

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC SUPREME COURT

Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2012-209540

Op. No. 2016-UP-174 (S.C. Ct. App. filed April. 13, 2016)

Jerome Curtis Buckson,

Petitioner,

v.

State of South Carolina,

Respondent

SUPPLEMENTAL APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Jerome Curtis Buckson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-209540

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2016-UP-174
Heard October 13, 2015 – Filed April 13, 2016

REVERSED

Attorney General Alan McCrory Wilson and Assistant
Attorney General James Rutledge Johnson, of Columbia,
and Assistant Deputy Attorney General Suzanne
Hollifield White, of Spartanburg, for Petitioner.

Tricia A. Blanchette, of the Law Office of Tricia A.
Blanchette, LLC, of Columbia, for Respondent.

PER CURIAM: The State appeals the grant of post-conviction relief (PCR) to
Jerome Curtis Buckson (Respondent), arguing the PCR court erred in finding trial

counsel was ineffective for (1) failing to investigate or call four witnesses in an attempt to establish Respondent was not guilty of first-degree burglary, (2) failing to utilize trial witnesses more effectively, (3) focusing more on the defense of the murder charge than the first-degree burglary charge, and (4) failing to object to an item stricken on the jury verdict form. We reverse.

1. We find the PCR court erred in concluding Respondent was prejudiced by trial counsel's failure to interview and call four witnesses who could have helped establish his habitation defense by testifying he lived with the victim. *See Walker v. State*, 407 S.C. 400, 404–05, 756 S.E.2d 144, 146 (2014) (stating to prevail on an ineffective assistance of counsel claim, a PCR applicant must demonstrate (1) "counsel was deficient" and (2) "the deficiency resulted in prejudice" (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984))); *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (explaining the petitioner must demonstrate any deficiency by trial counsel resulted in prejudice "to the point that he was deprived of a fair trial whose result is reliable"). To the extent trial counsel was ineffective for failing to interview and call the four witnesses, we find Respondent failed to demonstrate he was prejudiced by such deficiency. *See Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001) ("To prove prejudice, an applicant must show . . . a reasonable probability that[,] but for counsel's deficient performance, the result of the proceeding would have been different."). A thorough review of the record reveals the four witnesses' testimonies at the PCR hearing, consisting of assertions that Respondent lived with the victim, were cumulative to testimony offered by multiple witnesses at trial. *See Edwards*, 392 S.C. at 459, 710 S.E.2d at 66 (stating when "evidence produced during the PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward"). Accordingly, we reverse the PCR court's finding as to this issue.

2. With regard to the PCR court's finding that trial counsel was ineffective for focusing on the murder charge and neglecting the first-degree burglary charge, we find the PCR court erred in concluding trial counsel's performance was deficient. Our review of the trial transcript indicates trial counsel acted reasonably with his investigation and preparation for the burglary charge. *See Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("An attorney's performance is not deficient if it is reasonable under professional norms."). Trial counsel addressed the burglary charge and Respondent's residency status in both his opening and closing statements. Indeed, trial counsel devoted a significant amount of time to this subject during his closing statement, outlining the various testimonies and evidence tending to show Respondent lived with the victim, and he claimed

