THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellant Case No. 2017-002417
Lower Court Case № 2013-CP-42-0007

Larry Brent Horton, # 329065 .......................................... Petitioner,

vs.

State of South Carolina ............................................... Respondent.

# PETITION FOR WRIT OF CERTIORARI

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## Statement of Issues Presented

Question I: The lower Court erred in failing to find that a portion of the testimony of Anthony Sellers was impermissible hearsay that violated the confrontation clauses of the United States and South Carolina Constitutions.

Question II: The Lower Court err in failing to find trial counsel was ineffective when during the charge conference, trial counsel failed to argue facts and existing case law that would have required the trial judge to instruct the jurors as to the law of voluntary manslaughter.

Question III: The Lower Court erred in failing to find trial counsel was ineffective for his failure to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice.

Question IV: Did the lower court err in finding trial counsel effective when he failed to object to the trial court's erroneous instruction on about the definition of "malice aforethought."

Question V: Did the lower court err in finding trial counsel was not ineffective when he undermined his own credibility and the credibility of Horton's testimony when he told the jurors during closing argument that they should question the credibility of Horton and other defense witnesses.

Question VI: Did the lower court err in failing to grant a new trial to Larry Horton on the basis of cumulative error?

Question VII: Did the lower court err in failing to find Appellate Counsel was ineffective in failing to argue facts and existing case law that would have required the trial judge to instruct the jurors about voluntary manslaughter?

Question VIII: Did the lower court err in failing to find trial counsel was ineffective based upon cumulative error of trial counsel and appellate counsel to properlyaddress the issues as to voluntary manslaughter?Statement of Issues Presented

## Procedural History

On January 2, 2007, the Spartanburg County Sheriff's Office charged Horton with the murder of his wife, Erika Horton. On June 16-18, the State tired Horton before the Honorable J. Durham Cole and a jury. Solicitor Trey Gowdy and Cindy Crick prosecuted the case. Rick Vieth represented Horton. Despite a timely request, Judge Cole did not instruct the jurors about voluntary manslaughter. The jurors convicted Horton of murder. Judge Cole sentenced Horton to life imprisonment without the possibility of parole.

Horton appealed his conviction and sentence to the South Carolina Court of Appeals. Joseph L. Savitz, III, of the Appellate Defense Division represented Horton. The Court of Appeals affirmed Horton's conviction and sentence. *State v. Horton*, Ct. App. Unpublished Op. No. 2010-UP-406 (filed September 16, 2010). Wanda Carter, of the Appellate Defense Division, petitioned the Supreme Court of South Carolina for a writ of *certiorari*. On January 11, 2012, the Supreme Court denied that petition.

On January 2, 2013, Horton filed this application for PCR. On March 21, 2014, the State filed its return. On March 25, 2015, the Court convened an evidentiary hearing. At the call of the case, counsel for Horton informed the Court he was abandoning claims 11(a)(2), (3) and (4), 11(b), and 11(c) contained in his PCR Application. Horton amended his PCR Application so that claim 11(a)(1) also alleged a violation of the confrontation clause of the United States and South Carolina Constitutions. He also amended the application to allege cumulative error. Horton also provided the Court with an Index of Case Law and a booklet containing those cases. Rick Vieth was the only witness that testified during the PCR hearing. At the conclusion of the hearing, the Court requested written memorandums of law.

The PCR Application was denid by Order dated February 22, 2016. The Applicant filed a

timely Motion under Rule 59 of the South Carolina Rules of Civil Procedure. A hearing on this Motion was held on July 11, 2017 in Charleston, SC. The Motion was denied by Order dated October 25, 2017. A Notice of Appeal was filed on November 20, 2017

**Statement of Facts.**

Brenda and Larry Brent Horton, Sr. retained Rick Veith to represent their son, Larry Brent Horton, Jr., for killing his wife, Erika Horton. At the PCR hearing, Mr. Veith testified Brenda, Larry, Sr., and Brent, Jr. are good people. App. at 564, ll 20-22; 581, l 25 to 582, l 19. From the beginning, Mr. Veith recognized Horton's only defense would be voluntary manslaughter, and that was the defense presented at trial. The trial court judge, however, declined to instruct the jurors about voluntary manslaughter. By arguing facts contained in the record and then-existing South Carolina case law supporting given the instruction under the circumstances of this case defense and appellate counsel could have persuaded the trial court and appellate court to give a manslaughter instruction.

