

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO THE COURT OF APPEALS  
Appeal from Spartanburg  
The Honorable J. Mark Hayes II, Post-Conviction Relief Judge **S.C. SUPREME COURT**

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

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Appellate Case No. 2016-001430

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JERMONE BUCKSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

ALICIA A. OLIVE  
Assistant Attorney General  
S.C. Bar # 102089

Post Office Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## QUESTIONS PRESENTED

- I. Did the Court of Appeals correctly hold the PCR court erred in finding Petitioner demonstrated that he was prejudiced by Counsel's failure to call four witnesses at trial where there was no probative evidence to support that finding?
- II. Did the Court of Appeals correctly find that there was no probative evidence to support the PCR court's finding that Counsel was ineffective for failing to utilize Tate more effectively at trial?
- III. Did the Court of Appeals correctly hold there was no evidence of probative value to support the PCR court's finding that counsel focused entirely on the murder charge rather than the burglary charge?
- IV. Did the Court of Appeals correctly hold the PCR court erred in finding Counsel was ineffective for failing to object to the item stricken on the jury verdict form?

## STATEMENT OF THE CASE

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

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

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

Respondent filed a timely Notice of Appeal. The case was transferred to the Court of Appeals, and the Court of Appeals granted Respondent's Petition for Writ of Certiorari. The case went to briefing, and oral argument was scheduled and cancelled in October 2015. On April 13, 2016, the Court of Appeals issued an opinion reversing the PCR court. Buckson v. State, Op. No. 2016-UP-174 (S.C. Ct. App. filed Apr. 13, 2016). Petitioner filed a timely Petition for Rehearing and Petition for Rehearing *En Banc* on April 26, 2016. The Petition for Rehearing *En Banc* was rejected, and the Petition for Rehearing was denied June 10, 2016. Petitioner filed its Petition for Writ of Certiorari with this Court on July 29, 2016, and Amended Petition for Writ of Certiorari on August 1, 2016.

## STANDARD OF REVIEW

A reviewing court must affirm the post-conviction relief court's factual findings if there is any evidence of probative value in the record to sustain them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, the reviewing court should reverse the PCR court where there is no probative evidence to support the decision or the decision is controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). In a PCR proceeding, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENTS

- I. The Court of Appeals correctly held the PCR court erred in finding Petitioner demonstrated that he was prejudiced by Counsel's failure to call four witnesses at trial where there was no probative evidence to support that finding.**

The Court of Appeals correctly reversed the PCR court because there was no probative evidence to support the PCR court's finding that Petitioner satisfied his burden of proving he was prejudiced by Counsel's failure to call Shirley Hall, Elliott Canada, Antwon Martin, and Lloyd Williams.

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

The PCR court found that Counsel's conduct in failing to "investigate and utilize the testimony of Shirley Hall, Elliott Canada, Antwan Martin, and Lloyd Williams was unreasonable," (App. p. 746-47), and that "each witness provided pertinent testimony on the issues of Applicant's residency and intent to commit a crime in the apartment." (App. p. 749). The PCR court also noted that these "witnesses also could have refuted the State's witness testimony and affirmed Applicant's testimony." (App. p. 749). The court further found that the

testimony of these witnesses "would have been highly persuasive to the jury and would have likely affected the outcome of trial." (App. p. 749).

Though each of these witnesses provided some testimony regarding the fact that Petitioner lived with the victim at some point prior to the night she was killed, none of them had specific personal knowledge as to whether Petitioner was still living with the victim as of the night she was killed.

Shirley Hall testified that she had been a neighbor in the apartment complex at the time of the burglary and shooting. (App. p. 564). Respondent offered into evidence a handwritten note that Hall testified she gave to Respondent for him to provide to his attorney prior to trial, in which Hall indicated she saw Respondent living with the victim for a year and up until the time of the shooting. (App. p. 725). However, Hall also testified on cross-examination that she "would see him leave" and that "Other than I, [sic] I don't know what, you know, what went on over there because I'm like two doors down from them and there's a partition in-between us. And, so, I couldn't see . . . in and out." (App. p. 566). She also testified that she had no knowledge as to whether or not Petitioner had a key to the apartment or whether or not the victim had broken up with Respondent in the weeks prior to the burglary and shooting. (App. p. 566).

