ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes II, Circuit Court Judge

Case No. 2010-CP-42-5670
Appellate Case No. 2012-209540

Jerome Curtis Buckson, ...Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

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ATTORNEYS FOR RESPONDENT

RECEIVED

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QUESTIONS PRESENTED

Was there any probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to investigate or call witnesses in an attempt to establish that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the witnesses offered by Respondent lacked credibility or relevance and Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel called more witnesses and investigated more?

Was there any probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to utilize trial witnesses more effectively, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel utilized trial witnesses differently?

Was there any probative evidence to support the PCR Court's finding that Counsel was ineffective for focusing more on the defense for the murder charge, rather than prepare for the defense that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel prepared differently?

Did the PCR Court improperly hold that Counsel was ineffective for failing to object to the item stricken on the jury verdict form based upon the cumulative error analysis, when South Carolina has not acknowledged that as a proper analysis for post-conviction relief?

STATEMENT OF THE CASE

The Respondent is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Respondent at the February 2006 term of General Sessions for burglary – 1st degree (06-GS-42-0845) and murder (06-GS-42-0846). Mr. Richard H. Warder, Esquire, represented the Respondent on the charges. On February 2, 2007, following a jury trial, the Respondent was acquitted of murder, but convicted of burglary – 1st degree. The Honorable J. Derham Cole sentenced the Respondent to confinement for twenty years.

A timely Notice of Appeal was filed and an Anders brief was filed on Respondent's behalf. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Buckson, Op. No. 2010-UP-282 (filed May 20, 2010). A Petition for Rehearing was filed and denied June 17, 2010. Respondent filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, but then, by affidavit and letter, voluntarily withdrew his appeal. The Petition was dismissed and the Remittitur returned on October 6, 2010.

Respondent then filed an Application for Post-Conviction Relief on October 22, 2010, and an Amended Application on September 8, 2011. The Petitioner made its Return on or about May 3, 2011. An evidentiary hearing was held before the Honorable J. Mark Hayes II on September 23, 2011, at which time the Respondent was present and represented by Tricia Blanchette, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented the Petitioner. Judge Hayes signed an Order Granting Post-Conviction Relief on October 21, 2011. Petitioner then filed a timely 59(e) Motion and Respondent filed a Response. Judge Hayes dismissed the Motion on March 9, 2012.

A timely Notice of Appeal was filed on Petitioner's behalf and both a Petition for Writ of Certiorari and Return to Petition for Writ of Certiorari were filed. The South Carolina Court of Appeals granted Certiorari and ordered the parties to brief the issues. This Brief of Petitioner follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENTS

I. There was no probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to investigate or call witnesses in an attempt to establish that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel called these witnesses and investigated more.

The PCR Court found that Counsel was ineffective for failing to investigate and failing to contact and utilize witnesses presented at the hearing because they offered "pertinent" testimony regarding the Respondent's residency or intent to commit a crime within the apartment. (App. p. 746-47, 749). Although Respondent offered four witnesses that claim they would have testified at trial, the majority of the information that they offered was not in dispute or was completely irrelevant to the defense that the Respondent was living in the apartment at the time of the incident and could therefore, not have committed a burglary.

Shirley Hall

Shirley Hall testified that she had been a neighbor in the apartment complex at the time of the burglary and shooting. (App. p. 564). Respondent offered into evidence a handwritten note that Ms. Hall testified she had provided to Respondent prior to trial, for him to provide to his attorney, which indicates that Ms. Hall saw Respondent living with the victim for a year and up

until the time of the shooting. (App p. 725). However, Ms. Hall testified that she "recall[ed] him over there." (App. p. 565). Ms. Hall testified that she would have been willing to testify at Respondent's trial, had she been contacted by Counsel, but denied that she had ever spoken with Counsel or his investigator. (App. p. 565). Nevertheless, Ms. Hall testified that she lived two doors down from the victim's apartment and there was a partition between them, so she could not see anything but the Respondent leaving. She also testified that she had no knowledge as to whether or not the Respondent had a key to the apartment or whether or not the victim had broken up with Respondent in the weeks prior to the burglary and shooting. (App p. 566).

Counsel testified that he did recall receiving the note from Ms. Hall and the fact that his investigator did go meet with Ms. Hall. (App. p. 698). Counsel testified that he and his investigator discussed the fact that Ms. Hall would not be able to offer much helpful information and the information she could provide at the time was not beneficial. (App. p. 598).