The prosecution called Violent Crimes Investigator William Robert Gary, a thirteen-year veteran of the Spartanburg County Sheriff's Office, to testify about his interviews of Horton. Gary first encountered Horton "sitting in a chair in the carport with a blanket over him." Horton had blood on his hands, feet, and face. Investigator Gary read Mr. Horton his *Miranda* Warnings[1] from a card. Because it was cold, law enforcement transported Mr. Horton to the Sheriff's Office where it was warmer. At the Sheriff's Office, Investigator Gary used a "Pre-interrogation Waiver Form" to provide Mr. Horton with his *Miranda* Warnings a second time. App. 123, l 24 – 126, l 13; State's Trial Ex. 1.

Investigator Gary first asked Horton about "the background of his and Erika's

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

relationship." He then asked Mr. Horton about the events leading to Erika's death. Earlier in the evening, Mr. Horton had gone to the Bi-Lo. When he got back, "they got into an argument and Erika was fussing at him because he got the wrong size diapers." App. at 127, ll 11-17.. Horton "went back to the Bi-Lo and exchanged the diapers and returned home and she was fussing at him some more." Erika tried to leave. Horton got her phone, and she bite him and left. Investigator Gary saw the bite mark on Horton's hand "between the thumb and the index [finger] like in the middle part of your hand." App. 126, l 20 – 128, l 4.

Horton got "dressed for bed and was sitting on the couch in the dark." Erika "came in the house and they were fussing some more. She was getting things together, and they were fussing." According to Investigator's trial testimony, Horton said "the next thing he remembered was being in the carport on the phone. Investigator Gary claimed Horton "just kept saying we were just fussing." App. 128, ll 8-19.

Investigator Gary played the 911 recording for Horton and then pressed him for more information:

> And I told him, you know, the way it looked to in the house, whether they got into a fight, he got a knife, he hurt her. And I asked him if he could tell me about what happened with that. ***He said they did get physical and they did hit each other.***

App. 129, ll 19-23.

Horton told Investigator Gary that he grabbed Erika by the hair, kept hitting her, and grabbed a knife. Horton didn't recall where he got the knife from, but it was a kitchen knife." Horton said, "[I]t all happened so fast." App. 129, l 24 – 130, l 9.

At trial, Horton additionally testified, "[Erika] was going through a drawer and turned around and like she threw something at me." App. 257, ll 6-7. Horton repeated this testimony on cross-examination. App. 267, ll 17-21.

## Applicable Legal Standards.

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Strickland*, 466 U.S. at 694. The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel's errors.

Due process of law also requires that a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under the same test as other ineffectiveness claims. *Smith v. Robbins*, 528 U.S. 259 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). Certainly, appellate counsel has no constitutional duty to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). In most cases, the reason for abandoning one issue is to enable counsel to focus on the more meritorious issues, since a "brief that raises every colorable issue runs the risk of burying good arguments." *Jones,* 463 U.S. at 752-53. Appellate counsel, however, is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999)

(appellate counsel provided ineffective assistance of counsel that required a new capital sentencing trial by failing to assert, as trial counsel had, that the defendant was entitled to a charge that life is to be understood in its "ordinary and plain meaning," pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985)). *See also Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001) (appellate counsel was ineffective in failing to assert as error that the trial court failed to instruct the jury, as required by state law, that if it failed to make a unanimous finding that the death penalty was warranted by evidence in aggravation of punishment, it was required to return a life sentence); *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002) (appellate counsel ineffective for failing to assert as error the trial court's instruction that once the jurors "have unanimously found an aggravating circumstance, before they can weigh aggravating circumstances against any mitigating circumstances, they must all find the existence of at least one mitigating circumstance. This is not a correct articulation of the law").

**Arguments**

**Question I**

**The lower Court erred in failing to find that a portion of the testimony of Anthony Sellers was impermissible hearsay that violated the confrontation clauses of the United States and South Carolina Constitutions.**

The prosecution called Anthony ("Tony") Sellers. He was the used car manager at Toyota of Greer, in Greer, South Carolina. Sellers knew Erika Horton when she was employed there "for a little more than two years, as a sales person." Even after Erika moved to Beaufort, she returned to visit the dealership. App. 141-42.

