STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-002417

LARRY BRENT HORTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION OF CERTIORARI

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STATEMENT OF THE CASE

On January 2, 2007, Larry Brent Horton ("Petitioner") severely beat his wife, Erika Bell Horton ("Victim"), until she was unconscious or helpless inside of their shared home in Campobello, South Carolina. (App. p. 114, 123, 130, 179-181, 182, 261). According to Petitioner, he and Victim had separated in December of 2005, but had reconciled in November 2006, several weeks before her death. (App. p. 242-245). Earlier in the evening on January 2, there was an altercation between Petitioner and Victim. (App. p. 253). Petitioner had taken Victim's cell phone and Victim bit Petitioner on the hand, hours before she was killed. (App. p. 265). Victim left the home and following her departure, Petitioner's mother arrived and left with the couple's children. (App. p. 253). Petitioner admitted he was the only other person at the home at the time of Victim's murder. (App. p. 257). Petitioner was sitting on the couch, in the dark, when Victim arrived back home to gather her things. (App. p. 128).

Victim's body was found so severely beaten, one of her eye's collapsed into her sinus. (App. p. 180, 261). Victim's nose was broken, her lips were bruised, and her face featured contusions to her lips, eye, forehead, and scalp. (App. p. 179-181, 261). Victim's frenulum[1] was also torn. (App. p. 180).Victim suffered severe congestion of the thinnest layer covering the brain. (App. p. 181). Prior to Petitioner's attack, Victim had been diagnosed with multiple sclerosis. (App. p. 240, 247).

After beating Victim unconscious, Petitioner walked the length on the home to the kitchen while dripping Victim's blood on the floor. (App. p. 165-178, 179-186). Petitioner opened a drawer, grabbed a kitchen knife, and returned to the Victim. (App. p. 130, 165-178, 179-186). Petitioner stabbed Victim with the knife five times in the neck, nearly separating Victim's head

[1] The frenulum is the supportive tissue inside the upper lip.

from her neck completely. (App. p. 185). Petitioner's stabbing of Victim severed her jugular veins, both common carotid arteries in the neck, her esophagus, trachea, and all of the muscles of the front of her neck. (App. p. 184-185). There were also hesitation stab wounds to the victim's shoulders. (App. p. 179, 181-182, 261). There were **no defensive stab wounds** to Victim's hands or forearms, which indicates that at the time of her stabbing, Victim was either unconscious or unable to defend herself. (App. p. 182, 260). Victim died as a result of her injuries.[2]

After murdering Victim, Petitioner called 911 and told the operator he beat Victim for threatening to take his children away. (App. p. 272). Petitioner told law enforcement four times that he beat Victim. (App. p. 272). Petitioner admitted to law enforcement that after beating Victim, he walked to the kitchen and retrieved a knife. (App. p. 272). When law enforcement arrived, they found Victim's blood all over the bedroom where Victim's body was found, as well as a trail leading from the bedroom to a kitchen drawer. (App. p. 165-177). Victim's blood was also found on Petitioner's clothing, his hands, and his forearms. (App. p. 165-177).

During an interview with law enforcement, Petitioner stated that he was "fussing" with Victim when she returned to their home, as she was attempting to gather her things. (App. p. 128). Petitioner then stated that the next thing he remembered, he was in his carport on the phone with 911. (App. p. 128). After law enforcement played the 911 recording of Petitioner's call, Petitioner admitted he and victim were alone at the time of her death. (App. p. 129). Petitioner again stated he did not remember what happened to Victim, but he remember they "got physical and they hit each other." (App. p. 129). There were no injuries to Petitioner to indicate a physical altercation, other than the bite mark on his hand, which Petitioner admitted to having come from earlier in the day. (App. p. 136). There was never any evidence presented that Victim was ever the aggressor.

[2] The pathologist did not specify the cause of death, but based upon the injuries sustained by Victim, death from severe blood loss is the only reasonable inference from the record.

Initially, Petitioner denied knowing where the knife came from, but eventually admitted the knife came from the kitchen and he is the one who retrieved it. (App. p. 130).

