

IN THE SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

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

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RECEIVED

JUL 25 2018

S.C. SUPREME COURT

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

vs.

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

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REPLY TO RETURN

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C. RAUCH WISE  
Attorney at Law  
305 Main Street  
Greenwood, SC 29646  
(8640 229-5010  
S.C. Bar No. 00188

Attorney for Petitioner

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## Argument

### 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.**

Respondent appears to concede that the hearsay testimony of Anthony Sellers would not be admissible. Respondent justifies the admission of this testimony as part of trial strategy. The State relies upon *Watson v. State*, 370 S.C. 68, 634 S.E.2d 642 (2006), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) for the proposition that if inadmissible hearsay is admitted then a valid trial strategy will cause the hearsay not to be a defective performance of the trial counsel. In this case the trial strategy is not valid.

By admitting the hearsay, trial counsel not only admitted another alleged beating by Mr. Horton, but also hampered his ability to argue sudden heat and passion based upon sufficient provocation. If the parties had fought shortly before, a trial jury, or judge, would be less likely to accept that Mr. Horton acted in sudden heat and passion based upon sufficient provocation. The trial attorney contended that it was admitted “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 she’s been beat up or his 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.” App. at 570, ll 17-22. But this was the best argument that she was not beaten previously and not that the previous argument helped on sudden heat and passion. Furthermore, Mr. Horton denied ever beating his wife during the prior argument. App. at 267, ll 10-16. The inadmissible testimony hurt the testimony of Mr. Horton. Permitting this

evidence was not a valid trial strategy.

### **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.**

The State mis-characterizes this issue. The question of whether to charge voluntary manslaughter is not within the discretion of the trial court. This error on direct appeal would have been reviewed as an error of law if the facts supported the requested charge.

Petitioner believes the Petition for writ of Certiorari sets forth the argument of the Petitioner on this issue. Respondent does not argue against the statement in the petition that Mr. Horton told Officer Gary that they did get physical. App. at App. 129, l 19-23. This statement alone, if argued by trial counsel, should have been sufficient ground to require the trial judge to charge manslaughter.

Petitioner was prejudiced by this omission. As noted by the State and Petitioner, there is no dispute that Mr. Horton killed his wife. The only dispute is whether the jury should have been charged the law as to manslaughter. When the only viable defense available to the Petitioner is not charged to the jury, the Petitioner has in fact been prejudiced.

### **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.**

The law as to manslaughter in our state is confusing at best and perhaps contradictory. Petitioner has not urged a “new definition” but has simply asked the Court to carefully review all the

cases in this area and conclude that trial counsel did not argue the proper definition of manslaughter in this case.

The Petitioner does not argue, and has not argued, that trial counsel be clairvoyant. Petitioner only suggests that trial counsel properly research the issue and learn that the definition of “manslaughter” is not the proper definition. Had trial counsel properly researched the issue he would have found the cases set forth in the petition. Manslaughter is not defined by legal provocation but by provocation. The provocation is what creates the jury issue. And this has been the law since at least 1906. *See, State v. Andrews*, 73 S.C. 257, 53 S.E. 423 (1906)

#### **Question IV**

**Did the lower court err in finding trial counsel effective when he failed to object to the trial court’s erroneous instruction of the definition of “malice aforethought?”**

Malice aforethought should have a meaning by which juries can be provided some guidance as to how to decide the case. As one court has said concerning malice aforethought, “The nature of malice aforethought is the source of much of the confusion that attends the law of homicide. The cause of this confusion has been the evolution of malice aforethought from an independently significant element of murder to a ‘term of art’ whose significance is largely historical and procedural.” *People v. Morrin*, 31 Mich. App. 301, 312–13, 187 N.W.2d 434, 440 (1971) .