Respondent could not be guilty of burglary beyond a reasonable doubt. In addition, trial counsel frequently questioned the witnesses, when appropriate, regarding aspects related to the burglary charge. Trial counsel successfully objected on multiple occasions when the State attempted to elicit testimony showing why the victim changed her locks shortly before the incident, which would have strengthened the State's claim that the victim and Respondent ended their cohabitation prior to the incident. He cross-examined several other prosecution witnesses to show the jury Respondent could have resided with the victim, even though, at times, he used his mother's mailing address. Also, he questioned an employee of the victim's apartment complex to show the jury a valid reason why the victim could have decided against adding Respondent's name to the lease. Following the conclusion of the State's case, trial counsel moved for a directed verdict on the burglary charge alone, arguing no evidence demonstrated Respondent entered the victim's apartment without permission. During the defense's case, trial counsel called multiple witnesses that were used, in part, to create reasonable doubt on the burglary charge by supporting his contention that Respondent lived with the victim. Trial counsel called a total of four witnesses, including Respondent, who testified Respondent lived with the victim and spent a significant amount of time in her apartment and with her children. During Respondent's testimony, trial counsel questioned him extensively about living with the victim and keeping personal items in her apartment. He also showed Respondent multiple photographs of the victim's apartment so Respondent could identify the clothing and toiletry items he maintained in the apartment. In light of trial counsel's efforts, we find no evidence of probative value supports the PCR court's assertion that he "put his entire focus" on the murder charge. *See Davie v. State*, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009) ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). In our view, trial counsel acted reasonably to defend Respondent on the burglary charge, and he conducted an independent investigation by interviewing and calling multiple witnesses and reviewing the evidence. *See Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("An attorney's performance is not deficient if it is reasonable under professional norms."). Because the record of Respondent's trial shows trial counsel exhibited a reasonable amount of focus and attention on the burglary charge, while also successfully defending the murder charge, we reverse the PCR court's finding of ineffective assistance of counsel.

3. With regard to the PCR court's finding that trial counsel "was ineffective in his preparation and utilization of Tate," we find the PCR court erred in concluding trial

counsel's performance was deficient. After comparing Tate's trial testimony with his PCR hearing testimony, we find trial counsel's utilization of Tate was reasonable. *See Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("An attorney's performance is not deficient if it is reasonable under professional norms."). Trial counsel established Tate believed Respondent lived with the victim, and he elicited an explanation as to why Respondent's name would not have been on the lease. Tate also testified at trial he did not see Respondent during the week prior to this incident and, thus, could not refute the State's claim that Respondent and the victim ended their relationship shortly before this incident. We believe Tate's PCR testimony failed to add anything significant to his trial testimony. To the extent Tate's PCR testimony more clearly established his belief that Respondent lived with the victim, we find his testimony was cumulative to the testimonies of several other witnesses and Respondent suffered no prejudice from its omission. *See Edwards*, 392 S.C. at 459, 710 S.E.2d at 66 (stating when "evidence produced during the PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward"). Thus, we reverse the PCR court as to this issue because no evidence of probative value exists to support the finding that trial counsel's utilization of Tate as a witness was deficient. *See Davie*, 381 S.C. at 608, 675 S.E.2d at 420 ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.").

4. Finally, with regard to the PCR court's finding that trial counsel was ineffective for failing to "address the matter stricken through by the jury" on the verdict form, we find the PCR court erred in concluding trial counsel's performance was deficient. Respondent failed to present any actual evidence during the PCR hearing to show the verdict was somehow compromised. In any event, we believe trial counsel was not deficient for failing to raise an objection because the circuit court took reasonable and adequate precautions to confirm the guilty verdict. The circuit court polled the jury, per trial counsel's request, after the jury read the verdict. Subsequently, the court noticed the word "not" was scratched from the verdict form in front of where the jury wrote "guilty." Realizing this could be an issue, the foreman initialed the alteration, and the court questioned whether the foreman actually made the alteration. The foreman confirmed he made the alteration and the guilty verdict was correct. The court then polled the jury again to confirm the guilty verdict was correct, and the entire jury agreed. Because the circuit court thoroughly addressed the verdict form issue to ensure the jury's verdict was not compromised, we find trial counsel's decision not to further pursue the argument was reasonable. *See Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814

("An attorney's performance is not deficient if it is reasonable under professional norms."). Accordingly, we reverse the PCR court as to this issue because no evidence of probative value supports its finding that trial counsel was deficient for failing to address the jury verdict form. *See Davie*, 381 S.C. at 608, 675 S.E.2d at 420 ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). Further, to the extent the State argues the PCR court erred in hinging its analysis on the cumulative prejudice doctrine, we need not address this issue because our resolution of the prior issues is dispositive. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing "the threshold to asking the cumulative prejudicial question is to first find multiple errors").

