Sheriff's Office where a color diagram was requested and not provided with the explanation that the retired lead investigator had files in his garage, which greatly concerned him. App. p. 980.

3. Tony Gidron

When Tony Gidron took the stand, he explained that he was present on the night in question and testified at trial. He agreed with his trial testimony, specifically that he was very good friends with the victim's brother and friends with Petitioner. App. p. 882.

He explained that he was closer to the victim's brother than Petitioner. App. p. 913. Turning to the night in question, he described the scene as chaotic, and reiterated his trial testimony that the investigation was poorly handled.

Regarding his interaction with counsel or an investigator prior to trial, he recalled a guy popping up on his doorstep before trial and then just having to take the stand. App. p. 881. He also recalled going to the scene with a guy he did not know before trial. App. pp. 881-83. He acknowledged that he went to the scene with counsel, Pete Skidmore and Robert Tressell prior to the evidentiary hearing and walked them through the scene. App. pp. 886, 901. When shown the diagram utilized at trial, he indicated that he was not given any visual aids at trial, and he attempted to explain the scene and the inaccuracies in the trial diagram. App. pp. 887-890. When trying to utilize the diagram from trial, he concluded: "I just can't get it right." App. p. 899. 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 victim fall back with a gun in his hand. App. pp. 891-93.

Regarding his trial testimony, he affirmed it in relevant part. App. pp. 882-883. He reiterated that he did not see Petitioner with a gun, and he saw Petitioner keeping to himself. App. pp. 882-83. When asked about each section of his trial testimony, he further explained his eyewitness account from start to finish. App. pp. 882-897. He explained based upon his location and proximity to the victim he was scared when he got "hit" since he was "right in the line of that." App. p. 893, ln. 22 – p. 894, ln. 1. Thereafter, he provided the following testimony with reference to the diagram:

> Question: Based upon your present-sense impression that night, did it appear to you that the shots were coming from the club area where Mr. Benjamin's car were – was at or from the road?

Answer: Talking about when he got hit?

Question: Yes, when he got hit.

Answer: It was coming from the road. Because the way he – he kicked back, he never even had a chance to even turn toward – that car was, like, to his far – to our far right. I –

Question: Okay.

Answer: --- could see him. But he – he never had a chance to even look at them, because he was too busy focusing, I guess, trying to get the gun right.

Question: And what vehicle did you see on the road where you say gunfire coming from?

Answer: Right behind that tree. It was a person behind that tree. And it was blue – a blue Malibu at the top of the road. And a little farther up on the side, it was a blue Honda. But I knew it was a – a blue – even though it was dark, I knew that was a blue Malibu. It wasn't – it was only, like, one or tow of those cars down there.

Question: Okay. And based upon your perception that night, it appeared to you that that's where the gunfire was coming when the victim was struck?

Answer: Yes, ma'am. The way it was, like, leaning – after it came out that car, but it was a person standing right there in, like, the car here – the person was here in the – right behind the tree. But that spark came from right there.

App. p. 894, ln. 13- p. 895, ln. 17.

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

Petitioner could have shot victim. App. p. 911, lns. 4-8. He explained that the gunfire that killed victim came from a person standing behind a tree near the road. App. pp. 894-895.

4. Nicholas Thomas, Esquire

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

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

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

App. p. 1007, lns. 3-10. Mr. Thomas also remembered initially planning to utilize Mr. Fite for crime scene reconstruction, but Mr. Fite did not go to the scene or speak with any witnesses, including Mr. Gidron. App. pp. 1008-9. When asked about Mr. Fite's answer at trial that he had not been asked to review the discovery or reconstruct the crime scene, Mr. Thomas responded that he wished he would have "asked him in – in precise detail what I wanted him to do." App. p. 551, p. 1011, ln. 20 – p. 1012, ln. 17. Regarding

strategy in closing due to Mr. Fite's testmony, he remembered barely wanting to "touch on him" since his testimony was not beneficial. App. p. 1008, lns. 7-10.