Counsel testified that he did recall receiving the note from Hall and the fact that his investigator did go meet with Hall. (App. p. 698). Counsel testified that he and his investigator discussed the fact that Hall would not be able to offer much helpful information and the information she could provide at the time was not beneficial. (App. p. 598). When Counsel was asked why he did not call any witnesses for the defense other than Petitioner, Petitioner's mother, Petitioner's aunt, and Tate, Counsel testified that those witnesses "made good witnesses, they looked good, and brought no baggage with them." (App. p. 714). Therefore, Counsel did

investigate calling Hall as a witness, but determined based on the interview, that calling her would not be beneficial to the defense.

The PCR court found Counsel's testimony to be credible on the issues he specifically recalled. (App. p. 743). Hall's testimony concerned only facts that were not in dispute. Whether Petitioner and the victim had dated and whether Petitioner had stayed with the victim at some point prior to the shooting were not disputed issues at trial. The State presented testimony at trial to show the victim had broken up with Respondent and Respondent was no longer a welcome guest in her home as of the time of the shooting. Hall testified that she had no direct view of the apartment door and had no knowledge of whether Petitioner ever had a key to the victim's apartment or whether the victim had broken up with Petitioner recently. (App. p. 566). Because Hall's testimony added nothing to the testimony already presented at trial, there is no reasonable probability that, had her testimony been presented, the result of the proceeding would have been different. Therefore, the Court of Appeals correctly ruled that the PCR court erred in finding that Petitioner demonstrated he was prejudiced by Counsel's failure to call Hall as a witness.

Likewise, the Court of Appeals properly held the PCR court erred in finding Petitioner satisfied his burden of proving Elliott Canada's testimony would have resulted in a different outcome at trial. Canada testified that he had been to the victim's apartment on the night of the shooting and twice previously. (App. p. 569). Canada knew the victim through family, but worked with the victim's cousin Charlene and Watson, the gentleman that the victim was seeing that evening. (App. p. 568-69). In fact, Watson was the person that brought and took Canada home that evening. (App. p. 571). Notably, Watson was the individual the defense alleged was responsible for the victim's murder, rather than Petitioner. (App. p. 700). Canada also admitted he was dating the victim's cousin, Charlene, at the time. (App. p. 575).

Canada testified that he had seen men's items in the apartment upstairs in the bedroom area on the prior visits. (App. p. 569-70). He testified that it appeared to him that a man had been living in the apartment. (App. p. 570). However, he admitted that he did not see men's clothing items in the apartment on the night of the shooting. (App. p. 579). On cross-examination, he also admitted that he had been in the apartment a total of three times in the month prior to the shooting, but only went upstairs twice, contradicting his previous testimony. (App. p. 576). He also testified that he could not recall if he went upstairs on the night of the shooting. (App. p. 576). However, he did testify that he did not see any items to indicate that a man lived in the apartment on the night in question in the downstairs area. (App. p. 577). Canada testified that he never heard the victim refer to Respondent by his full name and never referred to Respondent as her boyfriend. (App. p. 577-8). Canada testified that he did not know if Respondent had a key to the apartment either. (App. p. 579). Canada testified that on the night of the shooting, "from what [he] could see, where [he] was . . . sitting" it did not appear to him that a man was living at the victim's apartment, but from the actions of the victim and Watson, it appeared that a man was living there and could return home that night. (App. pp. 579-80). Canada acknowledged that at the time of trial, he was in the county jail. He stated that the prosecutor came to meet with him in jail and he knew that he was listed as a potential State witness. (App. p. 572). However, he testified that he would have been willing to speak with Counsel or his investigator and would have been willing to testify for the defense if he had been subpoenaed. (App. p. 573).