REVERSED.¹

HUFF, A.C.J, and WILLIAMS and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

APR 26 2016

SC Court of Appeals

Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No.: 2012-209540

JEROME CURTIS BUCKSON,
RESPONDENT,

V.

STATE OF SOUTH CAROLINA,
PETITIONER.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING *EN BANC*

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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 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 (S.C. Ct. App. 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

¹ Pursuant to the Order issued by the South Carolina Supreme Court on October 3, 2012, Respondent is currently released subject to an appellate bond.

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. Respondent 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. On October 8, 2014, the Brief of Respondent was filed. An oral argument was scheduled and cancelled

in October 2015. On April 13, 2016, an Opinion was issued by this Court reversing the decision of the lower court, from which this Petition timely follows. Buckson v. State, Unpub. Op. No. 2016-UP-174 (S.C. Ct. App. filed April 13, 2016).

ARGUMENT

Pursuant to Rule 221, SCACR, Respondent would respectfully request that the entire Court review the prior filings and record as Respondent submits that the Court has overlooked or misapprehended the following in reaching the Opinion to reverse the granting of relief by the lower court.

1. Defense of the Burglary Charge

In reaching the Opinion reversing the relief granted by the lower court, it appears this Court has chosen to accept the State's invitation to improperly dissect the decision of the lower court into four findings when it is clear that the Court made two well-reasoned findings as addressed in the Brief of Respondent. In a Post Conviction Relief Appeal, great deference is to be 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). As a result, Respondent would ask this Court to properly consider the lower court's rulings and find as follows:

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, and 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.

Brief of Respondent p. 6.

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 errantly 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.

The lower court's findings regarding counsel's ineffectiveness in the defense of the burglary charge tracks very closely to the opinion set forth by the South Carolina Supreme Court in Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008). Lounds argued that counsel failed to adequately prepare for and defend him at trial. The Supreme Court agreed based upon counsel's

failure to conduct an independent investigation, which at a minimum should have included speaking to potential witnesses. Lounds, 380 S.C. at 460, 670 S.E.2d at 649, Ard v. Catoe, 373 S.C. 318, 642 S.E.2d 590 (2007). The Supreme Court relied upon the testimony of two witnesses that were called at the evidentiary hearing in their reasoning that counsel was ineffective; whereas, here, the lower court relied upon the testimony of four witnesses called at the evidentiary hearing. Similarly, to defense counsel's inability to remember and provide credible testimony as discussed further below, the Supreme Court also found that the lower court's finding of a reasonable strategy was errant since counsel failed to testify.

Here, the lower court found it was a matter of unreasonableness to not utilize the witnesses in the capacity they were utilized at the evidentiary hearing. The court also refused to accept the State's theory that the not guilty verdict on the murder amounted to a showing of effective representation on the burglary. The lower court responded to this theory in the Order by noting counsel's testimony that he believed that the burglary would simply go away if he obtained a not guilty on the murder and his admission that his focus was on the murder because it was more serious as he errantly stated that it carried more time. App. p. 745, 750. By way of the Order, the lower court responded to the State's theory as follows:

The court has searched the transcript and has considered the testimony presented at the present hearing for reasonable justification for such an opinion and can find none... 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.

App. p. 750.

It is well established that when matters of credibility are involved great deference is given 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.). As to credibility findings, the lower court held: "This Court finds the testimony of Shirely Hall, Barry Adair, Elliott Canada, Antwan Martin, Chad Tate, Lloyd Williams and Jerome Buckson to be credible. 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. 743-4.