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

On cross-examination by Respondent, Mr. Thomas was asked why he thought Mr. Gidron was not a good witness at trial. App. p. 1038, lns. 7-8. He responded that Mr. Gidron's nervousness on the stand came across as hostility. App. p. 1038, lns. 7-17. He noted the contributing factors he identified were Mr. Gidron's negative interaction with his investigator and his own failure to communicate to Mr. Gidron that he would be needed in court to testify. App. p. 1038. He stated: "It's just unfortunate that his persona on the stand came off – in a cloud of negativity." App. p. 1039, lns. 8-9. After being interrupted, he further stated: "Because he was my most important witness. And to me, he was more important than Kelly Fite." App. p. 1039, 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. App. p. 1040.

Regarding Mr. Gidron's trial and evidentiary hearing testimony, Mr. Thomas concluded that he had no reason to question his veracity and found him very believable.

App. p. 1010. Yet, he opined that the jury did not find him believable. App. p. 1048, lns. 8-15. When asked about Mr. Gidron's evidentiary hearing testimony, he concluded:

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

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

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

5. David Benjamin (Petitioner)

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

Regarding Mr. Gidron, Petitioner explained that he provided Mr. Gidron's name to counsel prior to trial. App. p. 1063. When asked if he was aware of the hostility counsel described with Mr. Gidron, he recalled counsel telling him that counsel's

investigator had a "little altercation" with Mr. Gidron, but that was all. App. p. 1063, 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. App. pp. 1063-64.

B. Discussion

The lower court erred in failing to find that the proper utilization of a lay witness and an expert was absent from trial, which amounted to prejudicial deficiency in the presentation and preparation of the defense. As the record reflects, Petitioner was called to trial in front of the Honorable Diane S. Goodstein and a jury on March 4, 2013 on charges of attempted murder as to James Hampton and Shawn DeFreitas and murder as to Dominique Lawton ("victim"). During the course of the trial, the State called a series of lay and law enforcement witnesses to address the events that took place during the late night hours of September 17, 2011 into the early morning hours of September 18, 2011 at the Piggy Park in Calhoun County, South Carolina.

The State's witnesses included Petitioner's co-defendant Joshua Haggood. Mr. Haggood provided his version of all the events in question. App. pp. 259-314. During his testimony, Mr. Hagood admitted to having a .40 caliber weapon and placed a .32 caliber weapon in the possession of co-defendant Kevin Frazier and a .45 caliber weapon in the possession of Petitioner. App. pp. 264-267, 272. Mr. Hagood attributed the initial agitation inside the club to Petitioner and explained that it was Petitioner's idea for the three to go out and get their weapons and return to the club. App. pp. 275-277. He did not describe any further conflict inside the club, but he provided details of how victim discharged his pistol as everyone was leaving the club. App. pp. 278-281. He explained that everything became chaotic and Mr. Frazier shot his gun in the air and said "I'm just

trying to get home. I am just trying to get home. I don't want any trouble." App. p. 282, lns. 2-10. He recalled being ushered towards the car and victim and his group going the opposite way. App. p. 283. After getting to their car, he placed Petitioner three steps in front of him as Petitioner shot twice "at that car," while he was trying to get in their car. App. p. 285, lns. 2-9. He recalled people shooting from "different directions," seeing someone shooting from behind "the van," and shooting back with his .40 caliber pistol. App. p. 286, ln. 22 – p. 287, ln. 5. He recalled shooting three to four times in the direction of the van and not knowing if he shot anyone. He recalled Mr. Frazier shooting two to three times more in the air before they got in the car and pulled out of the parking lot. App. pp. 288-289.

As his direct continued, he recalled conversations had in the car before dropping Mr. Frazier off at another club and bringing Petitioner to his mother's home. App. p. 290-292. Specifically, he attributed a statement to Petitioner about wasting bullets in response to Mr. Frazier shooting in the air. App. p. 291, ln. 23 – p. 292, ln. 1. He recounted returning to North Carolina and bringing the pistol back to its owner, who pawned it the next day. App. pp. 293-294.