There is no evidence of probative value in the record to support the PCR court's finding that Petitioner proved he was prejudiced by Counsel's failure to call Canada because, like Hall, he only testified concerning facts not in dispute. The State concedes that, at some point, the

Applicant stayed in the victim's apartment. However, Respondent needed witnesses to support that he was *still* living in the apartment on January 29, and Canada's testimony does not support that assertion. "The proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, and the right and expectation to be safe and secure in, the dwelling burglarized." State v. Singley, 392 S.C. 270, 277, 709 S.E.2d 603, 606 (2011). In fact, Canada's testimony suggests Petitioner was not living in the apartment at the time. He did not observe men's items in the home that evening and Canada testified that the victim and Watson both appeared nervous about Petitioner showing up at the apartment. (App. p. 580). The victim was the clear owner with rights to invite people into her home as guests and evict them when she so desired. Petitioner was welcome in the home so long as he was in the victim's "good graces." See Singley, 392 S.C. 270, 277, 709 S.E.2d 603, 606. Canada's testimony suggests that the Applicant was no longer in those "good graces." Therefore, it is equally if not more likely that Canada's testimony would have harmed, rather than helped, the defense. Accordingly, Petitioner failed to satisfy his burden of proving that there was a reasonable probability that if Canada had testified at trial, the result would have been different. See Strickland, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.").

Respondent also offered his childhood friend, Antwan Martin, as another witness. Martin testified that he had only been by the victim's apartment twice because of his work and family schedule. (App. p. 588). However, he could not recall when he had visited the apartment, but did know that it had not been the week or so prior to the shooting. (App. p. 591). He testified that he was aware that the apartment had flooded previously, which required the victim and Respondent to move in with Respondent's mother briefly. (App. p. 587). Martin also testified

that he thought the locks had been changed at the apartment because of a break-in. (App. p. 587). However, he did not testify how he knew this information. Martin also testified that he did not know whether Respondent had a key to the apartment at the time of the burglary and shooting or “anything about that situation.” (App. p. 587-88).

Martin testified that he was with Respondent the entire day prior to the shooting and Respondent never mentioned being kicked out or fighting with the victim. (App. p. 588). Martin also testified that when he returned Respondent to his car following the work that day, Respondent told him that he had numerous missed phone calls from the victim. (App. p. 590). Martin acknowledged that he did not see the phone, but relied on Respondent telling him that there were numerous calls from the victim throughout the day. (App. p. 591). Martin testified that he was never contacted by Counsel or his investigator, but would have been willing to speak with them or testify at trial. (App. p. 586). Counsel testified that he did recall Martin being with Respondent on the day prior to the shooting, but believed that he did not call him because there was some good and bad on Martin, and believed that Martin and Respondent had been at a club at some point that night. (App. p. 704).

Although Martin was the only witness present at the PCR hearing who claimed to have knowledge relating to Petitioner’s relationship with the victim, Respondent submits he lacked credible foundation for that knowledge because that information was based on his conversations with Petitioner. In addition, Martin’s testimony that he was with respondent from 3:00 pm until shortly after 8:00 pm, directly contradicts Petitioner’s trial testimony that he spent about two and a half hours, until 4:30 pm, helping Martin move. (App. p. 321; p. 591). Moreover, Martin had not been to the apartment in the weeks prior to January 29, and had not seen any interactions between Petitioner and the victim firsthand. Martin was merely present when Petitioner returned

to his phone and informed Martin that there were numerous voicemails from the victim. From that information alone, Martin merely made the assumption that Petitioner was still in a relationship with the victim and was still living in her apartment. Martin had no actual firsthand knowledge that Petitioner was residing with the victim as of the date of the shooting. Furthermore, regarding Martin's testimony, Counsel testified that the phone calls did not seem to him to indicate people living together any more than it indicated people who had broken up or were feuding. (App. p. 712, lines 10-12). Therefore, Petitioner failed to satisfy his burden of proving he was prejudiced by Counsel's failure to call Martin because Martin's testimony was not probative of any facts in dispute at trial and would have added nothing to support the defense that Petitioner was living with the victim at the time. Accordingly, the Court of Appeals correctly ruled that the PCR court erred in finding Petitioner established prejudice.