In reaching the standing decision, this Court must have chosen to ignore the credible testimony of several witnesses that testified that Mr. Warder did not speak with them prior to trial or in the case of Chad Tate, spoke with him one time immediately before trial. This Court has accepted the State's invitation to reverse the findings of Judge Hayes and rely on testimony of Mr. Warder, which was taken in firsthand by Judge Hayes and horribly limited by recall issues and emotional outbursts in courtroom. Additionally, the State has manipulated vague responses made by Mr. Warder to argue that he met with witnesses and chose not to use such witnesses as a result of a valid trial strategy. Both this Court and the State are ignoring Mr. Warder's clear admission that the witnesses would have "been helpful" at trial. App. p. 710, ln. 21.

Nevertheless, this Court has accepted the State's position that the that the testimony offered at the evidentiary hearing does not establish that Mr. Warder's failure to utilize the witnesses or more fully utilize the witnesses called affected the outcome of trial.² Again, this

² As is detailed in the Brief of Respondent, Respondent submits that each witness not called at trial provided testimony that was not merely cumulative to testimony or evidence offered at the trial and such a finding by this Court must not stand. Brief of Respondent pp. 11-15. Briefly, the testimony of the witnesses provided the following outcome determinative information:

1) Shirley Hall provided testimony as a neighbor that was aware of Respondent dwelling in the apartment and recalled providing such information to Mr. Warder.

2) Antwan Martin provided a first-hand account of the being with Respondent on the day in question, his knowledge that Respondent lived at the victim's apartment and knowledge that Respondent was currently in a relationship with the victim, which the court found directly refuted the testimony of the State's witness – Taffie Williams.

Court must review the lower court's finding to determine if there is any evidence in the record to support his finding and not conduct a de novo review since the State has not alleged an error of law. Based upon the evidentiary hearing transcript and the arguments set forth in the Brief, Respondent submits there is ample evidence to support the lower court's findings, which are clearly similarly to the findings in Lounds v. State.

Unlike the standing decision of this Court, the lower court's findings specifically address the burglary statute and controlling case law. 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. Relying upon 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

3) Lloyd Williams provided testimony that also refuted the testimony of Taffie Williams, corroborated the testimony of Respondent and provided a first-hand account of being at the apartment on the evening in question. The court found his testimony not merely cumulative and highly important since he was listed as a State's witness, the stepfather of the victim and the husband of Taffie Williams.

4) Elliott Canada provided testimony about being in the apartment during the night in question and his interactions with the victim and Mr. Watson (the person present in the bedroom when the victim was shot). Mr. Canada testified about the victim and Mr. Watson being "jittery" about the victim's "friend" named "J" coming home, it being apparent a man lived in the apartment, Mr. Watson's intention to return to the apartment with a gun, and his willingness to speak with defense counsel prior to trial.

Brief of Respondent pp. 11-15.

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.

As was addressed by the lower court, Singley requires a fact-intensive totality of the circumstances test. Here, Judge Hayes properly considered the entire record and the evidence presented at the evidentiary hearing and found trial counsel ineffective for his handling of the burglary charge, and based upon the any evidence standard of review, this Court should not disturb his finding.

As is noted in Respondent's Brief, the State alleged the following at trial:

- 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. Keeping in mind the fact intensive analysis required by Singley as the lower court did in his findings, it must be noted that the only witnesses used to attempt to refute such facts were Respondent, his family members and admittedly and obviously unprepared Chad Tate. Due to counsel's ineffective assistance, Respondent was on an island at trial trying to explain the following: 1) the regular use of the window for entry, 2) why he was not on the lease, 3) why he did not have a key 4) how the victim was trying to reach him that day, and 5) his involvement in picking up the kids / taking care of the kids. Instead of defense counsel calling witnesses that were not merely cumulative but were essential to the fact intensive analysis the last word came from a daycare worker rebutting Respondent's testimony.

As is detailed in Respondent' Brief and found in the record, the witnesses that this Court now finds to be merely cumulative provided credible testimony, which the lower court properly

found demonstrated counsel's deficient performance and that would have affected the outcome of trial. See Brief of Respondent pp. 13-14. Specifically 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.