Regarding his interaction with law enforcement, he admitted that he initially told law enforcement that none of them had guns. App. p. 298. He addressed the multiple versions of events he gave culminating in a fourth statement whereby he admitted shooting. App. pp. 298-300. He agreed that after going through the discovery, he realized that he had hit someone on the other side of the van. App. pp. 300-301.

On cross-examination, counsel asked Mr. Haggood about his military service, and he confirmed that he received marksmanship awards for being a sharpshooter and shot

expert. App. pp. 302-303. He also confirmed that he had been in combat before and agreed that there was "hostile fire" when he walked out of the club and "shots were coming from all directions." App. p. 303, lns. 6-16.

Mr. Haggood testified that he did not see the incident inside the club, but victim was the aggressor outside of the club. App. p. 304. He described victim's actions outside the club as an unprovoked "ambush type thing." App. p. 304, lns. 15-20. He recalled Mr. Frazier being very upset, even irate, as they were trying to get to the car. App. p. 305, lns. 15-21. He recalled hearing "a lot of shots" before Mr. Frazier fired, and he agreed that Petitioner was shooting in an attempt to lay cover fire to get to a safe point. App. p. 306, ln. 18 – p. 307, ln. 10. He testified that he did not see Petitioner shoot anyone and Petitioner did not say he shot anyone. App. p. 307, lns. 11-14.

Referring to his direct testimony, defense counsel asked Mr. Haggood one question about the Solicitor asking him about the lies he told along the way. App. p. 307, lns. 15-17. Counsel also asked: "You finally went in and told them and brokered a deal for your testimony, is that correct?".[2] App. p. 307, lns. 18-19. Mr. Haggood responded: "For the testimony here, yes." App. p. 307, ln. 20.

On redirect examination, Mr. Haggood testified that Petitioner's nickname from high school was "Killa Season" because he did not lose fights. App. pp. 308-309. In response to the Solicitor's questions, he maintained that despite the nickname Petitioner was not a hot tempered guy. App. p. 309. The State further questioned him about where

[2] On direct, Mr. Haggood testified that he had entered a guilty plea on the Friday before trial to one count of assault and battery of a high and aggravated nature involving the shooting of James Hampton. App. pp. 262-263. He agreed that he was looking at up to twenty years on that charge, but part of the plea was that the State was going to recommend no more than ten years in exchange for his testimony. App. p. 263. He also testified that his sentence was to run concurrent with his sentence in Lexington County for aggravated assault. App. pp. 262-263.

the shots were coming from and exactly how he saw Petitioner shoot two shots. App. pp. 310-312. On recross-examination, Mr. Haggood explained that Petitioner did not get his nickname from killing people but it was basically a flattering nickname. App. p. 314. Following Mr. Haggood's testimony, the State called a series of witnesses to include law enforcement, lay and expert witnesses.

After the State rested and the directed verdict motion was denied, the defense called Kelly Fite and Tony Gidron. App. pp. 542-582. Kelly Fite was called to the stand and qualified in the area of "firearms examination and homicide crime scene investigation and crime scene reconstruction." App. p. 544, lns. 1-7. Thereafter, Mr. Fite explained briefly how DNA is collected from ballistics evidence and addressed the circumference of a .45 caliber round, without reference to it being the caliber of the weapon attributed to Petitioner. App. pp. 544-6.

On his much lengthier cross-examination, Mr. Fite was questioned about reviewing "some of the discovery," and he agreed with the Solicitor that you need to review "everything you can get." App. p. 547, lns. 9-20. He was provided the DNA report and admitted he had not reviewed the DNA results. App. p. 548. He further admitted that the report actually showed that the ballistics evidence had been tested for DNA, as he had suggested should have been done. App. pp. 548-9. Specifically, the following testimony was elicited after Mr. Fite reviewed the report containing the DNA findings:

Question: Okay. And in looking at that report, they ultimately did not any DNA off any of those shell casings, is that correct?

