

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable J. Mark Hayes, II, Circuit Court Judge

Case No.: 2010-CP-42-05670
Appellate Case No.: 2012-209540

Jerome Curtis Buckson,.....Respondent,

vs.

State of South Carolina,.....Petitioner.

BRIEF OF RESPONDENT

RECEIVED

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SC Court of Appeals

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ISSUES PRESENTED

PETITIONER'S ISSUES PRESENTED:

- I. Was there was no probative evidence to support the PCR Court's finding that Counsel was ineffective in failing to investigator 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 investigate more?
- II. Was 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 Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel utilized witnesses differently?
- III. Was 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 the outcome of the trial would have been different had counsel prepared differently?
- IV. 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?

RESPONDENT'S COUNTER STATEMENT OF ISSUES PRESENTED:

- I. Whether the lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent was also facing an equally serious burglary charge. Whether the lower court further correctly held that such ineffective assistance and the resulting prejudice were demonstrated through counsel's failure to investigate and call witnesses and his failure to speak to and properly utilize witnesses called at trial.

- II. Whether the lower court incorrectly held that trial counsel was ineffective for failing to object to the item stricken on the jury verdict on the burglary indictment based upon the cumulative error analysis since the lower court clarified, at the State's request, that the verdict issue simply added to the totality of the prejudice analysis or possibly demonstrated that the jury was close to reaching a not guilty verdict but what it meant was left open to assumption since trial counsel failed to address the matter with the trial court.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

STATEMENT OF THE CASE

Respondent was confined in the South Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court.¹ During the February 2006 term of the Spartanburg County Grand Jury, Respondent was indicted for Burglary, First Degree (Indictment No.: 2006-GS-30-0845) and Murder (Indictment No.: 2006-GS-30-0846). On January 30, 2007, a jury trial was conducted in Spartanburg County in front of the Honorable J. Derham Cole. Respondent was represented by Richard H. Warder, Esquire. The jury returned a verdict of not guilty on the Murder charge and guilty on the Burglary, First Degree, charge. On February 2, 2007, the Honorable J. Derham Cole sentenced Respondent to confinement for a term of twenty (20) years.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected by M. Celia Robinson, South Carolina Office of Appellate Defense. Following the submission

¹ Pursuant to the Order issued on October 3, 2012, Respondent is currently released subject to an appellate bond

of the Brief of Appellant, the South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Buckson, Op. No. 2010-UP-282 (filed May 20, 2010). A Petition for Rehearing was filed and denied on June 17, 2010. Respondent filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was voluntarily withdrawn. The South Carolina Supreme Court issued the Remittitur on October 6, 2010.

On October, 22, 2010, Respondent filed an Application for Post Conviction Relief (PCR) in Spartanburg County. On or about May 3, 2011, the State submitted a Return. On September 8, 2011, Respondent, through counsel, submitted an Amendment to Application for Post Conviction Relief. An evidentiary hearing into the matter was held on September 23, 2011 at the Spartanburg County Courthouse in front of the Honorable J. Mark Hayes, II. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The State was represented by Suzanne H. White, Assistant Attorney General.

During the hearing, Respondent testified on his own behalf. PCR counsel also called Shirley Hall, Barry Adair, Elliott Canada, Antwan Martin, Chad Tate and Lloyd Williams to the stand. PCR counsel introduced eight exhibits. The State called Richard H. Warder, Esquire, to the stand. The lower court also had before it a copy of the Application, the Return, the Amendment, the records of the Spartanburg County Clerk of Court concerning the subject conviction, the trial transcript, and Respondent's records from the South Carolina Department of Corrections.

At the close of the hearing, the Honorable J. Mark Hayes, II, took the matter under advisement. On October 21, 2011, the Honorable J. Mark Hayes, II, issued an Order Granting Application for Post Conviction Relief. Petitioner filed a Motion to Alter or Amend the Order Granting Relief Pursuant to Rule 59(e) on November 8, 2011. Respondent submitted a Return

on November 15, 2011. On March 9, 2012, the Honorable J. Mark Hayes, II, issued a written Order denying the State's Motion and clarifying the Order Granting Application for Post Conviction Relief.