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

Williams testified that he was not aware that the victim's previous boyfriend, Chad Tate, was not listed on the apartment lease when he lived with the victim. (App. p. 607). Williams testified that he knew Petitioner was at the apartment often, but Williams could not say if Petitioner was living there or not. (App. p. 607). Williams stated that Respondent was at the apartment most of the time Williams visited and was told by the victim once that Respondent was upstairs sleeping because he had to work third shift. (App. p. 608-09). Williams also

testified that he had seen Respondent put one of the victim's children through the kitchen window so that they could unlock the door once, and Respondent claimed at that time that he did not have his key to the apartment yet because he had given his key to the victim's mother. (App. p. 609-11). Williams could not testify as to the time frame of when he saw that occur, though. (App. p. 619). However, Williams testified again that he could not say that Respondent was living at the apartment, only that he was there a lot. (App. p. 613). Williams also testified that he never saw any men's clothing items at the apartment. (App. p. 614). When shown his previous statement, Williams simply stated that "in the early stages," he believed that Respondent was living at the victim's apartment because he made that assumption when the victim would indicate that Petitioner was upstairs sleeping. (App. p. 617).

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

Although Williams' testimony tends to support that Petitioner, at some point, lived with the victim, he had no direct knowledge if they were dating at the time of the incident. He did not know if Petitioner had a key to the apartment at the time of the incident. His testimony corroborates Petitioner's testimony that the window was once used as a point of entry into the house, but this testimony at best reduces the suspicion surrounding Petitioner's method of entry. However, evidence relating to the use of the back window as a method of entry does not address whether Petitioner was still permitted to stay at the apartment at the time of the incident.

Additionally, it is equally likely that Williams' testimony would have been harmful to the defense because he testified that the victim did not want to open the door because she thought it was Respondent. That testimony suggests both that Petitioner was not welcome at the victim's apartment, and that he did not have a key. Therefore, Petitioner also failed to demonstrate he was prejudiced by Counsel's failure to call Williams as a witness.

Counsel testified that his strategy regarding calling witnesses is to make sure that it is a witness that he can get something out, but that the State will not have a stronger case once Counsel sits down. (App. p. 704). Counsel testified that even if a witness can bring something good, sometimes the cross-examination can be a disaster, leaving you with losing more ground than you gain. (App. p. 704). A criminal defense attorney has a duty to perform a reasonable investigation. “[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (citing Ard v. Catoe, 372 S.C. at 331-2, 642 S.E.2d at 597). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Although Petitioner offered these four witnesses to support his claim that Counsel was ineffective for failing to investigate and call more witnesses in his defense, there is no probative evidence contained in their testimony to support the PCR court's finding that Counsel was ineffective. None of the witnesses demonstrated any personal knowledge concerning whether the victim and Petitioner still lived together. The lack of any direct knowledge as to Petitioner's living situation on the day of the shooting would have done nothing more than provide ample

opportunity for the State to attack these witnesses on cross-examination. Therefore, Petitioner failed to prove with respect any of these witnesses, that but for Counsel's failure to present them, he would not have been convicted of first-degree burglary. Accordingly, the Court of Appeals did not err in reversing the PCR court's ruling that Counsel was ineffective for failing to investigate and call these witnesses.

**II. The Court of Appeals correctly found that there was no probative evidence to support the PCR court's finding that Counsel was ineffective for failing to utilize Tate more effectively at trial.**

The Court of Appeals correctly held that there was no evidence of probative value to support the PCR court's finding that Counsel's utilization of Tate as a witness was deficient. The PCR court found Counsel was ineffective for failing to prepare and utilize Chad Tate at trial. Chad Tate was the ex-boyfriend of the victim, and father to her two children. (App. p. 593). Tate testified at the trial on behalf of the defense. (App. p. 291-302). At the PCR hearing, Tate testified that prior to the trial he spoke with Counsel or the investigator, but he claimed that they did not meet with him to prepare him to testify at trial. (App. p. 594). Tate stated that he did meet with him in the conference room outside of the courtroom on the day of trial before he testified. (App. p. 603). However, Tate testified that it was his understanding that he was being called as a defense witness to testify that Petitioner lived with the victim. (App. p. 594). Tate testified that he had no firsthand knowledge as to whether or not Respondent had a key to the apartment. (App. p. 596-97). With respect to Tate's testimony that Counsel did not speak with him prior to trial, Counsel testified that, although he had no direct recollection of that, as a general recollection, he thought and felt it was not accurate. (App. p. 700).