Petitioner was indicted for murder during the February 2008 term by the Spartanburg County Grand Jury. (App. p. 544). At trial, Petitioner was represented by Richard W. Vieth, Esquire ("trial counsel"). Petitioner proceeded to trial on June 16, 2008, before the Honorable J. Derham Cole. At trial, Petitioner testified on his own behalf. (App. p. 235-273). Several times throughout his testimony, Petitioner claimed to not remember the details of the murder, but he remembered specific details of events the preceded Victim's death, up to Petitioner's phone call with 911. Petitioner did not dispute that he was the person who called 911 and did not dispute that Victim bit him **hours prior to her death during the first altercation.** (emphasis added).

At trial, Victim's former employer, Anthony Sellers, testified on behalf of the State. (App. p. 141-156). Sellers testified that on the night of the murder, Victim he had spoken to her over the phone around 9:00 p.m. (App. p. 143). The Victim told Sellers she needed her job back so that she could "make some money so that [Victim] can get out and get ... a place." (App. p. 145). Sellers testified that Victim told him "my husband just beat my ass and threw me out of the house." (App. p. 145). Finally, Sellers testified that Victim told him that she was going back to the house to get some things. (App. p. 146).

The jury returned a guilty verdict for murder. (App. p. 402). Judge Cole sentenced Petitioner to life without parole. (App. p. 412). A timely notice of appeal was filed on Petitioner's behalf, and Joseph L. Savitz, III, Esquire ("Appellate Counsel") of the Office of Appellate Defense perfected the appeal. (App. p. 440). In an unpublished opinion, The South Carolina Court of Appeals dismissed the appeal. (App. p. 448). Petitioner filed a Motion for Rehearing, which was denied on October 29, 2010. (App. p. 451). Petitioner filed a Petitioner for Writ of Certiorari with

the Supreme Court of South Carolina, which was denied on January 11, 2012. (App. p. 452-484). The Remittitur was returned on January 13, 2012.

Petitioner filed an application for post-conviction relief on January 2, 2013. (App. p. 485). In his application, Petitioner alleges ineffective assistance of trial and appellate counsel. (App. p. 485). Respondent made its Return on March 21, 2014. (App. p. 544). On March 25, 2015, an evidentiary hearing was held on Petitioner application before the Honorable Roger L. Couch, in Spartanburg County, South Carolina. (App. p. 556). Petitioner did not testify, nor did Petitioner call any other witnesses. Petitioner proceeded based upon the record from trial and case law presented to the PCR court. (App. p. 559-560). Petitioner's trial counsel testified on behalf of Respondent. (App. p. 561). Petitioner and Respondent submitted Memorandum in Support/Opposition of Application for Post-Conviction Relief. Judge Couch, by written order on February 22, 2016, denied and dismissed with prejudice the allegations by Petitioner. (App. p. 665).

Petitioner filed a Motion to Alter or Amend the Order of Dismissal, pursuant to SCACR Rule 59(e), on March 2, 2016. (App. p. 691). Petitioner made a Return to this motion on May 23, 2016. (App. p. 701). On July 11, 2017, a subsequent hearing was held on Petitioner's Motion to Alter or Amend the Judgment. (App. p. 707). By written order, Judge Couch denied Petitioner motion on October 25, 2017. (App. p. 736).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts his trial counsel and appellate counsel provided him with ineffective assistance of counsel. However, the PCR court properly denied Petitioner relief.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 [it] 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. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (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). The 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

I. Because trial counsel articulated a valid strategy for withholding objection to possible hearsay statements, and Petitioner failed to show he was prejudiced by any potential deficiency in this decision, the PCR court properly denied relief.

Petitioner asserts that the trial testimony of Anthony Sellers contained inadmissible hearsay and when Petitioner's trail counsel failed to object, this amounted to ineffective assistance of counsel. Petitioner asserts that this failure to object should convince this Court to reverse the PCR court's ruling and grant Petitioner a new trial. The petition for writ of certiorari does not account for PCR court's ruling that trial counsel articulated a valid strategic decision in not objecting at trial, therefore the ruling should be upheld and this petition should be dismissed.

"Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 199, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Sellers testified at trial concerning conversations with Victim the night she was murdered by Petitioner. Trial counsel testified during the PCR evidentiary hearing that he chose not to object to Sellers' hearsay testimony, because he reasoned that through effective cross-examination he could introduce evidence supporting a voluntary manslaughter charge. Trial counsel's entire trial strategy was to show Petitioner was entitled to this charge. The PCR court found that Petitioner failed to show evidence of deficiency or prejudice in trial counsel's strategy.