Petitioner first submits that the uncontroverted testimony is that Counsel was aware of and did investigate calling Ms. Hall as a witness. However, Counsel made a strategic decision based upon the witness interview, that calling Hall would not be beneficial to the defense. The lower court found Counsel's testimony to be credible on the issues he specifically recalled. (App. p. 743). Ms. Hall could only testify to facts which were not in dispute. There was no question as to the fact that the Respondent and the victim had dated and the Respondent had stayed with the victim in her home for a period of time. However, the State presented testimony which indicated that the victim had broken up with Respondent and Respondent was no longer staying with the victim in her home. Ms. Hall was unable to provide any testimony to support Respondent's defense that he was still living at the home at the time of the shooting. Hall testified that she had no direct view of the apartment door and had no knowledge of whether the

Respondent ever had a key to the victim's apartment or whether the victim had broken up with the Respondent recently. (App. p. 566). Petitioner submits that not only was Counsel not deficient in not calling Ms. Hall because he thoroughly investigated her potential testimony, but Respondent was not prejudiced by Counsel's failure to call Ms. Hall because she could only testify to facts which were not in dispute.

Elliott Canada

The second witness produced by the Respondent was Elliott Canada. Mr. Canada testified that he had been to the victim's apartment on the night of the shooting and twice previously. (App. p. 569). Canada knew the victim through family, but worked with the victim's cousin Charlene and Mr. Watson, the gentleman that the victim was seeing that evening. (App. p. 568-9). In fact, Mr. Watson was the person that brought and took Canada home that evening. (App. p. 571). Canada also admitted through cross-examination that he was dating the victim's cousin Charlene at the time. (App. p. 575)

Canada testified that he had seen men's items in the apartment upstairs in the bedroom area on the prior visits, and also that night. (App. p. 569-570). He testified that is appeared to him that a man had been living in the apartment. (App. p. 570). However, he admitted that he did not see men's clothing items in the apartment on the night of the shooting. (App. p. 579). On cross-examination, he also admitted that he had been in the apartment a total of three times in the month prior to the shooting, but only went upstairs twice, contradicting his previous testimony. (App. p. 576). He also testified that he could not recall if he went upstairs on the night of the shooting. (App. p. 576). However, he did testify that he did not see any items to indicate that a man lived in the apartment on the night in question in the downstairs area. (App. p. 577). Canada testified that he never heard the victim refer to Respondent by his full name and

never referred to Respondent as her boyfriend. (App. p. 577-8). Canada testified that he did not know if Respondent had a key to the apartment either. (App. p. 579).

Canada acknowledged that at the time of trial, he was in the county jail. He stated that the prosecutor came to meet with him in jail and he knew that he was listed as a potential State witness. (App. p. 572). However, he testified that he would have been willing to speak with Counsel or his investigator and would have been willing to testify for the defense if he had been subpoenaed. (App. p. 573). Because of his relationship with Mr. Watson, who at one point was also arrested for and accused of the murder of the victim, any assertions that he would have testified on Respondent's behalf are incredible.

Petitioner submits that the Respondent was not prejudiced by Counsel's failure to call Mr. Canada because, like Ms. Hall, Canada only offered testimony relating to undisputed facts. The State concedes that, at some point, the Applicant stayed in the victim's apartment as a resident. However, Respondent needed witnesses to support that he was *still* living in the apartment on January 29th, and Mr. Canada's testimony could not support that assertion. "The proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, and the right and expectation to be safe and secure in, the dwelling burglarized." State v. Singley, 392 S.C. 270, 277, 709 S.E.2d 603, 606 (2011). Mr. Canada's testimony suggested the Applicant was **not** living in the apartment at the time. Canada did not observe men's items in the home the evening of the shooting and Canada testified that the victim and Mr. Watson both appeared nervous about the Respondent showing up at the apartment. (App. p. 580). If the Respondent had been welcome in the home on January 29th, Petitioner submits that the victim would not have been so nervous about his return. The victim was the clear owner with rights to invite people into her home as guests and evict them when she so desired. The

Respondent was welcome in the home so long as he was in the victim's "good graces." *See* Singley, 392 S.C. at 275, 709 S.E.2d at 606. Mr. Canada's testimony suggests that the Applicant was no longer in those "good graces."

Respondent failed to establish that the outcome of the trial would have changed had Canada testified. The Petitioner submits that the Respondent was not prejudiced by Counsel's failure to call Mr. Canada.