Several states even specifically, and correctly say, that the finding of sudden heat and passion precludes a finding of malice. “And rather than assume the jury understands that malice and sudden heat of passion are mutually exclusive, and that it is the State's burden to prove malice and disprove sudden heat of passion beyond a reasonable doubt, the jury should be expressly instructed to that effect.” *Schmuck v. State*, 2017 Wyo. 140, 406 P.3d 286, 296 (Wyo. 2017). In *Brown v.*

*Commonwealth*, 86 Va. 466, 10 S.E. 745, 747–48 (1890) the Court said, “There can be no such thing in law as a killing with malice, and also upon the furor brevis of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot co-exist.”). This principle was also approved by implication by the United States Supreme Court when it recognized such a charge had been given in the case before it. The Court said, “‘The court emphasized that ‘malice aforethought and heat of passion on sudden provocation are two inconsistent things,’ . . .thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter.” *Mullaney v. Wilbur*, 421 U.S. 684, 686–87 (1975)(internal citations omitted). *See also, People v. Patterson*, 39 N.Y.2d 288, 302, 347 N.E.2d 898, 907 (1976), *aff’d sub nom. Patterson v. New York*, 432 U.S. 197 (1977)(“ That is to say, if the defendant’s mind was possessed by malice, his actions could not have resulted from an inflamed passion aroused by a sudden provocation.”)

In this case the trial judge recognized that the act was committed in sudden heat and passion, or at least recognized the evidence could be interpreted to establish that fact. Had trial counsel properly researched the issue and provided the trial judge with proper law, then the trial judge would have been required to charge the law of manslaughter.

Contrary to the argument of the Respondent, Petitioner does not desire “to equate ‘malice’ with ‘sudden heat of passion.’” Ret. at 13. Petitioner argues, as suggested by the cases above, a finding of sudden heat of passion precludes a jury from finding malice. The two are mutually exclusive and not equal.

## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari, hold that “sufficient legal provocation” is no longer the proper charge when manslaughter is an issue and that sudden heat of passion alone is sufficient to charge manslaughter. The Court should further hold that trial counsel was ineffective in failing to object to the hearsay testimony of Anthony Sellers and Larry Horton by prejudiced by this failure to object. This Court should reverse the findings of the Post Conviction Relief judge and grant Mr. Horton a new trial.

July 20, 2018



C. Rauch Wise  
301 Main Street  
Greenwood, SC 29646  
(864) 229-5010  
[rauchwise@gmail.com](mailto:rauchwise@gmail.com)  
S. C. Bar № 06188  
Attorney for Larry Horton

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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 July 20, 2018, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Reply to Return in the above case addressed to Jordan Adraine Cox, 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 20 day

*Sandy Traynham*

of July, 2018.

*C. Rauch Wise* (L.S.)

Notary Public for South Carolina

My Commission expires: 12/7/2019

LAW OFFICE OF  
**C. RAUCH WISE**  
Attorney & Counselor at Law  
305 Main Street  
Greenwood, SC 29646  
e-mail rauchwise@gmail.com

C. Rauch Wise

Telephone  
(864) 229-5010  
Facsimile  
(864) 229-2665

July 20, 2018

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

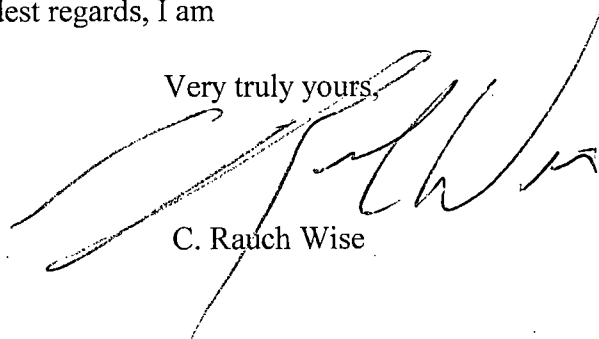
Re: Larry Brent Horton, #329065 vs. The State, Appellate Case No. 2017-002417

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Reply to Return together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/slt

cc Jordan Adraine Cox

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