Petitioner attempts to equate his case to this Court's recent decision in Thompson, where PCR was granted for trial counsel's failure to object to inadmissible hearsay. Thompson v. State,

Op. No. 27785 (filed March 21, 2018). However, in Thompson, the State never offered a strategic reason behind not objecting to hearsay at trial. Instead, this case is similar to Watson, where this Court found that trial counsel was **not** deficient when his failure to object to inadmissible hearsay testimony was part of a valid trial strategy. Watson v. State, 370 S.C. 68, 73, 364 S.E.2d 642, 644 (2006).

There was no dispute at trial that Petitioner beat his wife until she was unconscious and then stabbed her so severely that she was nearly decapitated. Trial counsel's strategy was to avoid a conviction for murder but presenting the jury with evidence of voluntary manslaughter. At the PCR hearing, trial counsel testified as to exactly what his strategy was:

> Q: And so, in preparing for [trial], what was your main thought in regards to a strategy?
>
> A: My main thought, from the, from the get go, even trying to work with [Solicitor] early on, **is could we get a plea to voluntary manslaughter.** I mean I had to do something to get voluntary. **I was not gonna get a not guilty**...
> ...I tried to make law, I guess, is what I'm trying to do and say, if you can actually prove demonic possession[3], it ought to be a defense. But, failing that, **it was voluntary manslaughter all the way. No question.**

(emphasis added)(App. p. 567-568). Trial counsel testified that he wanted to highlight, with Anthony Sellers' statements, that there was a fight between Victim and Petitioner when she returned to the house. Specifically, trial counsel explained:

> A: And that was the motive to say you don't get your tail kicked and not call the police if you want to go back to the house to pick up some jewelry. I mean that doesn't make any sense to me, and **that was the reason that I felt it relevant to let [Sellers' Testimony] in because it was gonna be the best argument I could make** to say why in the world would she go back there under the guise of having to beat up, telling her mom and dad when they didn't see any bruises, get the kids out of harm's way cause I'm gonna go back over there.
> ...

[3] Trial counsel attempted to raise a "demonic possession" defense during pretrial, but it was disallowed at trial. Petitioner has not raised any allegation relating to this defense.

> So, that was the – **that was what I was hoping to convey to the jury in closing arguments as to why she, why I let [Sellers' Testimony] in.**

(App. p. 570-571). Trial counsel's PCR testimony clearly shows the strategic decision to withhold objection to Anthony Sellers' statements from Victim, because he was arguing that Victim returned to the home to continue a fight with Petitioner. Trial counsel believed this to be evidence of Petitioner killing Victim in a heat of passion, thus potentially leading to a finding of voluntary manslaughter.

If Anthony Seller's testimony would have been deemed inadmissible at trial, the jury would have still been presented with the evidence of Victim's brutal murder at the hands of Petitioner. Petitioner is unable to present any evidence that the outcome of his trial would have been likely different had Seller's testimony not been allowed. Therefore, the PCR court's ruling should be upheld.

II. Because trial counsel argued for a jury instruction on voluntary manslaughter, but the trial judge used his discretion to deny the request, the PCR court properly denied relief.

Petitioner asserts that he is entitled to a reversal of the PCR court's ruling, because his trial counsel failed to argue facts and existing case law that would have required a jury instruction on voluntary manslaughter. Based upon the evidence presented at trial and at the PCR evidentiary hearing, the PCR court properly denied and dismissed this allegation.

At trial, Investigator William Gary testified that during their interview, Petitioner stated "[He and Victim] did get physical and [he and Victim] did hit each other." Petitioner asserts this provided the sufficient legal provocation for voluntary manslaughter. Petitioner asserts that this

evidence of "fighting," when combined with Petitioner's trial testimony that Victim *threw something at him*, further entitled him to an instruction on voluntary manslaughter.[4]

Trial counsel asked the trial court to instruct the jury on the law of voluntary manslaughter. During the charge conference, trial counsel argued that there was evidence of a physical altercation between Victim and Petitioner that night, the timeline presented was evidence of heat of passion and legal provocation, as well as the testimony of Anthony Sellers gave evidence of heat of passion. (App. p. 337-339). Trial counsel also cited case law, specifically State v. Davis[5] and State v. Grubbs[6]. The trial court was unconvinced that the evidence presented was sufficient to require a jury charge on voluntary manslaughter. Petitioner has failed to present evidence that the evidence presented by trial counsel fell below an objective standard of reasonableness. Petitioner simply asserts different cases (without distinction from those presented by trial counsel) and a version of the facts presented at trial, which he asserts should have been raised. Petitioner failed to prove his trial counsel was deficient in his representation.