On September 17, 2012, Petitioner filed a Petition for Writ of Certiorari and Appendix. On October 3, 2012, this Court issued an Order granting Respondent's Petition for Appeal Bond, and Respondent was released following a hearing and posting of bond in Spartanburg County on November 8, 2012. On December 14, 2012, Respondent filed a Return to Petition for Writ of Certiorari. Thereafter, the appeal was transferred to the South Carolina Court of Appeals. On April 10, 2014 an Order granting Certiorari was issued by the Court of Appeals. On August 11, 2014, Petitioner submitted the Brief of Petitioner and additional Appendices, from which this Brief follows.

ARGUMENT

- I. The lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent was also facing an equally serious burglary charge. The lower court further correctly held that such ineffective assistance and the resulting prejudice were demonstrated through counsel's failure to investigate and call witnesses and his failure to speak to and properly utilize witnesses called at trial.

In pertinent part, S.C. Code Ann. § 16-11-310(3)(a) (2003) provides: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." The lower court found that being charged under this statute, presented two important issues for Respondent: "First, the issue is to what degree did the Applicant have a right to claim possession to the victim's apartment; and the second issue is the implication of his lack of intent to commit a crime when he entered the victim's apartment." App. p. 744. State v. Singley, 392 S.C. 270,

271-72, 709 S.E.2d 603, 604 (2011), the lower court reasoned that the jury must determine whether Respondent used the dwelling in such a manner that it could have been said to be his own home because one cannot commit the offense of burglary by breaking into his own home. Id. at 276, 709 S.E.2d at 606. The lower court further noted that the South Carolina Supreme Court held that the proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, and the right of expectation to be safe and secure in, the dwelling burglarized. Id. at 278, 709 S.E.2d at 607.

Under the any evidence standard of review, the lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent was facing an equally serious burglary charge. Specifically, the lower court reasoned:

At the PCR hearing, Applicant alleged that trial counsel failed to focus on the burglary charge during the preparation and investigation phase of his representation. Even though the Applicant was going to trial on murder and burglary, Applicant explained that counsel focused on the murder charge and trial counsel did not refute this assertion. Trial counsel explained that the murder charge was more complicated and was his primary focus. Interestingly, both charges carry a life sentence, yet counsel determined that he would regrettably put his entire focus on the preparation and presentation of Applicant's murder defense. This Court finds this decision to focus on the murder charge to be unreasonable and ineffective, which resulted in prejudice to the Applicant. The State has argued that the not guilty verdict on the murder is indicative of counsel's effective investigation and preparation, but this Court is not convinced of this argument. When counsel choose to focus his investigation and preparation on the murder charge, he could not anticipate a not guilty verdict nor does his preparation on one charge excuse the unreasonableness of his preparation and investigation on the other charge.

App. p. 745.

At the evidentiary hearing, trial counsel explained that he focused his preparation and time with Respondent prior to trial on the murder charge since it was more problematic and had more defenses. App. p. 694. On cross-examination, when asked if both charges, murder and

burglary in the first degree, were equally important, counsel explained that the risk was more on the murder, so it took up most of the focus. App. pp. 714-5. He also explained that he did not contemplate that the jury would split as he assumed a not guilty on the murder would result in a not guilty on the burglary charge. App. p. 715.

Based upon Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) and Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the lower court held that trial counsel failed to conduct an independent investigation into the burglary charge and speak with witnesses prior to trial. The court found that counsel's prejudicial lack of investigation and preparation on the burglary charge was demonstrated by the witnesses he failed to utilize at trial and the witnesses he failed to utilize effectively at trial.² Interestingly, Petitioner argues that this Court should reverse the lower court due to the credibility of the witnesses called at the evidentiary hearing.³ When matters of credibility are involved this Court has consistently given great deference to a post conviction relief court's findings. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), McCray, 317 S.C. 557, 455 S.E.2d 686, Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.). Furthermore, the lower court's findings regarding the witnesses presented at the evidentiary hearing are fully supported by the record.