Petitioner failed to demonstrate either deficiency or prejudice as to Counsel's preparation of or questioning of Tate. Though Tate testified that he thought he had more to offer as a defense

witness, (App. p. 604), Tate's trial testimony established that he believed Petitioner was living at the apartment with the victim, which is what he understood to be his purpose for testifying at trial. Petitioner failed to show how Counsel's preparation of Tate was lacking or what how more preparation would have changed his testimony at trial. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."); see also Moorehead v. State 329 S.C. 329, , 496 S.E.2d 415 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.").

Accordingly, there was no probative evidence to support the PCR court's finding that Counsel was ineffective for failing to properly prepare or utilize Tate at trial. Therefore, the Court of Appeals did not err in reversing the PCR court's decision.

**III. The Court of Appeals correctly held there was no evidence of probative value to support the PCR court's finding that counsel focused entirely on the murder charge rather than the burglary charge.**

The Court of Appeals correctly ruled that the record contains no evidence of probative value to support the PCR judge's finding that Counsel was ineffective for focusing more on the defense for the murder charge and for failing to prepare to defend Respondent on the charge of first-degree burglary.

The PCR court found that Counsel's testimony was credible as to the issues that he recalled. (App. p. 743). Counsel testified that the case was clearly two crimes, which were intertwined and occurred within a short period of time. (App. p. 694). Counsel testified that in his meetings with Petitioner, he focused on the ones that he saw were most problematic and they

probably discussed the murder more than the burglary, because it had more problems generally and they had to convince the jury that the perpetrator was Watson, not Petitioner. (App. p. 694-95). In fact, the only witness for the defense regarding the murder was Petitioner, and Counsel focused on the important job of cross-examination of Watson. (App. p. 696).

Counsel testified that he thought they presented a strong case as to the fact that Petitioner lived at the apartment through the introduction of pictures from inside the apartment and from the testimony of the defense witnesses. (App. p. 697). Counsel's opening statement at trial points out that Petitioner was the victim's live-in boyfriend and explains why he entered through the window. (App. p. 74-75). Petitioner acknowledged during his testimony that Counsel discussed at trial several pictures from the scene, which included a photo of what appeared to be men's clothing on the futon in the victim's bedroom, a photo of personal papers of Petitioner's and a photo of a toothbrush in the bathroom, (App. p. 683-84, p. 687). Counsel asked Petitioner about those items and pictures at trial. (App. p. 345-9). Counsel testified that he thought that Petitioner's mother was a very effective witness, but that all four defense witnesses provided good information about Petitioner's relationship with the victim and their living situation. (App. p. 701). Counsel testified that there might have been individual things or testimony that he elected to not put up at trial to support Petitioner living at the apartment, but he thought he tried a strong case to establish that Petitioner did live at the apartment. (App. p. 705-06).

To establish counsel was inadequately prepared, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any

possible effect on the result at trial). Other than the testimony of the four witnesses, none of whom had direct knowledge as to whether or not the victim had broken up with or evicted Petitioner from her home, Petitioner failed to produce any evidence or testimony of what Counsel would have discovered had he conducted any additional investigation into the burglary charge. Counsel provided testimony from those closest to Petitioner to support his testimony that he had not been evicted from the apartment, but in fact was still living there. Trial testimony from several witnesses, including Charlene and the victim's mother, indicated that Petitioner had come to the apartment earlier in the evening and was let in to go upstairs. (App. p. 109-110, 134).

Petitioner contends the Court of Appeals erred in not analyzing this case under the facts of State v. Singley, 392 S.C. 270, 278, 709 S.E.2d 603, 607 (2011) (holding "defendant's ownership interest in the dwelling will not preclude a conviction of burglary as a matter of law"). However, in Singley, the Court upheld the trial judge's denial of the defendant's motion for directed verdict. Therefore, while Singley is informative concerning the elements of burglary first degree, it is not controlling. See also State v. Coffin, 331 S.C. 129, 502 S.E.2d 98 (1998) (holding charge of burglary was properly submitted to the jury because evidence supported inference that appellant was a guest in victim's home where appellant did not have key and was not on lease and victim was entitled to terminate appellant's lawful possession by evicting him as she did before stabbings occurred). In both Coffin and Singley, a person with a clear possessory interest evicted the individual accused of burglary. In Coffin, the defendant had no possessory right, and "his rights were dependent solely on his girlfriend's good graces." 331 S.C. 129, 502 S.E.2d 98. When the defendant's girlfriend evicted him from her mobile home, he no longer had the right of expectation to be safe and secure in that home. Id. Further, a possessory interest is