Further, Petitioner has failed to present evidence that he was prejudiced by trial counsel. The judge considered counsel's request and argument for a jury instruction on voluntary manslaughter, but found there was no evidence of legal provocation. There is no dispute that Petitioner killed Victim. By Petitioner's own admission, he was not afraid of Victim taking his children away and he saw Victim **turn like she was going to throw something at him.** (App. p. 267). Petitioner stated several times throughout trial that he did not remember what happened

[4] Petitioner uses the term "involuntary manslaughter" four times within this subsection of his petition. Respondent believes this to be an error, and based upon the arguments within the section, Respondent believes Petitioner meant a jury charge of "voluntary manslaughter."
[5] State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983).
[6] State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (2003).

between Victim arriving at the house and when he dialed 911 following her murder. Petitioner has failed to meet his burden of proof and the PCR court properly denied relief.

III. Because Petitioner failed to meet his burden of proof, and the offered definition of "voluntary manslaughter" is not the law of South Carolina, the PCR court properly denied relief for ineffective assistance of counsel.

Petitioner asserts that trial counsel was ineffective for failing to argue that "voluntary manslaughter is the absence of premeditation and not the absence of malice." Petitioner has not presented any controlling authority to give weight to his new definition of voluntary manslaughter. This definition also is in direct conflict with South Carolina statutory definition.

Murder is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16–3–10 (2003). Premeditation is not an element of murder in this state. Furthermore, voluntary manslaughter is defined as "the unlawful killing of another without malice." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (citing S.C. Code Ann. § 16–3–50 (2003)); Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990)).

Petitioner asserts that his trial counsel should have presented this definition of voluntary manslaughter during his June 2008 trial. This Court has never required an attorney to be clairvoyant or anticipate changes in the law that were not existent at the time of trial. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). South Carolina has not adopted Petitioner's proposed definition of voluntary manslaughter, so trial counsel should not be held ineffective for not arguing for its use in jury instruction ten years ago.

Applicant has failed to set forth any evidence that Counsel's performance fell below an objective standard of reasonableness with respect to this allegation. Therefore, this Court finds Applicant has failed to satisfy his burden of proving that counsel's performance was deficient. This

Court also finds that Applicant has failed to satisfy his burden of proving that any alleged deficiency in this regard affected the outcome at trial.

IV. Because the trial judge gave an appropriate jury instruction on "malice aforethought," the PCR court properly denied relief for ineffective assistance of counsel.

Petitioner asserts he is entitled to post-conviction relief, because his trial counsel did not object to the trial court's jury instruction on "malice aforethought." Petitioner suggests that trial counsel should have "pointed to existing, contrary South Carolina case law"[7] in his objection to this particular jury charge.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Brown, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). The law to be charged must be determined from the evidence presented at trial. State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). This Court found no error within a jury instruction containing:

> "Even though malice must be aforethought, the law does not require that the malice must exist for any appreciable length of time before the commission of the act. However, there must be a combination of the evil intent and of the act producing the result."

State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956)(overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009)). A common jury charge on "malice" used by South Carolina Circuit Court Judges includes the following language:

> "Further, there must be malice aforethought, which means that the malice conceived in the mind of the defendant prior to the fact producing the fatal result. However, **the law does not require** that the malice exist for any appreciable length of time before the commission of the act."

Tom J. Ervin, South Carolina Requests to Charge – Criminal § 31-7 (Aleta M. Pillick, Esq. ed., 1st ed. 1994).

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[7] Petitioner cites to Belcher, a South Carolina opinion which this Court decided after his conviction, and Glenn, a Maryland appellate decision from 1986.

In Petitioner's case, the trial judge's jury instruction was nearly verbatim of the commonly used instructions for malice aforethought. Trial counsel was not deficient, because the trial judge correctly instructed the jury on the law.