When Respondent took the stand, he provided the court a detailed account of the events in question and affirmed his trial testimony. App. pp. 559-60, 624, 641-4, 660-3. While on the stand, the following testimony was elicited by PCR counsel:

² Additionally, the lower court held that trial counsel's deficient preparation and investigation was demonstrated by his failure to utilize the phone records admitted at the evidentiary hearing and explained during Respondent's testimony App pp 746, 633-36

³ As to Richard Warder, Esquire, the lower court held "This Court finds the testimony of Richard Warder to be credible on the matters that he specifically recalled, but this Court cannot make a finding of credibility on all the matters he could not recall" App pp 743-4

PCR Counsel: Did you and Mr. Warder have extensive conversations about the burglary charge?

Respondent: We didn't. It was concerning the murder because he felt like if we get rid of the murder the burglary would also go.

PCR Counsel: And why did he not or what was your understanding as to why the burglary was not your primary problem?

Respondent: He said it was the intent, effect of the burglary, and basically just telling me if we got rid of the murder, the matters in the intent of the crime would possibly go away.

PCR Counsel: And did he ever talk with you about whether or not you could burglarize your own home?

Respondent: Yeah, he told me that's impossible when I lived there. If I was living in the home, you can't burglarize it.

PCR Counsel: So, it was very important to establish that you were living at the residence and did not have the intent to commit a crime at that residence, is that correct?

Respondent: Yes, ma'am.

App. pp. 627-8, lns. 11-25, 1-4. Respondent explained that he did not understand the elements of the burglary statute and counsel did not explain to him what the State had to prove. App. p. 660, lns. 6-12. When asked, he also answered that he did not understand the legal principle that burglary is a crime against possession and habitation not ownership, so the trial evidence and argument's about the lease or ownership did not matter. App. p. 660, lns. 13-17. When asked about his thoughts about taking the stand at trial, Respondent stated. "I felt like I was obligated to defend myself with the, murder and the burglary. I mean both of them carried life sentences." App. p. 659, lns. 20-25.

Respondent recalled asking trial counsel to speak with each witness discussed below, and he explained that he and his mother would have been willing to assist trial counsel in locating or contacting the witnesses. App. p. 629. Respondent briefly addressed his reasoning for wanting

counsel to contact and/or utilize each witness. Respondent identified the letter he provided counsel from apartment neighbor Shirley Hall. App. pp. 629-30. He explained that Ms. Hall “lived next door to us” and she saw him come and go from the apartment and would come get him when the kids were acting up outside the apartment.⁴ App. p. 630. Respondent indicated that he thought his attorney may have spoken to Elliott Canada and that he wanted him called at trial since he was a “key witness” due to his friendship with Mr. Watson and his presence at the apartment shortly before the alleged crimes took place. Additionally, he was in the apartment when events took place that were testified to by the State’s witnesses. In contrast to the family member witnesses called by trial counsel, he explained that Mr. Canada had no reason to help him, so he felt his testimony would carry a lot of weight with the jury. App. pp. 631-2. Respondent acknowledged that Antwan Martin was present at his trial and willing to testify, but counsel failed to utilize him or available telephone records to refute the testimony the State presented regarding Respondent’s phone calls with the victim. App. pp. 632-3. Due to the absence of the phone records and Mr. Martin’s testimony, Respondent explained that the State made it appear as if he was the only calling the victim and the calls made to him by the victim were not addressed by trial counsel. App. pp. 633-36. Regarding Lloyd Williams, Respondent recalled asking his attorney to speak with him since he was the victim’s stepfather. He further explained his reasoning, as follows: “I feel like this man is a good person that I know of, and he wouldn’t lie just for the simple fact of relationship to family. I felt like they, the prosecution didn’t call him because he had something else to say other than agreeing with whatever the prosecution was going for.” App. pp. 637, ln. 24 – 638, ln. 4. As is detailed below, it is apparent from Mr. Williams’ testimony that Respondent’s reasoning was correct. As was cited to by the

⁴ Respondent agreed that in applying common sense it was true that the witnesses’ memory would have been clearer in 2006 when he asked trial counsel to speak with them and utilize them at trial App p 630

lower court, Respondent also noted that Mr. Williams could have been used at trial to impeach the testimony of Taffy Williams. App. p. 638. Finally, Respondent concluded that Chad Tate was not used correctly by counsel and there were a number of additional questions he wanted counsel to ask Mr Tate. App. pp. 637, 657. Respondent made it clear that he just did not understand why counsel failed to utilize available witnesses and failed to fully utilize Chad Tate. App. p. 666.