Answer: That is correct.

Question: And, in your experience, that is while it's possible it's fairly typical, is that correct, to not get DNA off of a shell casing that's been fired?

Answer: That's correct, but there is a possibility and it has been done.

Question: Okay. And in this case they attempted to do it and couldn't get them, is that correct?

Answer: That's correct.

App. p. 549, lns. 1-12.

On redirect, he was briefly asked about the entry and exit impact of a .45 caliber round. App. pp. 552-3. On recross, he stated: "...you don't expect a large caliber hollow point bullet to penetrate a person's head, but it does happen." App. p. 554, lns. 2-4.

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

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

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

He recalled when law enforcement arrived at the scene, and he provided his opinion that the scene was "handled poorly" by law enforcement. App. p. 566, lns. 5-9. When asked if he spoke with investigators, he recalled speaking with "someone." App. p. 566, lns. 17-19. He said that he did not want to testify at trial or at the evidentiary hearing, but he had to because he has a conscious and "it's been bothering me since it happened." App. pp. 566, ln. 20 – p. 567, ln. 11. He explained that he is "ninety-nine percent sure" Petitioner did not commit a crime. App. p. 567, lns. 6-8.

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

As stated, Tony Gidron was called as a witness and Kelly Fite as an expert at trial. As the record demonstrates, trial counsel was deficient in calling Mr. Gidron without proper preparation and without the proper utilization of an expert. At the evidentiary hearing, Petitioner carried his burden and demonstrated 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 explained by counsel at the evidentiary hearing.

Even though, Mr. Gidron was called at trial, Petitioner submits the instant case is analogous to *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1999), wherein 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, Petitioner called Mr. Gidron to the stand and showed how counsel should have properly handled and utilized Mr. Gidron prior to and during trial. Additionally, the failure to effectively utilize Mr. Gidron was conceded by trial counsel.

While on the stand at the evidentiary hearing, Mr. Gidron reiterated his trial testimony, and he provided additional testimony and explanation of the scene, as addressed above, that was tantamount to Petitioner's defense. Notably, he placed a gun in the victim's hand when he was shot, provided further detail of the scene and provided explicit detail of seeing the fatal shot come from the roadway at the same time he saw Petitioner without a gun in hand. He, along with trial counsel and Mr. Skidmore, addressed the way he was not properly prepared prior to trial, and counsel explained how his nervousness on the stand came across as hostility. Trial counsel testified 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 explained how Mr. Gidron's demeanor and testimony was different, in a positive way, at the evidentiary hearing. Counsel's testimony regarding his failures as to Mr. Gidron were erroneously ignored by the lower court in failing to find ineffective assistance of counsel. *See Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998) (noting a court may find ineffective assistance of counsel when trial counsel admitted the testimony of a witness might have made the difference in obtaining an acquittal), *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance.). Clearly, the lower court must be reversed since the record, to include counsel's admissions, does not support the following finding regarding Mr. Gidron: "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.**" App. p 1099 (emphasis added).

Furthermore, Mr. Gidron also addressed his concern with the investigation at the evidentiary hearing, which was further explored by Mr. Skidmore and Mr. Tressell. Regarding the diagram provided to the jury, he found it to be inaccurate and struggled to utilize it to explain the scene. Mr. Tressell also explained how the diagram was not helpful but how vital it was to go to scene with Mr. Gidron. Mr. Tressell also provided his opinions regarding the crime scene and investigation, which were absent from the testimony of Mr. Fite at trial. In complete contrast to the testimony provided by Mr. Fite, Petitioner submits that Mr. Tressell's expert opinions would have aided the defense to the point that the outcome of his trial cannot be relied upon as having produced a just result. As the record establishes and the lower court must have ignored, the proper utilization of an expert, in conjunction with an investigator and Mr. Gidron, clearly would have allowed counsel to effectively attack the State's investigation, the theory of the case and witnesses called at trial. Counsel's failure to do so is not "proper performance" but clearly deficient. App. p. 1101