Additionally, this Court has also disturbed the lower court's findings regarding the testimony of Chad Tate as a stand-alone issue. It is clear from both the Order and the Brief of the Respondent that the testimony of Chad Tate was addressed in conjunction with counsel's deficient use of the Respondent's testimony, which has been unaddressed by this Court. App. p. 749-50. Furthermore, this testimony was part of the basis of the lower court's overall finding that trial counsel was provided ineffective assistance in his unreasonable focus on the murder charge. Nevertheless, standing alone, Respondent submits that the testimony of Chad Tate demonstrated counsel's failure to properly prepare for trial and properly present a defense that resulted in clear prejudice to Respondent. It appears it has become the duty of the State and now the appellate court to excuse clear ineffective assistance by conducting a de novo review of the record to find any portions thereof to justify apparent deficient representation and defeat well-reasoned findings of the lower court.

In the Order the lower court held:

This Court agrees with Applicant's assertions that trial counsel was ineffective when he failed to prepare and investigate, failed to call witnesses, and failed to utilize trial witnesses to establish that the apartment at issue was his dwelling and/or residence and his of intent to commit a crime. This Court further finds that Applicant was prejudiced as a result of counsel's ineffective assistance.

App. p. 744. Clearly, the lower court found multiple interrelated deficiencies that that formed the basis of his reasoning that counsel provided ineffective assistance on his defense of the highly fact intensive burglary charge, which affected the outcome of Respondent's trial.³ The lower court reviewed the trial testimony and did not find, as this Court did, that the testimony he witnessed firsthand was merely cumulative to the trial testimony or that the record or testimony of Mr. Warder justified his admitted focus on the murder charge. Therefore, Respondent asks this court to adhere to the proper standard of review and find that there is evidence to support the findings of the lower court regarding counsel's ineffective assistance in the defense of the burglary charge.

2. Verdict Form

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

³ It must be noted that the lower court's analysis is distinguishable from a cumulative error analysis, which comes into play when there are several non-prejudicial errors that are combined to form a finding of prejudice. See Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) Here, the lower court's findings are merely interrelated and help form the basis of his reasoning for his finding that counsel provided ineffective assistance in his defense of the burglary charge detailed above.

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.

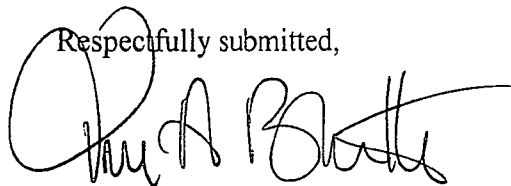
App. pp. 768-9. Respondent submits that the State has misconstrued the lower's court clarification by arguing that the lower court committed an error of law in applying a cumulative error analysis in granting relief. In post conviction relief, the lower court must examine the record as a whole and consider 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 this Court should not disturb the lower court’s well-reasoned and well supported finding of ineffective assistance and granting of a new trial.

CONCLUSION

In consideration of the above stated arguments, Respondent respectfully requests that the Court conduct a full review of the previously submitted filings and record before this Court. Respondent urges this Court to grant rehearing, reverse the Opinion filed on April 13, 2016 and remand to the lower court for a new trial.

Respectfully submitted,



Tricia A. Blanchette – Bar # 74904
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
ATTORNEY FOR PETITIONER

This 26 day of April 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

RECEIVED

APR 20 2016

Honorable J. Mark Hayes, II, Circuit Court Judge

SC Court of Appeals

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

Jerome Curtis Buckson,.....Respondent,

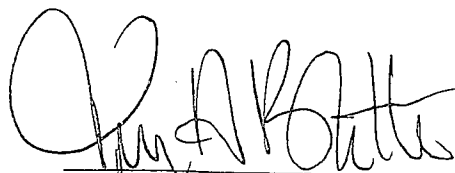
vs.