Turning first to the witnesses that were not called at trial, the lower court held: “This Court finds that trial counsel’s failure to investigate and utilize the testimony of Shirley Hall, Elliott Canada, Antwan Martin and Lloyd Williams was beyond reasonableness... As noted by the South Carolina Supreme Court, a burglary charge requires a very fact intensive analysis, which would have been aided by the testimony of Shirley Hall, Elliott Canada, Antwan Martin, and Lloyd Williams.” App. p. 746. Respondent submits there is ample evidence in the record to support the lower court’s finding. Interestingly, trial counsel admitted that the witnesses called at the evidentiary hearing “would have been helpful at trial.” App. p. 710, ln. 21.

At the evidentiary hearing, Shirley Hall testified that she was a neighbor to the victim and provided a letter for Respondent to provide to his defense counsel that stated in pertinent part: “I saw him living with Tiffany for about a year and up until the shooting.” App. p. 567, lns. 1-2. When asked, trial counsel said “you recall funny things” and he explained that he recalled receiving the letter and having his investigator speak with Ms. Hall. App. p. 698, lns. 17-21. He recalled that she provided “nothing that was beneficial.” App. p. 698, lns. 21-24. After hearing Ms. Hall’s testimony at the evidentiary hearing, the lower court concluded that when residency was one of the primary issues it was unreasonable for counsel to have this information available through Ms. Hall or potentially any other neighbor and to “not provide it to the jury to assist in

their fact intensive analysis of the burglary charge.” App. p. 747.

Elliott Canada testified that he was at the victim’s apartment on the night in question with Mr. Watson (the person present in the bedroom when the victim was shot) and had been there a total of three times in the month prior with the victim’s cousin Charlene. App. pp. 568-9, 576. He recalled seeing a man’s stuff upstairs in the bedroom area and stated that it was apparent there was a man living in the apartment. App. p. 569-570. He recalled both the victim and Mr. Watson being “jittery” about the victim’s “friend” coming home. App. pp. 570, 578. He further recalled the victim using the name “J.” He concluded from their actions it was clear there was a man living there and he could return home. App. p. 580. He recalled that Mr. Watson planned to return to the apartment after dropping him off and he planned to bring his gun to protect himself. App. p. 571. He recalled meeting with the Solicitor and the victim’s family at the jail, and he thought he would be called as a witness at trial. App. pp. 572, 574. He testified that he never spoke to defense counsel, but he would have been willing to talk to counsel or an investigator for the defense. App. p. 573. Specifically, he testified:

PCR Counsel: Do you think that the information you had actually might be helpful to Mr. Buckson’s defense?

Mr. Canada: Well, if they asked the same that you’re asking now I would assume so.

App. p. 573. As Mr. Canada concluded and the lower court correctly agreed, Mr. Canada had testimony that should have been investigated by trial counsel and presented to the jury. On several occasions, PCR counsel attempted to ask Mr. Warder about his failure to speak to or utilize Mr. Canada, but Mr. Warder failed to provide an answer. App. pp. 699, 713.

Antwan Martin testified that he attended trial, was willing to testify but was not called as a witness for the defense. App. p. 586. He explained that he was with Respondent for a majority

of the day on January 29, 2006 since the Respondent helped him with a move. App. p. 588. He recalled everything appearing normal in Respondent's relationship with the victim and that the victim appeared to be tracking Respondent down with a number of calls to come home. App. pp. 589-90. He explained that he knew that Respondent's home was at the apartment shared with the victim and that he could have testified that Respondent lived at that apartment on January 29, 2006 with the victim. App. pp. 589-90. He testified that he had no knowledge of a fight or that Respondent was staying with his mom due to a fight with the victim, as was alleged by the State. App. p. 590. He was aware that the victim and Respondent had recently stayed with Respondent's mother when the apartment in question flooded. App. p. 587. When asked about speaking with Mr. Martin or calling him as a witness, trial counsel thought he remembered something about a nightclub but admitted he could not remember. App. pp. 704, 711. The lower court addressed Mr. Martin's testimony at length and found that it could have directly refuted the testimony of Taffie Williams (state witness, victim's mother) that Respondent and the victim were not dating and had been broken up for about two weeks. App. p. 121, Ins. 18-24. Additionally, he was an eyewitness to the events that took place in the hours leading up to the alleged crimes and had firsthand knowledge about Respondent residing with the victim.