In *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (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 South Carolina Supreme 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 South Carolina Supreme 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, the record is absent of evidence of reasonable professional judgment exercised by counsel that limited his investigation and utilization of Mr. Fite. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360. At trial, Mr. Fite told the jury that he was not provided the complete discovery and his expert testimony was rendered moot and prejudicial when he admitted the testing he was addressing had been attempted, as reported in discovery he had not reviewed until cross-examination. At the evidentiary hearing, trial 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. In light of the record, it is incredulous to find counsel's utilization of Mr. Fite amounted to effective assistance. App. p. 1097.

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Gilchrist v. State* , 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002). However, "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.'" *McKnight v. State* , 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hillerby v. State*, 431 S.C. 323, 847 S.E.2d 500 (Ct. App. 2020). Here, counsel did not attempt to excuse his utilization of Mr. Fite as a valid strategic decision nor does the record demonstrate that he exercised reasonable professional judgment in his preparation and utilization of Mr. Fite.

Even without the testimony of Mr. Tressell, it is apparent from trial counsel's own admissions and the trial record that Mr. Fite was not properly prepared or utilized as an expert witness and trial counsel's performance was not "adequate." App. p. 1097. After qualifying Mr. Fite as an expert, trial counsel asked him a brief series of questions regarding how evidence is typically collected and secured at a crime scene, along with a few questions about the circumference of a .45 caliber round, before turning him over to the State for cross-examination. App. pp. 544-546. Somehow, the lower court reviewed Mr. Fite's brief testimony and concluded: "Trial counsel was able to effectively use Mr. 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 a reasonable doubt. Tr. p. 544." App. p. 1097.

Upon proper review of the record, it reflects that trial counsel never asked Mr. Fite a specific question about the scene or evidence as it related directly to Petitioner's case, yet the State now argues in support of the lower court's erroneous finding that Mr. Fite was ineffective not trial counsel. Return p. 14. It is a relief that the State is willing to concede that Mr. Fite was unprepared to testify and ineffective, but it is misplaced to assign this error to Mr. Fite.[3] Furthermore, this argument that Mr. Fite was ineffective blatantly contradicts the findings of the lower court. App. pp. 1096-1098. Here, the proper finding is that counsel was ineffective and the record supports this finding that was not made by the lower court.

Counsel's utilization of Mr. Fite is analogous to the deficient performance addressed in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), where the South Carolina Supreme Court upheld the lower court's finding that counsel failed to further investigate and more thoroughly challenge the gunshot residue evidence. In granting relief, the lower court addressed counsel's failure to further question the State's gunshot residue expert (Powell) and counsel's utilization of an expert (Avery) that was not independent. *Ard*, 642 S.E.2d at 597-598. In upholding the lower court's decision, the Supreme Court noted that during the defense expert's questioning and the State's closing argument the State emphasized to the jury that the defense expert confirmed the State's expert's findings. Specifically, the Court noted: "The Deputy Solicitor specifically argued

[3] The State's argument attacking PCR counsel's preparation and questioning of Mr. Tressell is also misplaced and appears to be a personal attack on PCR counsel for making a misstatement that was not even addressed on cross-examination by the State at the evidentiary hearing or raised in the Order of Dismissal as a basis for denying relief. Return pp. 13-14.

in closing that the defense could not attack Powell's testimony 'because their own expert, Mike Avery, was hired by the defense to review Mr. Powell's work.... He found no fault with Joe Powell's findings...'" *Ard*, 642 S.E.2d at 598, fn. 16.

As stated, *Ard* is analogous to the instant case since the record supports a finding that counsel was deficient in his utilization of Mr. Fite, with such deficiency being evidenced in both the trial record and the evidentiary hearing record. Similarly to *Ard*, the State capitalized on the poor use of Mr. Fite during cross-examination and closing argument, but putting the deficiency beyond *Ard* is counsel's admission that he wanted to barely touch on Mr. Fite in his own closing argument. App. p. 1008, lns. 7-10. Here, the lower court must be reversed for failing to find that Petitioner met the first prong of the *Strickland* analysis since counsel's performance was deficient.