not enough to entitle a defendant to a finding of custody and control of the dwelling. Singley, 392 S.C. at 277, 709 S.E.2d 603, at 606. Regardless, the additional witnesses presented at the PCR hearing would not have changed the outcome of the trial because, as argued above, none of the witnesses could testify as to whether the victim had evicted Petitioner as of the time of the shooting. Although the determination of habitation is a fact-intensive one for the jury, if the undisputed owner of the house indicates that the defendant is no longer welcome in the home, the defendant will not succeed in claiming he entered his own dwelling, even where the defendant owns a possessory interest in that home.

The Court of Appeals correctly held there is no evidence of probative value in the record indicating that Counsel failed to present an adequate defense to the burglary charge or that he focused more on the murder charge rather than the burglary charge. Counsel credibly testified that he prepared and planned on presenting a defense to both charges at trial. Counsel testified, and the record demonstrates, that he brought credible and effective witnesses forward during the trial to support the defense that Petitioner still lived in the victim's apartment. Counsel presented three witnesses in addition to Petitioner at trial, and only Petitioner's testimony was offered in relation to the murder charges. Counsel's testimony and the record demonstrate that Counsel reviewed all discovery and conducted an independent investigation by interviewing and calling multiple witnesses. Furthermore, Counsel demonstrated that he understood what evidence needed to be presented at trial to acquit Petitioner of the burglary charge and he presented that evidence. Therefore, there was no evidence of probative value to support the PCR court's finding that Counsel was deficient for focusing more on the murder charge than the burglary charge, or that Petitioner was prejudiced as a result.

**IV. The Court of Appeals correctly held the PCR court erred in finding Counsel was ineffective for failing to object to the item stricken on the jury verdict form.**

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

The PCR court originally found that Counsel was ineffective for failing to address the matter before the trial court based upon Counsel's testimony that he thought the jury "compromised" on the verdict. (App. p. 751-52). However, in the Order denying Respondent's 59(e) Motion, the court acknowledges that the action of the jury or the failure of Counsel to address the matter with the trial court, "standing alone," would not lead to a conclusion of ineffective assistance of counsel. (App. p. 769). The PCR court also agreed that it would be speculation to determine that the strike through indicated indecision by the jury. (App. p. 769).

The Court of Appeals properly held that the PCR court erred in concluding that Counsel's performance was deficient because there was no evidence of probative value to support its finding that Counsel was deficient for failing to address the jury verdict form. In determining whether Counsel was deficient, the courts must measure attorney performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Here, the trial court polled the jury at Counsel's request, the trial court questioned

the jury foreman regarding the alteration, and polled the jury again to confirm the verdict was correct. Petitioner produced no evidence at the PCR hearing to show that the verdict was compromised in any way. Therefore, there was no evidence of probative value in the record to support the PCR court's finding that counsel was deficient in this regard. Accordingly, the Court of Appeals correctly held that Petitioner produced no evidence at the PCR hearing to show that Counsel was deficient in deciding not to pursue the argument further.

### CONCLUSION

For the reasons stated above, Respondent requests that this Court deny the Petition for Writ of Certiorari and affirm the Court of Appeals. Should this Court grant Certiorari, the Respondent requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON  
Attorney General

ALICIA A. OLIVE  
Assistant Attorney General  
Bar Number #102089

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

September 6, 2016.

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to the Court of Appeals  
Appeal from Spartanburg  
The Honorable J. Mark Hayes, II, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2016-001430

JEROME C. BUCKSON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing one (1) copy 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 6<sup>th</sup> day of September, 2016.

  
ASHLEY HAWORTH  
LEGAL ASSISTANT