Sellers direct testimony was devastating to Horton's defense. On January 2, 2007, Sellers noticed he "had a couple of missed calls from Erika." The missed calls were between 8:00 and

8:30 p.m., and Sellers returned the calls "around 9:00 or 9:15-ish." According to Sellers, Erika's "voice was a little distraught."[2] Erika asked, "Tony, I was calling you to ask you if I could possibly get my job back with you." She added, "I need to get a job. I need to make some money so that I can get out and get me a place." Sellers asked, "Erika, is everything all right with you." Sellers claimed Erika responded, "Well, ***my husband just beat my ass and threw me out of the house"*** (emphasis added). Erika purportedly told Sellers "she was going to stay with a friend." "And she said that she wanted to get her kids but she couldn't, he wouldn't, her husband wouldn't let her get her kids."[3] Sellers claimed Erika said she was going back to her house "to get some things." The "next morning" Sellers heard "Erika Horton was murdered." He called the police and "told them what had transpired the night before." App. 143-47. Trial counsel did not object to any of this hearsay testimony.

Sellers' response to trial counsel's cross-examination of Sellers emphasized this hearsay testimony:

> I asked her was everything okay because, well, I got – she – things just didn't sound right with her. I mean, you know, this is someone you worked with for a couple of years. And I said, " Is everything okay?" And she just sounded. She didn't sound herself. And, again, you know, ***stated to me that her husband had beat her ass and kicked her out of the house.***
>
> And at that time I'm saying, oh, God, you know. We conversated a little bit more, and she started telling me that she needed to make some money or whatever so that she can get out of the house and just what I just told you earlier."

[2] The trial court judge sustained an objection to this characterization, but there was no companion motion to strike or curative instruction. App. 144, ll 7-9. Trial counsel would later emphasize Erika's purported distraught sounding demeanor at App. 155, l 16 – 156, l 2.

[3] The testimony from Brenda Horton, the mother of the applicant, was that Erica asked her to pick up the children. App. at 217, ll 8-9

App. 155, l 16 – 156, l 2 (emphasis added).

The prosecution began its closing by emphasizing Seller's testimony:

> Erika Horton went back to her house on January the 2nd of 2007 after her husband has already hit her.
>
> She was not planning to stay there that night. The only reason she went back is because she wanted to get a few things for the night.
>
> She'd already arranged to get her old job back. She'd already arranged to stay with a friend. She was getting out of a bad situation.

App. 367, ll 3-11.

Later on, the prosecutor argued:

> And what was on Erika's mind at the time this happened? Mr Veith told you in his opening that she went back to her house. But we don't know why she went back there. Yes, we do; yes, we do.
>
> No. Erika Horton didn't come in this courtroom and she didn't get on the stand and testify. But we do know some things abut what was going on and what was in her mind at the time based on the actions, based on what she did that night.
>
> She tells us through her actions. And we know what was on her mind because she told Tony Sellers on the telephone. ***I left the house. He just beat my ass. I left the house. He just beat my ass.***
>
> She wanted her old job back. She was going to go stay with a friend. What she's telling us is she's making plans to leave. She's making plans to support herself.
>
> She does not have any intention of staying in that home that night. . . .
>
> We do know she went back to the house. She told Tony Sellers why she went back to the house. Listen, I'm just going to get a few things for the night, I'm going to go back. . . .

App. 371-72 (emphasis added).

The prosecution clearly offered Erika's purported statements to Sellers "to prove the truth of the matter asserted." Rule 801, SCRE. Sellers' entire testimony was inadmissible hearsay.

Rule 802, SCRE. *State v. Garcia*, 334 S.C. 71, 512 S.E.2d 507 (1999) (held that admission of evidence concerning victim's fear of defendant under "present state of mind" exception to hearsay rule was reversible error). Recently the South Carolina Supreme Court granted Post Conviction Relief because trial counsel failed to object to hearsay testimony. *Thompson v. State*, Op. No. 27785 (S.C.Sup.Ct. filed March 21, 2018)(Shearhouse Adv.Sh. No. 12 at 14).