Turning to prejudice, Petitioner must show that "there is a reasonable probability that, but for counsel's errors, the result of trial would have been different." *Strickland*, 466 U.S. at 691-692; *Rhodes v. State*, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Furthermore, when a defendant's conviction is challenged, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Here, counsel's deficient performance goes right to the heart of creating a reasonable doubt as to Petitioner's guilt.

Contrary to the State's argument in support of the lower court's findings on prejudice, Petitioner's largest problem was not accomplice liability, but it was the prejudice that resulted from counsel's failure to properly utilize the only witnesses called

for the defense – Mr. Gidron and Mr. Fite. Yes, from start to finish the State has hung its hat on accomplice liability, and the State is now claiming Petitioner is purposefully avoiding addressing it and the testimony of Mr. Haggood. Return p. 15. Petitioner has no issue with addressing these matters that actually further demonstrate how counsel's deficiencies resulted in prejudice.

As was addressed on appeal, the issue of accomplice liability was discussed during the directed verdict stage of the trial. After the defense moved for a direct verdict, the trial court asked the State to address what evidence existed to put a gun in Petitioner's hand and pointing the gun in the area of the victims. App. p. 535, lns. 1-8. In response, the State relied heavily upon Mr. Haggood's testimony and argued that they had established that Petitioner had possession of .45 caliber gun and based upon the testimony it showed that "basically around the same time" that the victim was fatally shot Petitioner was the only person shooting in that direction. App. pp. 536-537. As to the third victim, the State argued that it was their position that Mr. Hagood shot Mr. Hampton. App. p. 537.

Thereafter, an exchange took place between the Solicitor and the court regarding "accomplice liability theory" and the court noted that the State had requested "hand of one is the hand of all" and she was unsure which victim the State was thinking it applied to. App. p. 537, ln. 19 – p. 538, ln. 12. In response, the Solicitor stated: "I think primarily Mr. Hampton." App. p. 538, ln. 13. Defense counsel made brief argument, which included the following regarding Mr. Haggood:

> And without some testimony of a defendant – of a co-defendant who has already made a deal with the State, without his testimony, there is nothing that put that .45 caliber handgun in his hand, let alone there is no evidence that said a .45 caliber handgun killed the decedent Dominique Lawton.

App. p. 539, lns. 9-14. After counsel concluded his argument, the court denied the motion for a directed verdict. App. pp. 540-541.

Following the conclusion of the trial, counsel filed a Motion to Reconsider Sentence asking for a reduction in sentence arguing that Petitioner's conviction was "likely achieved due to accomplice liability theory or "hand of one." App. pp. 733-734. He further argued: "Direct and circumstantial evidence indicates that the Defendant, David Jamar Benjamin, more likely than not, was not the individual whose bullets caused the death of Dominique Lawton or the injuries to James Hampton and Shawn Defreitas." App. p. 734.

On direct appeal, both parties argued regarding the strength of the evidence and accomplice liability as it related to the defense motion for a directed verdict and a new trial. App. pp. 735-837. In a *per curiam* opinion, this Court affirmed the trial court's rulings. App. pp. 838-840. By way of a Petition for Rehearing, appellate counsel argued:

> The Court of Appeals decision correctly recognizes that accomplice liability may exist under the theory that "the hand of one is the hand of all" but the opinion fails to explain a key element of this type of criminal liability.
>
> In order for this accomplice theory to be a proper basis for criminal liability, there must be evidence that there was some agreement among the players to undertake the criminal activity. *See State v. Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010). Benjamin must have known of the other co-defendants' intended crimes. The State's case simply did not present sufficient evidence, if any, evidence – direct or circumstantial – on this key element.
>
> Though the opinion cites to cases and summarizes this piece of accomplice liability, it does not identify how – in this case – such liability was properly imposed. As a matter of law, there simply was not sufficient evidence to convict Benjamin as an accomplice in these crimes.