Lloyd Williams testified that he became the victim's stepfather when she was four and he was married to Taffie Williams at the time of Respondent's trial. App. p. 606. He explained that he knew that he was on the State's witness list and was prepared to be called as a witness. App. p. 606. He explained that he was not called by the State as a witness and he was concerned about it. App. p. 615. He further explained that he was very upset that the man that killed his daughter (Mr. Watson) was walking around free and "nobody cares about that." App. pp. 615-6. He acknowledged that he would have been willing to testify for the defense, but he was never

contacted by trial counsel. App. p. 615. He affirmed that Respondent was known as “J” and that victim informed him that Respondent helped pay the bills at the apartment. App. p. 608. He recalled seeing Respondent at the apartment with and without the victim since he came by at least once a week. App. pp. 606-609. He also recalled Respondent being at the apartment with the victim’s sons and Respondent bringing them home. App. p. He explained:

Yeah, sometimes he would be there and she wouldn’t. Like once I saw J, he’s, he just drove up with the boys and he told me Tiffany was at work, but he had the boys, and he put one of them in the window so he would unlock the door so they could go in.

App. p. 609, lns. 6-10. He testified that the window was used since Respondent did not have a key to the apartment after the locks were changed and Respondent informed him that he had given his key to Taffie Williams. App. pp. 610-11, 619. Turning to the hours before the alleged crimes took place, Mr. Williams recalled bringing the victim a new car and no one came to the door when he arrived. When he was finally let in, he saw Charlene and two guys in the apartment and he talked with the victim about “creeping” behind the Respondent’s back. App. pp. 612-13. He was adamant that he knew that the victim was still dating Respondent on January 29, 2006 and he would have known if she was not. App. p. 614. After giving several responses, he concluded that he assumed that Respondent lived at the apartment and he knew that he did not live with his mother. App. pp. 607, 617, 621. In addressing Mr. Williams testimony, the lower court found that his testimony would have directly refuted the trial testimony of Taffie Williams and provided testimony on the events immediately preceding the alleged crimes. App. p. 748-9.

As to the witnesses not called at trial, the lower court held:

This Court finds that trial counsel’s failure to contact and/or utilize Shirley Hall, Elliott Canada, Antwan Martin, and Lloyd Williams was not excusable nor was it a reasonable tactical decision. Each witness provided pertinent testimony on the issues of Applicant’s residency and intent to commit a crime at the apartment. These witnesses also could have refuted the State’s witness testimony and

affirmed Applicant's testimony. At trial, counsel only called Applicant, Chad Tate, his mother, and his aunt for the defense. Even though these witnesses provided some pertinent testimony, trial counsel only called one non-family member when these other vital non-family member witnesses were available. Interestingly, Lloyd Williams and Elliott Canada were listed as potential State witnesses and were willing to testify for the defense despite being Ms. Fogey's stepfather and Mr. Watson's friend. This Court finds that these factors combined with the credibility of the witnesses' testimony would have been highly persuasive to the jury and would have likely affected the outcome of the trial.

App. p. 749. Respondent submits that the lower court's ruling clearly meets the any evidence standard of review as is demonstrated through the above summary of the evidentiary hearing testimony of each witness and a complete review of the record. Additionally, Respondent submits that Petitioner is ultimately asking this Court to disturb findings on credibility that are properly vested in the lower court.