Sellers' testimony recounting Erika's purported statements also violated the confrontation clauses of the Sixth Amendment of the United States Constitution and Article I, Section 14 of the South Carolina Constitution. *Davis v. Washington*, 547 U.S. 813 (2006); *Davis v. Washington*, 547 U.S. 813 (2006).

The Court should reversed the order of the lower court and grant a new trial.

**Question II**

**The Lower Court err in failing to find trial counsel was ineffective when during the charge conference, trial counsel failed to argue facts and existing case law that would have required the trial judge to instruct the jurors as to the law of voluntary manslaughter.**

During the charge conference, trial counsel argued that Investigator William Robert Gary's[4] testimony was Brent told him he and Erika "had been fighting." This statement provided the sufficient legal provocation for voluntary manslaughter. App. 338, ll 3-5; 338-339

The Solicitor down played the fighting by arguing, "Fighting is a synonym for fussing, which is the word [Horton] used when he testified." The Solicitor further contended, "The only episode of physical contact between the two of them was when he got her cell phone and she tried to get it back, which, as the Court knows, is the exercise of a legal right." And, Horton "testified he was sitting there in his pajamas and the next thing he knows he as lunging at her." The Solicitor

[4] Trial counsel actually referred to Investigator Gary as "Mr. Williams." App 338, l 1-5. Referring to the Investigator by his first name might have confused the trial court judge.

contended, "[T]here is no sufficient legal provocation" and "no evidence of sudden heat of passion that would overcome someone's will." App.. 339-40.

The trial court judge asked trial counsel:

> Well, Mr. Veith, even assuming from the evidence in the case that you could reasonably infer heat of passion, I think the record in this case is lacking in any evidence that would support that heat of passion based upon sufficient legal provocation.
>
> Maybe you can help me with that difficulty. I don't recall any evidence in the case, direct or circumstantial, for which you could reasonably find that there was a sufficient legal provocation.

App. 340, ll 10-18.

Trial counsel again pointed to when Horton told the investigating officer "they had been fighting." The trial court judge responded, "Well, that might give rise to heat of passion, but that doesn't give rise to sufficient legal provocation. I'm talking about the legal provocation. What evidence is there of that." Trial counsel conceded, "I have no pinpoint evidence because she's deceased and he purportedly can't remember. So I don't know what happened from 10:00 t 10:30." App. 340-41.

The trial court judge found "there might be some evidence from which you could reasonably infer anger or heat of passion," but "I don't ***recall*** any evidence from which you could reasonably infer that there was a sufficient legal provocation for that heat of passion." The trial judge, therefore, declined to instruct the jurors about the law of voluntary manslaughter. App. 341 (emphasis added).

Trial counsel never reminded the judge about Investigator Gary playing the 911 recording for Horton and then pressed him for more information:

> And I told him, you know, the way it looked to in the house, whether they got into a fight, he got a knife, he hurt her. And I asked him if

> he could tell me about what happened with that. ***He said they did get physical and they did hit each other.***

App. 129, l 19-23. Nor did trial counsel remind the judge that Horton said, "[I]t all happened so fast." App. 129, l 24 – 130, l 9.

Trial counsel never pointed out to the judge that Horton testified, "She was going through a drawer and turned around and like she threw something at me." App. 257, ll 6-7; 267, ll 17-21.[5]

The trial court judged erred by focusing on sufficient legal provocation rather than "reasonable provocation." South Carolina has long held:

> The distinction between murder and manslaughter, as put in the books, and as generally understood by the profession, is not merely an arbitrary rule, but is founded on a thorough knowledge of the human heart, and framed in compassion to the passions and frailties which belong to and are inseparable from our natures. We look in vain through all classes of society, for even one individual who has so much command of himself as to remain passive and unmoved when suffering under personal injuries. Passion arising out of even imaginary wrongs, frequently gets the ascendancy of distempered minds, and even those that are better regulated are sometimes carried away by the ordinary "ills which flesh is heir to." These may, however, be subdued and overcome by a proper course of reflection and discipline, and it is our duty to keep them within proper bounds; but he who has suffered great bodily harm, the parent who sees his child, or the child who sees the parent, suffering under the hand of ruffian violence, or the husband who finds his wife in the embrace of an adulterer, does not stop to reason about the extent to which he will carry his resentment, and in proportion to the degree of provocation will be the almost certain excess of resentment; and if, under the influence of such an excitement, one man takes the life of another in whose wrong it originated, it is manslaughter and not murder. There must, however, be a provocation—***a reasonable provocation,*** and what will or will not constitute a ***reasonable provocation,*** is perhaps the only difficulty in applying the otherwise well defined distinction between the crimes of murder and manslaughter. ***The line which distinguishes between those***

[5] The Solicitor mischaracterized this testimony during cross-examination, suggesting it was a sock, which Horton immediately disputed. App. 260, ll 5-8.