Antwan Martin

Respondent also offered his childhood friend, Mr. Antwan Martin, as another witness. Although he testified that he and Respondent were lifetime friends, Mr. Martin testified that he had only been by the victim's apartment twice to see Respondent because of his work and family schedule. (App. p. 588). Martin could not recall when he had visited the apartment, but did know that it had not been the week or so prior to the shooting. (App. p. 591). He testified that he was aware that the apartment had flooded previously, which required the victim and Respondent to move in with Respondent's mother briefly. (App. p. 587). Martin also testified that he thought the locks had been changed at the apartment because of a break-in. (App. p. 587). However, he did not testify how he knew this information. Martin also testified that he did not know whether Respondent had a key to the apartment at the time of the burglary and shooting or "anything about that situation." (App. p. 587-8).

Martin testified that he was with Respondent the entire day prior to the shooting and Respondent never mentioned being kicked out or fighting with the victim. (App. p. 588). Martin also testified that when he returned Respondent to his car following the work that day, Respondent told him that he had numerous missed phone calls from the victim. (App. p 590). Martin acknowledged that he did not see the phone, but relied on Respondent telling him that

there were numerous calls from the victim throughout the day. (App. p. 591). Mr. Martin testified that he was never contacted by Counsel or his investigator, but would have been willing to speak with them or testify at trial. (App. p. 586). Counsel testified that he did recall Mr. Martin being with Respondent on the day prior to the shooting, but believed that he did not call him because there was some good and bad on Martin, and Martin and Respondent had been at a club at some point that night. (App. p. 704).

Although Mr. Martin was the only witness present at the PCR hearing who claimed to have knowledge relating to the Respondent's relationship with the victim, the Petitioner submits he lacked credible foundation for that knowledge and the outcome of the trial would not have changed had he testified. Martin's basis for knowledge about the Respondent's relationship with the victim was solely based on information Respondent provided. In fact, Martin's testimony that he was with Respondent from 3:00 pm until shortly after 8:00 pm, directly contradicts the Respondent's trial testimony that he only spent about two and a half hours, until 4:30 pm, helping Martin move. (App. p. 321; 591). Mr. Martin had not been to the apartment in the weeks prior to January 29th and had not seen any interactions between the Respondent and the victim. Martin was merely present when the Respondent returned to his phone and Respondent informed Martin that there were numerous voicemail from the victim. From that information alone and no personal or first-hand knowledge, Mr. Martin concluded that the Respondent was still in a relationship with the victim and he was still living in her apartment. The Petitioner submits that this testimony does not support the defense that the Respondent was living with the victim at the time and the Respondent was not prejudiced by Counsel's failure to call Mr. Martin.

Lloyd Williams

The final witness offered was the victim's stepfather at the time of the shooting, Lloyd Williams. The Petitioner submits that, much like Ms. Hall and Mr. Canada, Mr. Williams' testimony relates only to matters undisputed at trial Mr. Williams testified that he was listed as a witness for the State, but was never called at trial. (App. p 606). Williams testified that he had known the victim since he married her mother when the victim was four years old. (App. p. 606). Williams testified that he normally saw the victim at least once a week and would often visit her at the apartment where the shooting occurred. (App. p. 606-7).

Williams testified that he knew the Respondent was at the apartment often, but Williams could not say if the Respondent was living there or not. (App. p. 607; 613). Williams stated that Respondent was at the apartment most of the time Williams visited and was told by the victim once that Respondent was upstairs sleeping because he had to work third shift. (App. p. 608-9). Williams also testified that he had seen Respondent put one of the victim's children through the kitchen window so that they could unlock the door once, and Respondent claimed at that time that he did not have his key to the apartment yet because he had given his key to the victim's mother. (App. p. 609-611). Williams could not testify as to the time frame of when he saw that occur though. (App. p. 619). Williams also testified that he never saw any men's clothing items at the apartment. (App. p. 614). When shown his previous statement, Williams simply stated that "in the early stages," he believed that Respondent was living at the victim's apartment because he made that assumption when the victim would indicate that the Respondent was upstairs sleeping. (App. p 617). In fact, Williams stated that he "[made] the assumption that [Respondent] was living there." (App. p. 617). Williams testified that he did not know if

Respondent would leave the home after Williams visited or if Respondent would stay the night. (App. p. 607; 620)

Williams testified that he visited the victim's apartment on the night of the shooting and the victim told him that she originally did not answer the door when he knocked because she thought it was "J," referring to the Respondent. (App. p. 612). Williams also testified that he saw that the victim was playing cards with Charlene and two other guys. (App. p. 613). He testified that when he saw the victim and Charlene with the two guys, he did not know what to think in regards to whether or not the victim and the Respondent were dating anymore (App. p. 619).