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

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Respondent, hereby certify that my law clerk hand delivered this 26th day of April 2016, a copy of a Petition for Rehearing and Petition for Rehearing En Banc and Response to Motion to Revoke Appeal Bond to Alicia Olive of the Attorney General's Office, at:

Office of the Attorney General
ATT: Alicia Olive, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Respondent

April 26 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes II, Circuit Court Judge

Appellate Case No. 2012-209540

JEROME CURTIS BUCKSON,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

MOTION TO REVOKE APPEAL BOND

State of South Carolina ("Petitioner") hereby moves for an order revoking the appeal bond allowed by the Supreme Court by Order filed October 3, 2012. This Motion is based on the following:

1. Jerome Curtis Buckson ("Respondent") was 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 Applicant at the February 2006 term of General Sessions for murder (06-GS-42-0846) and first degree burglary (06-GS-42-0845). Mr. Richard H. Warder, Esquire, represented the Applicant at trial on the charges. On February 2, 2007, Buckson was acquitted of the charge of

murder, but found guilty of first degree burglary. The Honorable J. Derham Cole sentenced the Applicant to confinement for twenty years.

A timely Notice of Appeal was filed and an Anders brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's 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. Applicant 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.

2. Buckson thereafter filed an application for post-conviction relief on October 22, 2010. The State made its Return on May 3, 2011. Buckson filed an amendment to his application on September 8, 2011. An evidentiary hearing was convened on September 23, 2011, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Respondent was represented by Suzanne H. White of the South Carolina Attorney General's Office. The Honorable J. Mark Hayes II granted post-conviction relief by Order dated October 21, 2011, and served October 25, 2011. The State filed a motion to alter or amend pursuant to Rule 59(e), SCRPC, on November 7, 2011. By Order dated March 9, 2012, Judge Hayes denied the 59(e) motion with no additional arguments. Thereafter, the State filed and served notice of appeal.

3. On August 17, 2012, Buckson moved this Court to issue an order releasing him on bond pending the State's appeal. The State filed its Return to Petition for Appeal Bond on August 27, 2012, requesting the Court to deny Buckson's request for release on

bond. In an order dated October 3, 2012, the South Carolina Supreme Court granted Buckson's request.

4. This Court reversed the post-conviction relief court's ruling in an Unpublished Opinion filed April 13, 2016, thereby reinstating Respondent's convictions and sentences. Respondent had not completed his sentence when he was released on appeal bond in 2012, and must return to South Carolina in order to serve the remainder of his sentence.

5. The State submits that Buckson stands convicted of the crime of first degree burglary, which is both a violent and most serious offense. Buckson was convicted of entering the victim's home through the window at 3:00 am one morning. This occurred after Buckson found all the doors locked, was told by the victim to leave and while her two young boys were asleep in an adjacent bedroom. Buckson ignored the victim's request and entered the apartment anyway. Following his entry into the apartment and victim's bedroom upstairs, the victim was fatally shot. Although Buckson was acquitted of the murder charge, it is clear that Buckson's actions early that morning led to the gunfire that killed the victim, Ms. Tiffany Foggie. The violent and serious nature of the offense for which Buckson was convicted should preclude his continued release on bond, as this Court has reversed the PCR court's granting of relief.

6. Furthermore, the State asserts it is unlikely that Buckson will prevail on rehearing in this Court or on Petitioner to Writ of Certiorari to the South Carolina Supreme Court once the Court has the opportunity to review the issues. The State submits it will prevail in having this Court's reversal upheld.

7. Based upon the foregoing, the State requests an order from this Court revoking Respondent's appeal bond, and requiring him to report to the Spartanburg County Sheriff's Office for detention and transfer to the South Carolina Department of Corrections within ten days of the date the appeal is remitted to the circuit Court.

Respectfully submitted,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar #102089

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER-RESPONDENT

April 13, 2016.