> ***provocations which will and will not extenuate the offence, is not, nor can it be, certainly defined.*** Those provocations which are in themselves calculated to provoke a high degree of resentment, and which ordinarily superinduce a great degree of violence, when compared with those that are slight and trivial, and from which a great degree of violence does not usually follow, may serve as a general outline to mark the distinction, and when applied with judgement and discretion, will usually lead to correct results. Decided cases furnish practical applications of the principle, and are of infinite use in carrying it out. According to those, it is now well established that no provocation, however grievous, will operate to excuse the slayer of the crime of murder, when, from the weapon used, or from the manner of the assault, an intention to kill or to do some great bodily harm was manifest, unless it was accompanied by some act of unlawful violence, or denoting an intention to do bodily harm; nor will even a trivial provocation extenuate the offence, although, in point of law, it may amount to an assault, if the punishment inflicted is outrageous in its nature, either in the manner or circumstance of it, and beyond all proportion to the provocation; because it manifests rather a diabolical depravity than the frailty of nature; and, as more directly applicable to the case in hand, it is laid down by all the criminal law writers, that if one interpose in a fray to separate the combatants, and give notice of his pacific intent, and is slain by one of the affrayers, it is murder.

*State v. Ferguson*, 20 S.C.L. 619, 621-23 (S.C. App. L. & Eq. 1835) (emphasis added) *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005). See also *State v. Hammond*, 36 S.C.L. 91 (S.C. App. L. 1850) and *State v. Martin*, 216 S.C. 129, 57 S.E.2d 55 (1949) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

Horton's statements to Investigator Gary about him and Erika "fighting" and that "they did get physical and they did hit each other" is evidence of reasonable provocation that entitled Horton to a jury instruction on involuntary manslaughter. These statements, when combined with Horton's trial testimony that Erika threw something at him, further entitled him to an instruction on involuntary manslaughter.

This case should be controlled by *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951). The facts of the two cases are very similar. In *Gardner* the defendant killed his estranged wife.

She had taken out a child support warrant and he went to her house to talk to her about it. In holding that manslaughter should have been charged this Court ruled:

> He says that his wife 'jumped on me' and 'me and her got into it'. These expressions can reasonably be construed as meaning nothing more than that appellant's wife severely reprimanded or violently censured him, and that they became engaged in a heated argument. On the other hand, they might be subject to the construction that there was some overt, threatening act or a physical encounter. At least there is sufficient doubt thereabout, we think, to warrant submission to the jury of the question of manslaughter. *Id.* at 105, 64 S.E.2d at 134-135.

In addition, the prosecution argued in closing Horton's motive for killing Erika was because she was going to take the kids. App. 369, ll 22-25; 371, l 17-19; 376, l14 – 377, l 6; 378, ll 12-18. Under *Ferguson, Hammond, Gardner* and *Martin,* threatening to take someone's kids is reasonable provocation entitling Horton to a charge on involuntary manslaughter. If finding one's spouse in the embrace of their lover is reasonable provocation, then surely the threat to take one's children from them is also reasonable provocation. At the very least, the jury shold be given the option to make that determination.

Under *Mullaney v. Wilbur*, 421 U.S. 684 (1975) if the trial court had charged manslaughter, the State would have the burden of proving that Mr. Horton did not act in sudden heat and passion. Under the facts of this case, that would have been a difficult burden. This fact also illustrates why a charge on manslaughter was required. Interestingly, in Maine, a common law state, they refer to provocation as "sudden provocation." This is perhaps a better description as to what is required to reduce murder to manslaughter. "Legal provocation" has no real meaning as defiend by our cases. A jury can much easier understand "sudden provocation."