Although Williams' testimony supports the fact that Respondent, at some point, lived with the victim, Williams offered no direct knowledge if Respondent and victim were dating at the time of the incident. Williams did not know if the Respondent had a key to the apartment at the time of the incident. His testimony corroborates the Respondent's testimony that the window was once used as a point of entry into the house, but this testimony at best reduces the suspicion surrounding the Respondent's method of entry. Insofar as the State was trying to prove that his method of entry indicated that he did not live at the apartment, Mr. William's testimony could have potentially rebutted that However, the defense still needed to rebut the State's evidence, offered by Mrs. Williams, that Respondent and the victim had ended their relationship and Respondent was no longer was welcome to stay in the apartment. No witnesses offered at the PCR hearing, including Mr. Williams, offered testimony to refute that. Evidence relating to the use of the back window as a method of entry does not address whether the Respondent was still permitted to stay at the apartment at the time of the incident. Additionally, Petitioner submits that the testimony could have been harmful to the defense, because Williams testified that the victim

did not want to open the door the night of the incident because she thought it was Respondent. That testimony appears to indicate three things: one; the Respondent was not welcome at the victim's apartment, two; the Respondent did not have a key to the apartment and would have had to knock for entry, and three; the victim was frightened by or had cause to be concerned about allowing Respondent in her home. The Petitioner therefore submits that the Applicant was not prejudiced by Counsel's failure to call Mr. Williams.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. 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 Petitioner 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S E 2d 813.

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, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner 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, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner 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. Here, even if there was evidence to support a finding of deficiency on Counsel's behalf, Petitioner submits that the Respondent failed to establish the second prong of the Strickland test and failed to show that Counsel was ineffective.

An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). While Petitioner acknowledges that Respondent offered four witnesses to support his claim that Counsel was ineffective for failing to investigate and call more witnesses in his defense, the clear lack of relevance of the witnesses' testimony is not probative evidence to support the lower court's finding that Counsel was ineffective. Counsel should not be found ineffective for his failure to call any of these four witnesses, either by themselves or as a group.

Furthermore, Counsel testified that his strategy regarding calling witnesses is not only to make sure that it is a witness that he can get something out of, but also that the State will not have a stronger case once Counsel sits down. (App. p. 704). Counsel testified that even if a witness can bring something good, sometimes the cross-examination can be a disaster, leaving you with losing more ground than you gain. (App. p. 704). A criminal defense attorney has a duty to perform a reasonable investigation "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum; counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (citing Ard v. Catoe, 372 S.C. 318, 331-2, 642 S.E.2d 590, 597 (2007)).

It is clear that Counsel had completed an independent investigation of the case and interviewed potential witnesses. Counsel testified to meeting with Respondent and his mother

numerous times and reviewing discovery materials with Respondent. (App. p. 693-7). Counsel testified that he investigated calling Ms. Hall and he testified that he believed he looked into Mr. Williams and Mr. Martin, but decided against calling them because of some potential negative testimony as well. (App. p. 698, 702-4). Counsel was aware of and had reviewed the phone records of Respondent and the victim, stating that he did not feel it was helpful at trial because the numerous phone calls back and forth, as testified to by Mr. Martin as well, could just as well have indicated a couple that is feuding following a break-up instead of people living together. (App. p 712). Counsel testified that the reason he called the Respondent, his mother and aunt to testify on Respondent's behalf was because they made good witnesses and brought no baggage with them. (App. p. 714). Counsel also testified that having the mother testify showed that Respondent was close to his family and had cared for his brother and family. (App. p. 701).

Petitioner submits that the lower court's findings that Counsel's failure to contact or utilize these four witnesses was inexcusable and unreasonable are not supported by any probative evidence. The lack of credibility and direct knowledge as to Respondent's living situation on the day of the shooting would have done nothing more than provide ample opportunity for the State to attack these witnesses on cross-examination. Petitioner asserts that the lower court's ruling that Counsel was ineffective for failing to investigate and call these witnesses should be reversed.

II. There was no probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to utilize trial witnesses more effectively, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel utilized trial witnesses differently.