As to the witnesses called at trial, the lower court noted that Chad Tate was the only non-family member of Respondent called at trial. As is supported by his testimony at the evidentiary hearing, the lower court found that trial counsel failed to properly utilize Chad Tate at trial and Respondent was prejudiced as a result. App. p. 750. When he took the stand, Chad Tate explained that he had previously been in a relationship with the victim and they had two boys together. App. p. 593. He explained that he had also lived with the victim at the apartment complex in question and had not been on the lease due to Section Eight housing restrictions App. pp. 593-4. He explained that he did not meet with trial counsel prior to trial and that he was very confused by the questions he was asked at trial. App. pp. 594-5. He explained that he knew that Respondent paid bills at the apartment and he knew that Respondent lived at the apartment. App. pp. 596, 604. When asked about his testimony, he responded: "I felt like I had more to offer." App. p. 604, Ins. 13-17. He agreed that there were more questions trial counsel should have asked him and his knowledge about Respondent residing at the apartment was not

properly conveyed through his testimony. App. pp. 604-5. As a result of Mr. Tate's credible testimony and review of his trial testimony, the lower court correctly held that "trial counsel was ineffective in his preparation and utilization of Mr. Tate and that Applicant was prejudiced as a result." App. p. 750.

Contrary to the State's argument, the prejudice suffered by counsel's ineffective assistance is readily apparent and was directly addressed by the lower court. During opening arguments and throughout Respondent's trial, the State alleged the following: 1) Respondent's relationship with the victim was over, 2) Respondent was not living at the apartment with the victim and was not welcome to enter it, 3) Respondent was not paying bills at the apartment, and 4) Respondent had not given his key to Taffie Williams. App. pp. 70-73, 106, 114-115, 121. When asked at the evidentiary hearing, trial counsel concluded: "The real issue was had he lived there had they split up and was, and was he no longer living there." App. p. 706, lns. 8-13. Before being cut off by another question, trial counsel explained: "I think that the transcript reflects that – I think there is more favorable that he lived there than he didn't. But they brought a great deal of information contrary to it that kind of..." App. pp. 705-6, lns. 24-25, 1-2. As is detailed in the summary of their testimony above, alleged by Respondent and held by the lower court, the testimony that was not elicited by trial counsel could have refuted all of the State's allegations and the great deal of "contrary" information noted by trial counsel. App. pp. 666, 673. Yet, for some unexplained reason, trial counsel chose to not elicit that testimony and to put Respondent in a position where he felt that he had to use his testimony to fight for his life.⁵ As Respondent testified at the evidentiary hearing, he was simply going home that night and counsel advised him that you cannot burglarize your own home, but counsel failed to call the witnesses

⁵ At the evidentiary hearing, trial counsel spoke generically about cross examination and why a witness would not be utilized at trial, a point which is argued in the State's Petition, but counsel failed to connect any of his conjecture to a specific witness called at the evidentiary hearing App p 704, lns 6-19

that could have established that fundamental issue and directly refuted the State's witnesses. App. pp. 627, 658.

Additionally, the lower court made it abundantly clear that he did not agree with the State's argument that the jury's not guilty verdict on the murder charge showed effective assistance and a lack of prejudice. App. pp. 745, 750. Respondent submits the lower court properly concluded.

This Court finds that counsel's above detailed failures cannot be cured by a not guilty verdict on the murder charge when the jury found the Applicant guilty on the burglary charge. This Court further finds that trial counsel's ineffective assistance directly affected the verdict on the burglary charge, and but for counsel's ineffective performance the outcome of the trial would have been different.

App. p. 750.

Finally, Respondent submits that the not guilty verdict on the murder charge is indicative of how close the jury may have been to finding him not guilty on the both charges. This indication is also supported by the jury verdict on the burglary indictment, which the lower court examined and found that it appeared that the jury wrote the word "not" and crossed it out and wrote their initials above it. App. p. 719, Ins. 15-19, 771. When asked, trial counsel surmised that the jury entered a "compromised" verdict, which he explained happens when "they acquit on one and convict on another." App. p. 711, Ins. 1-7. The lower court found that the verdict on the indictment "shows how close the jury may have been to a not guilty verdict and how important it was for counsel to prepare, investigate, and call the witnesses discussed on the burglary charge." App. p. 751.