App. pp. 842-84. The Petition for Rehearing was denied on January 20, 2016. App. p. 845.

At this juncture, this Court has ruled upon the appellate arguments made regarding accomplice liability, but the record before this Court on direct appeal obviously did not contain the record created at the evidentiary hearing. Therefore, the issue is not whether the State established accomplice liability at trial, but whether credibility would have been shaken and a reasonable doubt established if counsel was not deficient. By way of the Order of Dismissal, the lower court erroneously concluded that counsel was effective in utilizing Mr. Fite in his trial strategy of raising a reasonable doubt due to the chaotic and poorly documented scene, yet Petitioner is now trying to get this Court to merely focus on prejudice in the realm of defeating the State's accomplice liability theory. App. p. 1097.

During closing argument, counsel admittedly briefly mentioned Kelly Fite, but he spent considerable time addressing Mr. Haggood's testimony and motivation for testifying at Petitioner's trial. App. pp. 608-611. He pointed out that Mr. Haggood was the only witness that said they went to the car, got guns and returned to the club. App. p. 610, lns. 5-12. After arguing that Mr. Haggood kept changing his story to law enforcement, trial counsel specifically argued: "He had a reason to lie. And once he made his deal, he's out." App. p. 611, lns. 1-15. Thereafter, counsel addressed the statute on the hand of one is the hand of all. App. p. 611, ln. 21. He concluded his argument on accomplice liability and closing argument by calling himself a salesman and addressing reasonable doubt and whether the jury had heard enough to tip the scales in the favor of a conviction or a reasonable doubt. App. p. 614, ln. 14 – p. 615, ln. 11. Petitioner submits

that those scales would have been tipped in his favor if counsel had provided effective representation.

Furthermore, Petitioner submits that the lower court erred in finding the testimony "merely cumulative" since the proper utilization of an expert, whether it be Mr. Fite or Mr. Tressell, and the proper use of Mr. Gidron would have called the State's investigation, theory of the case and witnesses into question. App. p. 1096. Yes, counsel argued that the scene was chaotic and called an expert and Mr. Gidron at trial, but the record clearly establishes that he failed to utilize Mr. Gidron and Mr. Fite in a way that should be deemed proper and effective at trial. Clearly, the testimony at issue is not merely cumulative and was not categorized as such by trial counsel.

In conclusion, trial counsel called Kelly Fite, an expert with the qualifications who could have done the expert work Mr. Tressell conducted and Mr. Gidron at trial, but, as counsel admitted, Mr. Fite offered regrettably poor testimony and Mr. Gidron was hostile and not believed by the jury. Mr. Fite and Mr. Gidron were Petitioner's only witnesses and counsel admittedly tried to avoid even mentioning Mr. Fite in closing, a closing for which he failed to complete his exhibits of the scene. As counsel stated, he should have had an expert at trial testify in the capacity Mr. Tressell did at the evidentiary hearing, yet somehow the lower court ignored this clear admission of ineffective assistance. "Counsel's function... is to make the adversarial process work in the particular case," and counsel clearly did not meet this function in his utilization of Mr. Gidron and Mr. Fite as the only witnesses for the defense. *Strickland*, 466 U.S. at 690.

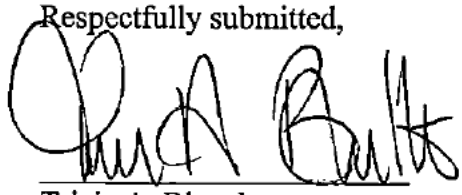
Therefore, Petitioner urges this Court to find that the proper utilization of Mr. Gidron and an expert was absent from trial, which amounts to deficiency in the

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

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court reverse the denial of post conviction relief.

Respectfully submitted,



Tricia A. Blanchette
Bar. No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

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