The lower court also found that Counsel was ineffective for failing to prepare and utilize Chad Tate at trial. Chad Tate was the ex-boyfriend of the victim, and father to her two children.

(App. p. 593). Tate testified at the trial on behalf of the defense. (App. p. 291-302). At the PCR hearing, Tate testified that prior to the trial he spoke with Counsel or the investigator, but he claimed that they did not meet with him to prepare him to testify at trial. (App. p. 594). However, Tate testified that he was aware that his purpose in testifying was to support the defense that Respondent lived at the apartment with the victim and her children. (App. p. 594-5). Tate testified that he had no firsthand knowledge as to whether or not Respondent had a key to the apartment. (App. p. 596-7). However, Tate testified that he thought he had more to offer as a defense witness. (App. p. 604).

The Petitioner submits that the Respondent was not prejudiced by Counsel's preparation of or questioning of Mr. Tate. Mr. Tate's testimony established that he believed the Respondent was living at the apartment. The testimony he offered at the PCR hearing relating to a break-in which occurred while he was living in the apartment was completely irrelevant to whether the Respondent lived in the apartment at the time. Tate offered **no** testimony at the hearing to support the claim that had there been additional preparation with him, the outcome of the trial would have changed. Petitioner submits that there was no probative evidence to support the finding that Counsel was ineffective for failing to properly prepare or utilize Mr. Tate at trial.

III. There was no probative evidence to support the PCR Court's finding that Counsel was ineffective for focusing more on the defense for the murder charge, rather than prepare for the defense that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel prepared differently.

Petitioner argues that there was no probative evidence to support the court's finding that Counsel was ineffective for focusing more on the defense for the murder charge and for failing to prepare to defend Respondent on the charge of burglary – 1st degree. In fact, Petitioner argues

that this finding is directly refuted by Counsel's testimony, which was deemed credible by the lower court, and the record itself. (App. p. 743). Counsel testified that the case was clearly two crimes, which were intertwined and occurred within a short period of time (App. p. 694). Counsel testified that he did focus on the issues that he thought had the most problems and probably did discuss the murder more than the burglary because they had to convince the jury that the perpetrator was Mr. Watson, not the Respondent. (App. p. 694-5). In fact, the only witness for the defense regarding the murder was the Respondent, whereas Counsel focused on the important job of cross-examination of Mr. Watson. (App. p. 696).

Counsel testified that he thought they presented a strong case as to the fact that Respondent lived at the apartment through the introduction of pictures from inside the apartment and from the testimony of the defense witnesses. (App. p. 697). Counsel's opening statement at trial points out that Respondent was the victim's live-in boyfriend and explains why he entered through the window. (App. p. 74-45). Respondent acknowledged during his testimony that Counsel discussed at trial several pictures from the scene, which included a photo of what appeared to be men's clothing on the futon in the victim's bedroom, a photo of personal papers of Respondent's and a photo of a toothbrush in the bathroom, (App. p. 683-4, 687). Counsel asked Respondent about those items and pictures at trial. (App. p. 345-9). Counsel testified that he thought that Respondent's mother was a very effective witness, but that all four defense witnesses provided good information about the Respondent's relationship with the victim and their living situation. (App. p. 701). Counsel testified that there might have been individual things or testimony that he elected to not put up at trial to support Respondent living at the apartment, but he thought he tried a strong case to establish that the Respondent did live at the apartment. (App. p. 705-6).

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Other than the testimony of the four witnesses, none of whom had direct knowledge as to whether or not the victim had broken up with or evicted the Respondent from her home, Respondent failed to produce any evidence or testimony that Counsel would have discovered had he done additional investigation into or focused more on the burglary charge.

The facts of this case are similar to those found in State v. Coffin, 331 S.C. 129, 502 S.E.2d 98 (1998). In that case, the victim had recently evicted her boyfriend from staying in her mobile home. Id at 130-31, 502 S.E 2d at 98-99. The evidence supported the testimony that the victim had the only key and her name was the only one on lease. Id. However, in that case, the appellant argued that because he had paid rent several times, he should be considered a resident. Id. Additionally, the facts indicated that the appellant had shown up at the mobile home and was not let in by the victim. Id. The evidence supported the inference that appellant was a guest in the victim's home and she was entitled to terminate appellant's lawful possession by evicting him as she did before the stabbings occurred, so the charge of burglary properly went to the jury. Id at 132, 502 S.E.2d at 99. In this matter, Counsel provided testimony from those closest to Respondent to support his testimony that he had not been evicted from the apartment, but in fact was still living there. Trial testimony from several witnesses, including Charlene and the victim's mother, indicated that Respondent had come to the apartment earlier in the evening and was let in to go upstairs. (App. p. 109-110, 134).