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
Appellate Case No. 2012-209540

JEROME CURTIS BUCKSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Motion to Revoke Appeal Bond has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Mrs. Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211**

This 13th day of April, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No.: 2012-209540

RECEIVED

APR 26 2016

SC Court of Appeals

JEROME CURTIS BUCKSON,
RESPONDENT,

V.

STATE OF SOUTH CAROLINA,
PETITIONER.

RESPONSE TO MOTION TO REVOKE APPEAL BOND

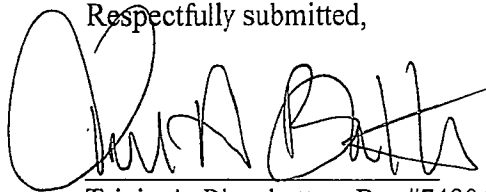
In response to the Motion to Revoke Appeal Bond, submitted by the State on April 13, 2016 and received via mail by undersigned counsel on April 15, 2016, Respondent would submit the following:

1. The South Carolina Supreme Court issued an Order for Appeal Bond on October 3, 2012. On November 8, 2012, Respondent was released on appeal bond following a hearing and posting of bond in Spartanburg County.
2. Since November 8, 2012, Respondent has been successfully on appeal bond with no complaints from the State or any party.
3. On April 13, 2016, this Court issued an Opinion reversing the granting of relief by the lower court. Buckson v. State, Unpub. Op. No. 2016-UP-174 (S.C. Ct. App.

April 13, 2016). On April 26, 2016, Respondent timely filed a Petition for Rehearing and Petition for Rehearing *En Banc*, which causes the standing Opinion to not be a final decision in the case.

4. Additionally, if this Court sees fit to deny the standing Petition for Rehearing, Respondent intends to pursue Certiorari in the South Carolina Supreme Court, which is the Court that granted the current appeal bond.
5. Similarly to the State's request, Petitioner requests that revocation not be ordered until a final decision is rendered by the South Carolina Supreme Court and the case is remitted to the lower court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

Tricia A. Blanchette – Bar #74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Respondent

April 26, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes II, Circuit Court Judge

Appellate Case No. 2012-209540

JEROME CURTIS BUCKSON,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

REPLY TO RESPONSE TO MOTION TO REVOKE APPEAL BOND

In Reply to the Response to the Motion to Revoke Appeal bond submitted April 26, 2016, the State submits the following:

1. In accordance with the State's motion to Revoke Appeal Bond filed April 13, 2016, the State attaches as "Exhibit A" the Supreme Court's order filed October 3, 2012, in which the Court granted Respondent's Motion for an Appeal Bond. In its Order granting bond, the Court directed that Respondent will surrender to the Sheriff of Spartanburg County immediately upon the filing of an opinion in this matter.

2. This Court reversed the post-conviction relief court's ruling in an Unpublished Opinion filed April 13, 2016, thereby reinstating Respondent's convictions and sentences.

3. Pursuant to the Supreme Court's order granting bond, this Court may immediately revoke bond rather than awaiting the issuance of a remittitur in this case.

4. The State reiterates it is unlikely that Buckson will prevail on rehearing in this Court or on Petition for Writ of Certiorari to the Supreme Court of South Carolina once the Court has the opportunity to review the issues. The State submits it will prevail in having this Court's reversal upheld.

5. Based upon the foregoing and in accordance with the Supreme Court's order granting bond, the State requests an order from this Court revoking Respondent's appeal bond and requiring him to report to the Spartanburg County Sheriff's Office for detention and transfer to the South Carolina Department of Corrections immediately.

Respectfully submitted,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar #102089

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER-RESPONDENT

May 3 2016.

The Supreme Court of South Carolina

Jerome Curtis Buckson, Respondent,

v.

State of South Carolina, Petitioner.