Horton was prejudiced by his trial counsel's failure to call the trial court judge's attention to these facts and cases. Had counsel done so, then the trial court judge would have instructed the jurors about the law of involuntary manslaughter.

The Court should reversed the order of the lower court and grant a new trial.

## Question III

**The Lower Court erred in failing to find trial counsel was ineffective for his failure to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice.**

South Carolina has long held that when "one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation ***without premeditation or malice,*** it would be manslaughter." *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 3-4 (2003); *State v. Graham*, 260 S.C. 449, 451, 196 S.E.2d 495, 496 (1973); and *State v. Andrews*, 73 S.C. 257, 53 S.E. 423, 424 (1906).

While such a definition may have been long recognized, such a definition is not correct and serves only to confuse a jury, the bench and the bar. A simple example will illustrate this fact. A classic example of manslaughter is when a man comes home and finds his wife in bed with another man. He pulls out his gun and kills the man. While there was no physical threat to the upset husband, courts traditionally would charge manslaughter as this crime was done in sudden heat and passion. If the husband were to exclaim shortly before firing the fatal shot "I am going to kill you, you SOB" would not change the requirement that manslaughter should be charged. But when that statement is made there is expressed malice and an intent to kill. This simple example should cause the court to question the usual definition of manslaughter.

In *State v. Belcher*,385 S.C. 597, 685 S.E.2d 802 (2009) our supreme court began to re-think the law as to murder and eliminated in most cases the use of an inference of malice in the use of a deadly weapon. In deciding the case, the court said "it becomes clear that inferring malice from the use of a deadly weapon is indeed only a 'half-truth.'" *Id.* at 610, 685 S.E.2d at 808. This discussion of "half truths" in the concept of murder came from *Glenn v. Maryland*, 68 Md.App.

379, 511 A.2d (1986).[6] *Glenn* also discusses in detail another "half truth" of murder cases – "MALICE IS THAT WHICH SEPARATES MURDER FROM MANSLAUGHTER." *Id.* at 379, 398, 511 A.2d at 1121. As discussed above, an intent to kill is not what distinguishes murder from manslaughter and neither is the lack of malice. In the opinion, Judge Daniel Moylan of the Court of Special Appeals of Maryland gives an historical lesson on the use of the words "malice" and "aforethought" as they relate to the charges of murder, manslaughter and attempted murder.

In referring to the problems with the use of the word "malice" Judge Moylan said "The linguistic snare has been that the umbrella term 'malice' has been carelessly used to refer to any one of its component parts individually, especially the first and third components. It is frequently used to denote the intent element. It is frequently used to denote the absence of mitigation. What is true of one is not necessarily true of the other." *Glenn* at 404, 511 A.2d at 1124. Interestingly the *Ferguson* case, cited above, discusses the difference between murder and manslaughter as reasonable provocation which would mitigate the charge down to manslaughter much as the *Glenn* case does. Defense counsel was ineffective in failing to object to an improper definition of manslaughter use dby the trial judge which prevented the trial judge from giving a manslaughter charge.

The Court should the order of the lower court and grant a new trial.

**Question IV**

**Did the lower court err in finding trial counsel effective when he failed to object to the trial court's erroneous instruction on about the definition of "malice aforethought."**

Question III is incorporated by reference as if set fort here fully and verbatim. Trial counsel

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[6] Trial counsel admitted on cross examination that he had copied and probably read the *Glenn* case before trial. A copy of the case was in his file. The *Glenn* case is a very scholarly opinion in this area of the law.

also did not object to the trial court judge's erroneous instruction on "malice." The trial court judge instructed the jurors:

> [T]he law does not require that malice must exist for any appreciable length of time before the commission of an act or acts proximately causing a fatal result. Indeed, it may be conceived at the very moment that the fatal act or acts are committed.
>
> It is sufficient in the law so long as the state has proven beyond a reasonable doubt both the existence of malice and the commission of an act or acts by the defendant which proximately caused the fatal result.

App. 393, l 23 – 394, l 5.