Petitioner suggests that his trial counsel should have objected, because the instruction would theoretically permit a finding of malice when the crime is in fact committed in sudden heat or passion. Petitioner also asserts that "a finding of sudden heat and passion should be mutually exclusive of a finding of 'aforethought,' but not necessarily a finding of 'malice.'" Respondent would at this time incorporate its arguments to Petitioner's Question III, as Petitioner wishes to equate "malice" with "sudden heat of passion."

The trial court rejected Petitioner's request for a jury charge on "voluntary manslaughter," finding no evidence presented that would reduce, mitigate, excuse, or justify the homicide. Therefore, Petitioner is unable to prove he was prejudiced by trial counsel's lack of objection to the jury instruction, as he was not eligible for a differing instruction. Petitioner has failed to show there is a reasonable probability that the outcome of the proceeding would have been different. The petition should be dismissed.

V. Because Petitioner failed to present any evidence that trial counsel's strategy during closing argument was deficient performance, or that he was prejudiced by use, the PCR court denied the allegation of ineffective assistance.

Petitioner asserts that trial counsel undermined the credibility of defense witness testimony, by delivering the line "[s]o probably all of these textbooks ought to be erased of amnesia. Under that theory of cross-examination, it's just a joke." (App. p. 349). Petitioner also contends that trial counsel undermined the credibility of defense witnesses by delivering the line "[a]nd 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. p. 366). The PCR found that Petitioner had failed to present evidence of

deficient performance and that Petitioner had not shown he was prejudiced by counsel's closing argument.

Counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Yarborough v. Gentry, 540 U.S. 1 (2003). A court *may* find that ineffective assistance of counsel occurred when "there is a reasonable probability that, but for counsel's improper closing comments, the result of the trial would have been different." Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008). An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010). No prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilty." Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E2d 5, 8 (2009).

In regards to his closing argument, trial counsel testified:

> "So, I just tried, sometimes in front of jurors, to, to be more down to Earth with them and say look, you can believe anybody you want. If you don't want to believe my client, you don't have to. If you don't want to believe so and so, you don't have to.
>
> It's not to say he, he's not believable. I'm just trying almost to reinforce that the weight of credibility is on your shoulders. Not mine, not the Judge's, and, and so, it's - - maybe it's not the right way to handle it, but I try to do it that way in a way that a jury knows I'm not trying to blow smoke at them.
>
> I'm trying to say if you don't want to believe my guy, don't, but **let me tell you why I think the way I do.**"

(App. p. 573)

Counsel testified that he uses tone, such as sarcasm, during his closing arguments to convey a message. Petitioner has not offered no evidence that trial counsel's tone or manner during his closing argument was damaging to his case. Petitioner has offered no evidence of how trial

counsel's specific closing argument was deficient representation. Further, Petitioner has failed to offer evidence showing, despite that overwhelming evidence of his own guilt, that the specific language used during trial counsel's closing argument prejudiced the outcome of his case. The petition should be dismissed and the PCR court's denial of relief should be upheld.

VI. Because a cumulative error analysis was inappropriate in Petitioner's case, the PCR court properly denied relief.

Petitioner asserts this Court must apply a cumulative error analysis, because the deficiencies taken together combined to deny Petitioner a fair trial.

South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See, e.g., Green v. State, 351 S.C. 184, 196-97, 369 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess."). Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and, therefore, does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998).

The PCR court found Petitioner failed to satisfy his burden of proving ineffective assistance of counsel on any issue, therefore the record failed to contain any record for the PCR court to cumulatively assess. Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, error. Green, 351 S.C. at 197, 569 S.E.2d at 325 ("While it is unsettled law whether individual errors, which may not be

independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors").

The PCR court adequately addressed all issues before it, and found that Petitioner failed to satisfy his burden of proving ineffective assistance on any issue. Therefore, the PCR properly denied relief.

VII. Because Petitioner failed to show appellate counsel's performance was deficient, and he was prejudiced by any deficiency of appellate counsel, the PCR court properly denied relief.

Petitioner asserts the PCR court erred when the court denied relief for ineffective assistance of appellate counsel. Petitioner asserts that the filed brief of appellate counsel to the South Carolina Court of Appeals is deficient on its face, as it fails to argue facts and existing case law that would have required the trial just to instruct jurors on voluntary manslaughter.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucy, 469 U.S. 387 (1985). However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record. Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). (citing Jones v. Barnes, 463 U.S. 745 (1983)).