Based upon the above arguments and the well-reasoned and supported decision of the lower court, Respondent would urge this Court to find that the lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder

charge in his preparation and presentation of Respondent's defense when Respondent was also facing an equally serious burglary charge. Additionally, Respondent would urge this Court to find that the lower court further correctly held that such ineffective assistance and the resulting prejudice were demonstrated through counsel's failure to investigate and call witnesses and his failure to speak to and properly utilize witnesses called at trial.

- II. The lower court did not incorrectly hold that trial counsel was ineffective for failing to object to the item stricken on the jury verdict on the burglary indictment based upon the cumulative error analysis since the lower court clarified, at the State's request, that the verdict issue simply added to the totality of the prejudice analysis or possibly demonstrated that the jury was close to reaching a not guilty verdict but what it meant was left open to assumption since trial counsel failed to address the matter with the trial court.

In the Order Granting Application for Post Conviction Relief the lower court held, as follows:

This Court finds that trial counsel was ineffective when he failed address the matter stricken through by the jury on the burglary indictment, and this Court finds that this issue further demonstrates the jury's indecision with their verdict on the burglary charge. As does the jury's questions, it clearly shows how close the jury may have been to a not guilty verdict and how important it was for counsel to prepare, investigate and call the witnesses discussed above on the burglary charge. On its face, this issue with the verdict form does not appear to be a matter of ineffective assistance of counsel, but trial counsel's testimony on the matter cannot be ignored. When asked about this issue, trial counsel stated that he thought the jury verdict was compromised. Here, trial counsel thought the jury verdict was compromised, yet he failed to bring his concern to the trial court's attention or preserve the issue for appellate review. Due to his own testimony on the matter, this Court finds trial counsel's performance was deficient and Applicant was clearly prejudiced as a result.

App. pp. 751-2. Following the State's argument on this issue in their "Motion to Alter or Amend the Order Granting Relief Pursuant to Rule 59(e)," the lower court issued an Order and clarified the above finding as follows:

The only clarification to the prior ruling is to the last paragraph on page 21 of the order in addressing the trial counsel's decision not to address the matter stricken

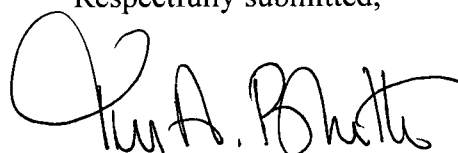
through by the jury on the burglary indictment. The Court agrees with the State that such an action by the jury, standing alone, one cannot conclude with any degree of certainty the jury's intent. Likewise, counsel's failure to address the matter with the Court, standing alone, would not lead to the conclusion of ineffective assistance of counsel. Such an action by the jury could indicate a number of conclusions as to their intent from a clerical mistake as suggested by the State, a compromised verdict as suggested by trial counsel, or any other number of conclusions. Nevertheless, this factor, added to the totality of other credibility evidence presented before this Court, supports the conclusion that trial counsel was ineffective in his representation of the applicant on the burglary charge. He should have addressed this matter with the court.

App. pp. 768-9. Respondent submits that the State has misconstrued the lower's court clarification by arguing that the lower court committed an error of law in applying a cumulative error analysis in granting relief. In post conviction relief, the lower court must examine the record as a whole and consider the totality of the circumstances. It appears that the lower court is not citing to cumulative error as the basis for his decision but simply clarifying that counsel's omission cannot be considered in a vacuum but must be considered under the unique factors and issues the instant case presents. Furthermore, the lower court makes it clear that he is finding trial counsel ineffective for his omission and failure to address the matter with the court. Contrary to the Petitioner's argument, the lower court does not conduct a cumulative error analysis but makes a finding based upon "credibility," which is clearly a finding that is proper for the lower court to make upon review of the totality of the evidence before him. Respondent submits that Petitioner is attempting to convert the lower court's finding into a cumulative error analysis in an attempt to convince this Court to disturb the lower court's well reasoned and well supported finding of ineffective assistance and granting of a new trial.

CONCLUSION

For the above stated reasons, Respondent respectfully requests that this Court find that Certiorari was improvidently granted or deny Petitioner's request that the lower court's granting of a new trial be reversed.

Respectfully submitted,



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This 8th day of October, 2014.