Trial counsel neither objected to this instruction nor pointed to existing, contrary South Carolina case law, which was cited in Question III, *supra*. Under this definition, which is unfortunately given in virtually all murder trials in South Carolina, the element of malice can be formed in a millisecond. Obviously such a charge makes the word "aforethought" devoid of any real meaning. The problem with this definition of malice is that it theoretically would permit the finding of malice when the crime is in fact commited in suden heat or passion. However, a finding of sudden heat and passion should be mutually exclusive of a finding of "aforethought," but not necessarily a finding of "malice."

The Court reverse the order of the lower court and grant a new trial.

**Question V**

**Did the lower court err in finding trial counsel was not ineffective when he undermined his own credibility and the credibility of Horton's testimony when he told the jurors during closing argument that they should question the credibility of Horton and other defense witnesses.**

During his testimony, Horton testified that he did not have a memory of most of what

happened when he killed his wife. E.g. App. 247, l 13-16; 257, ll 3-10. On cross-examination, the prosecution questioned Horton extensively about his lack of memory. App. 261-72.

The defense called Dr. Margaret Milikian, a forensic psychiatrist and professor at the Medical University of South Carolina, to testify about Horton's amnesia. Dr. Milikian diagnosied Horton with dissacotiave amnesia, "which occurs when something is so traumatic and has so much emotion reckoned with it that the person can't remember it." She did not find any evidence that Horton was malingering amnesia. App. 311-19.

During closing argument, trial counsel undermined the credibility of Brent Horton and Dr. Melikian's testimony by arguing:

> I told you in my opening statement that the issue of amnesia hurts me more than it helps me.[7] And I realize Mr. Gowdy jumped all over Dr. Melikian about amnesia. And I think after hearing Mr. Gowdy give his argument about it, that there is no such thing as amnesia, because it would be contrive and always would be malingering.
>
> So probably all of these textbooks ought to be erased of amnesia. Under that theory of cross-examination, it's just a joke.

App. 349, ll 13-21. Trial counsel again emphasized how Horton's amnesia hurt his defense. App. 361, ll 21-23. And then he argued:

> A lot of things in this case are unique. I haven't seen amnesia in a long time. And, again, it doesn't make someone not guilty of a crime. We never contended that. I just felt I had to cover that base with a doctor to see why he can't help me.
>
> And if you don't want to believe it, then you don't have to. Everything goes to credibility that sits on that side of the jury post.

App. 366, ll 9-15.

Trial counsel also undermined the credibility of Brenda Horton, his client's mother, by

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[7] *See* App. 92-94.

arguing:

> Again, this is where Brenda's credibility is going to be attacked by the solicitor's office, and rightly so, because she gave a statement of minimal length about three hours after she had heard of this case and didn't indicate that stuff had happened.

App. 358, ll 8-12.

During closing argument, the prosecution accused Horton of faking amnesia: "Make no mistake. He remembers." App. 371, l 17. And, "I guarantee he has not forgotten one punch, one lunge. He hasn't forgotten one cut." App. 378, ll 23-25.

Our Supreme Court has long recognized the significance of trial counsel maintaining credibility with the jurors. E.g. *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) ("The effect of the judge's after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury."). Ineffective assistance of counsel results when trial counsel damages "the defense case because the closing argument did not support [his client's] account of what had happened." *Lounds v. State*, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008). *Cf. Ingle v. State,* 348 S.C. at 472, 560 S.E.2d at 403 (where defense counsel put up a witness who gave testimony contradictory to the petitioner's defense and was therefore "quite damaging" to the defense, the Court found ineffective assistance of counsel).

The Court should reverse the order of the lower court and grant a new trial.

**Question VI**

**Did the lower court err in failing to grant a new trial to Larry Horton on the basis of cumulative error?**

If this Court concludes these deficiencies, standing alone, are insufficient to order a new trial, then this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Horton a fair trial. *Kyles v. Whitley*, 514 U.S 419, 436 (1995) (the prejudice

must be "considered collectively, not item-by-item"); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (considered "the entire post-conviction record...as a whole"); *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); and *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

Here, multiple errors by trial counsel led to the trial court judge not instructing the jurors about involuntary manslaughter. But for these errors, the judge would have provided the instruction.

The Court should reverse the order of the lower court and grant a new trial.