The PCR court must analyze claims of ineffective assistance of appellate counsel according to the same standard set forth in Strickland v. Washington. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)). In other words, [Petitioner] has the burden of proving appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005) (citing Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003)). Where an [Petitioner] contends appellate counsel rendered ineffective assistance by failing to argue an issue, [Petitioner] must show the failure to raise the issue was

objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed. See Southerland v. State, 337 S.C. 610, 617, 524 S.E.2d 833, 836 (1999) (citing People v. Griffin, 687 N.E.2d 820 (Ill. 1997)).

Petitioner argues appellate counsel's performance was deficient, in part, because of the length and content of his brief filed in the court of appeals. In support of that argument, Petitioner refers to the South Carolina Supreme Court's ruling in Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). In that case, however, counsel "devoted [only] three short paragraphs to [the] issue [on appeal], did not give any useful analysis, . . . only cited one case. . . ." in his brief and failed to "make any note of [the pertinent] issue in his petition for rehearing." Id. at 208, 562 S.E.2d at 611.

Additionally, counsel raised the issue "in a conclusory fashion in [his] final brief" and failed to state it with particularity in [the] petition for rehearing." Id. at 208-09, 562 S.E.2d at 612. Based on the court of appeals statements and counsel's briefs, the Court found appellate counsel was ineffective for failing to adequately raise or address the merits of prosecutorial retaliation. Id. Here, Appellate Counsel not only presented an argument on the controlling legal issue of voluntary manslaughter in his brief to the South Carolina Court of Appeals, but also cited the relevant case law addressing the requirements of "heat of passion" and "sufficient legal provocation." Therefore, the PCR court properly found Patrick is not applicable in this case.

Appellate counsel effectively argued the controlling legal issue of voluntary manslaughter and cited to relevant case law in support of his arguments. Following the denial of the appeal, Wanda Carter, also with the Office of Appellate Defense, filed a well-argued petition for rehearing in the court of appeals and an extensive Petition for Writ of Certiorari to the Supreme Court. Although the Court ultimately denied certiorari, appellate counsel provided effective assistance in both selecting and raising the issues that he deemed meritorious on appeal. Petitioner has failed to

show that appellate counsel's "failure to raise the issue was objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed." See Southerland v. State, 337 S.C. at 617, 524 S.E.2d at 836. Petitioner has therefore failed to produce evidence sufficient to overcome the presumption of effective assistance.

VIII. Because the PCR considered all of Petitioner's allegations and found no evidence of ineffective assistance of counsel for either trial or appellate counsels, the PCR court properly denied relief for a combined cumulative error argument.

Petitioner simply asserts this Court must apply a cumulative error analysis, because the alleged deficiencies taken together also combined to deny Petitioner a fair trial.

Petitioner again alleges that the cumulative effect of Counsel's alleged errors constitutes ineffective assistance of counsel. As aforementioned, "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); see also Lorenzen, 376 S.C.at 535 n. 3, 657 S.E.2d at 779 n.3. Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and, therefore, does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). This Court finds that a cumulative error analysis would be inappropriate and therefore finds that this allegation must be denied and dismissed with prejudice.

The PCR court properly addressed each individual claim of ineffective assistance of counsel for both trial and appellate counsel, but found no evidence of deficiency or prejudice for each claim. The PCR court was left without "several errors" to analyze their cumulative effect. Therefore, the PCR properly denied relief.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

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Assistant Attorney General

By: _____
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July 12, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 12 2018

S.C. SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-002417

Larry Brent Horton, ...Petitioner,

v.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

This 12th day of July, 2018.

Jordan A. Cox
S.C. Bar # 103157
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 12 2018
S.C. SUPREME COURT

July 12, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Larry Brent Horton, #329065 v. State of South Carolina**
Appellate Case No.: 2017-002417
Lower Court Case: 2013-CP-42-0007

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

Jordan A. Cox
Assistant Attorney General
SC Bar #103157

JAC/lm
Enclosures

cc: C. Rauch Wise, Esquire
Trisha Allen, Director - Victim Advocacy Division