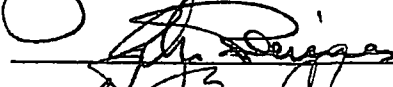
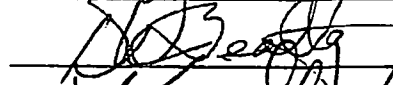
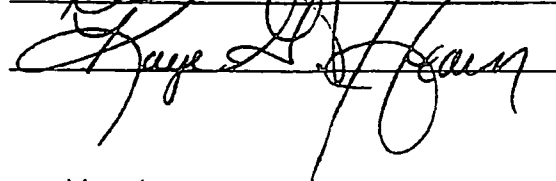
Appellate Case No. 2012-209540

ORDER


Respondent seeks to be admitted to bail while this post-conviction relief (PCR) case is pending review. The State opposes the petition. Pursuant to Rule 243(k) of the South Carolina Appellate Court Rules, the petition is granted and respondent shall be released from custody upon the following conditions:

- (1) Respondent will surrender to the Sheriff of Spartanburg County immediately upon the filing of an order dismissing this appellate case, an order denying the petition for a writ of certiorari, or an opinion in this matter;
- (2) Respondent will comply with all orders issued by this Court;
- (3) Respondent will not depart the State of South Carolina without the permission of this Court; and
- (4) Respondent will be of good behavior.

Further, respondent shall not be released until respondent and a good and sufficient surety have signed a recognizance in the amount of \$100,000, witnessed by the judge of the circuit court, which shall be forfeited to the State upon the failure of respondent to comply with the terms of this order. The form of the bond and the surety thereon shall be approved by the circuit court judge. The recognizance shall be filed with the clerk of court of Spartanburg County. Deposit of a cash percentage in lieu of bond pursuant to S.C. Code Ann. §17-15-15 will be permitted.


C.J.

J.

J.

J.

I would deny the petition for an appeal bond.


J.

Columbia, South Carolina

October 3, 2012

cc:

Tricia A. Blanchette

Suzanne Hollifield White

Hope Blackley, Clerk of Court

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Spartanburg
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2012-209540

JEROME BUCKSON,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

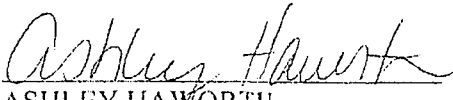
PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Reply to Response to Motion to Revoke Appeal Bond has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Mrs. Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211**

This 3rd day of May, 2016


ASHLEY HAWORTH
LEGAL ASSISTANT



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 10, 2016

Mrs. Tricia A. Blanchette, Esquire
PO Box 12725
Columbia SC 29211

Re: Jerome Curtis Buckson v. State
Appellate Case No. 2012-209540

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny Abbott Kitchings".

CLERK

cc: Suzanne Hollifield White, Esquire
Alan McCrory Wilson, Esquire
James Rutledge Johnson, Esquire
Alicia A. Olive, Esquire
The Honorable J. Mark Hayes, II

The South Carolina Court of Appeals

Jerome Curtis Buckson, Respondent,

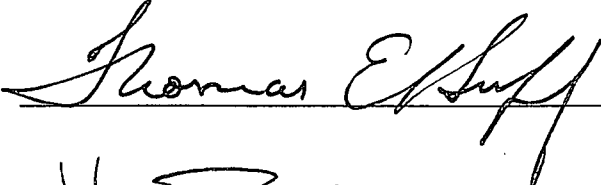
v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-209540

ORDER

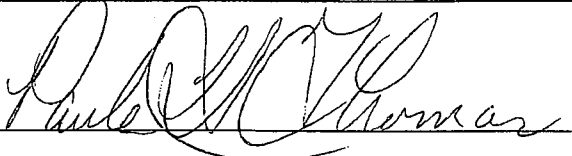
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



A.C.J.



J.



J.

Columbia, South Carolina

cc:

Tricia A. Blanchette, Esquire
Suzanne Hollifield White, Esquire
Alan McCrory Wilson, Esquire
James Rutledge Johnson, Esquire
Alicia A. Olive, Esquire
The Honorable J. Mark Hayes, II

FILED

June 10, 2016
jt