**Question VII**

**Did the lower court err in failing to find Appellate Counsel was ineffective in failing to argue facts and existing case law that would have required the trial judge to instruct the jurors about voluntary manslaughter?**

The brief that appellate counsel filed in the Court of Appeals is deficient on its face. The argument section is only one page in length, does not argue the grounds given to the trial court for the voluntary manslaughter charge, and fails to cite relevant, then-existing, South Carolina case law. Inadequately briefing issues before the Court is ineffective assistance of appellate counsel. *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002) (Appellate counsel's performance was deficient in failing to adequately raise or address merits of the issue of prosecutorial retaliation).

Assuming *arguendo* that trial counsel adequately developed the trial record regarding the

request for a voluntary manslaughter instruction, appellate counsel failed to adequately brief the issue. The brief does not even mention the testimony of Investigator Gary that that Horton told him that he and Erika were "fighting." Like trial counsel, appellate counsel failed to point out that Horton told Investigator Gary ***"they did get physical and they did hit each other."*** App. 129, ll 19-23. Nor did appellate counsel point to Horton's testimony that said, "[I]t all happened so fast." App. 129, l 24 – 130, l 9.

Appellate counsel failed to recognize a very basic tenet of when a jury charge should be given. Unlike a directed verdict, when a defendant requests a charge on the law the trial court must view the evidence in the light most favorable to the defendant, not the state, to determine if the requested charge should have been given. As the South Carolina Supreme Court said "We therefore review the evidence in the light most favorable to appellant, mindful that the charge request is properly rejected only where 'there is no evidence whatsoever' of the lesser offense." *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). Appellate counsel failed to adopt this basic position.[8]

The case law cited in Questions II and III was available to trial counsel. If trial counsel had cited this case law in the trial judge, then the outcome would have been different, and the Court would have charged the jurors the law of voluntary manslaughter.

The Court should reverse the lower court order and grant a new trial a new trial.

*Appellate counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice.*

The case law cited in Questions II and III was available to appellate counsel. If appellate

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[8] Ironically the South Carolina Court of Appeals recognized this principle in affirming the conviction of the applicant. Obviously had appellate counsel pointed out that some evidence of the fight existed in the record, relief could have been obtained.

counsel had cited this case law in the brief to the Court of Appeals, then the outcome would have been different, and the Court would have reversed the conviction and remanded with instructions to charge the jurors the law of voluntary manslaughter. *See Patrick, supra.*

The Court should reverse the lower court and grant a new trial.

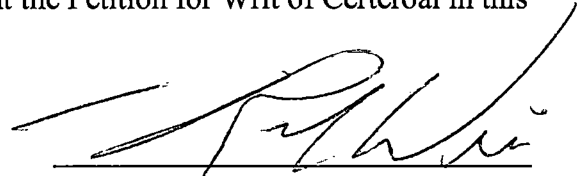
## Question VIII

**Did the lower court err in failing to find trial counsel was ineffective based upon cumulative error of trial counsel and appellate counsel to properly address the issues as to voluntary manslaughter?**

If this Court concludes these deficiencies, standing alone, are insufficient to order a new trial, then this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Horton a fair trial.

**Conclusion.**

For the foregoing reasons, the Court should grant the Petition for Writ of Certeroai in this matter and grant Larry Horton a new trial.



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IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellant Case No. 2017-002417
Lower Court Case № 2013-CP-42-0007

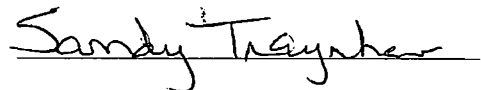
Larry Brent Horton, # 329065, . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Petitioner,

vs.

State of South Carolina, . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on April 5, 2018, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to Megan Harrigan Jameson, Office of the Attorney General, P.O. Box 11549 Columbia, South Carolina 29211 and Jenny Abbott Kitchings, Clerk, SC Court of Appeals, P.O. Box 11629, Columbia, SC 29211.



SWORN to and Subscribed
before me this 5th day
of April, 2018.

(L.S.)
Notary Public for South Carolina
My Commission expires: 12/7/2019

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April 5, 2018

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Larry Brent Horton, #329065 vs. The State, Appellate Case No. 2017-002417

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Petition for Writ of Certiorari and the original and 2 bound copies of the Appendix in the above matter together with the original Affidavit of Service. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

C. Rauch Wise

CRW/slt

cc Megan Harrigan Jameson

S.C. SUPREME COURT