As discussed above, the South Carolina Supreme Court has established that "[t]he proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, **and** the right and expectation to be safe and secure in, the dwelling burglarized." State v. Singley, 392 S.C. 270, 277, 709 S.E.2d 603, 606 (2011)(emphasis added). The PCR Court relies on State v. Singley in its determination that Applicant was prejudiced by Counsel's failure to call additional witnesses. The Petitioner agrees that this is the appropriate test, but submits that the additional witnesses presented at the PCR hearing would not have changed the outcome of the trial because none of the witnesses could testify as to whether the victim had evicted the defendant.

In both Coffin and Singley, a person with a clear possessory interest evicted the individual accused of burglary. In Coffin, the defendant had no possessory right, and "his rights were dependent solely on his girlfriend's good graces." When the defendant's girlfriend evicted him from her mobile home, he no longer had "the right and expectation to be safe and secure" in that home. The Court went further in Singley, when it found that a possessory interest was not even enough to entitle the defendant to a finding of custody and control of the dwelling. Singley at 277. These cases make clear that although the determination of habitation is a fact intensive one, if the undisputed owner of the house indicates that the defendant is no longer welcome in the home, the defendant will not succeed in claiming he entered his own dwelling, even where the defendant owns a possessory interest in that home.

Petitioner submits that Counsel brought credible and effective witnesses forward during the trial to support the defense that the Respondent still lived in the victim's apartment. Counsel prepared and planned on presenting a defense to both charges at trial. There was no probative

evidence to support the lower court's findings that Counsel was ineffective for focusing more on the murder charge than the burglary charge Respondent was faced with.

IV. The PCR Court improperly held that Counsel was ineffective for failing to object to the item stricken on the jury verdict form based upon the cumulative error analysis, when South Carolina has not acknowledged that as a proper analysis for post-conviction relief.

Although Respondent was acquitted of the murder charge, he was found guilty of burglary – 1st degree and received a sentence of twenty years. (App. p. 477). At the end of the trial, the jury returned the verdict forms to the trial court and an issue was brought up by the judge regarding a few letters that appeared to have been written in and then struck out and initialed by the jury foreman. (App. p. 479). The judge addressed that issue with the jury foreman and the jury foreman stated that there had been a mistake as to where things were written. (App. p. 479). The jury was also polled following the issuance of the verdicts to confirm that the verdicts were correct. (App. p. 477-8).

The lower court originally found that Counsel was ineffective for failing to address the matter before the trial court based upon Counsel's testimony that he thought the jury "compromised" on the verdict. (App. p. 751-2). However, in the Order denying the Petitioner's 59(e) Motion, the court acknowledges that the action of the jury or the failure of Counsel to address the matter with the trial court, "standing alone," would not lead to a conclusion of ineffective assistance of counsel. (App p. 769). The lower court also agreed that it would be speculation to determine that the strike through indicated indecision by the jury. (App. p. 769). Nevertheless, the court found that it was a factor, that when considered alongside the totality of other credibility evidence, supports the conclusion that trial counsel was ineffective in his handling of the Respondent's burglary defense. (App. p. 769).

Petitioner submits that the lower court's reasoning articulated in the Order denying the State's 59(e) Motion demonstrates that a cumulative error test was applied, which is an error of law. It is yet unsettled in this State "whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002). This Court has previously held that it will reverse a PCR court's decision when it is controlled by an error of law. Lounds v State, 380 S.C. 454, 460, 670 S.E 2d 646, 649 (2008).

Petitioner submits that this finding of the lower court should be reversed because it is based upon an error of law. Additionally, the only evidence to support this decision which does not require pure speculation on the PCR Court's part is the transcript from the trial, where the jury states that the cross through on the verdict form was a mistake of placement.

CONCLUSION

For the reasons stated above, Petitioner requests that this Court reverse the PCR Court's ruling.

Respectfully submitted,

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August 11, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Spartanburg County

Honorable J. Mark Hayes II, Circuit Court Judge

Jerome Curtis Buckson,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

PROOF OF SERVICE

I, Ashley Haworth, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to her attorney of record, Tricia A Blanchette, Esquire, Esquire P.O. Box 12725 Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 11th day of August, 2014.

Ashley Haworth

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