STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 2016-UP-174 (S.C. Ct. App. filed April 13, 2016)
Appellate Case No. 2012-209540

Appellate Case No. 2016-001430

JERMONE CURTIS BUCKSON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

QUESTIONS PRESENTED

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

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

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

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

STATEMENT OF THE CASE

Petitioner was incarcerated in the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment.[1] The Spartanburg County Grand Jury indicted Petitioner at the February 2006 term of General Sessions for murder (06-GS-42-0846), and for burglary, first degree (06-GS-42-0845). Richard H. Warder, Esquire, represented Petitioner on both charges. On February 2, 2007, following a jury trial, Petitioner was acquitted of murder, but convicted of burglary, first degree. The Honorable J. Derham Cole sentenced Petitioner to confinement for twenty years.

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

Petitioner then filed an Application for Post-Conviction Relief on October 22, 2010. Respondent made its Return on or about May 3, 2011. On September 8, 2011, Petitioner submitted an amendment to his application. An evidentiary hearing was held before the Honorable J. Mark Hayes, II on September 23, 2011, at which time Petitioner was present and represented by Tricia Blanchette, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented Respondent. Judge Hayes signed an Order Granting Post-

1 Petitioner was released from the Department of Corrections subject to an appellate bond by Order of this Court on October 3, 2012.

Conviction Relief on October 21, 2011. Respondent then filed a timely 59(e) Motion and Petitioner filed a Response. Judge Hayes denied the motion by written order filed March 9, 2012.

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

Petitioner filed its Petition for Writ of Certiorari with this Court on July 29, 2016, and Amended Petition for Writ of Certiorari on August 1, 2016. Respondent filed its Return to the Petition for Writ of Certiorari on September 6, 2016. This Court granted Petitioner's Petition for Writ of Certiorari and dispensed with further briefing by Order dated April 13, 2017. Petitioner filed its Brief of Petitioner on May 8, 2017. This brief follows.

STATEMENT OF THE FACTS

Petitioner was tried for the murder of his alleged girlfriend, Tiffany Foggie, and the burglary of her home. The two had separated, testimony offered by the defense suggested they were still living together, but the evidence strongly supported that the dwelling was hers. The undisputed facts were Tiffany had dated Petitioner, Petitioner had resided in Tiffany's apartment, Tiffany was seeing another man, Petitioner entered the apartment through a window and forced entry into Tiffany's bedroom where he found another man, Tiffany was shot to death, and both Petitioner and Tiffany's new paramour fled. It was further undisputed Tiffany told the Petitioner to go away and that if he came in, there would be an argument. The facts diverge on the issue of whether Petitioner and Tiffany had broken up, whether Petitioner resided in Tiffany's apartment at the time of the murder and burglary, and who fired the gun.

The original trial judge in the case was one of the most experienced state criminal trial judges in South Carolina. Petitioner's trial attorney has over forty years of experience trying criminal cases in the courts of South Carolina. The prosecutor on the case was the Deputy Solicitor at the time of trial and is now the Solicitor for the Seventh Judicial Circuit. Petitioner's PCR counsel now argues that because the existence of "any evidence" of probative value is sufficient to uphold the lower court's granting of a new trial, Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984), this Court should reverse the Court of Appeals, and find:

> Trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of [Petitioner]'s defense when [Petitioner] was also facing an equally serious burglary charge, and that such ineffective assistance and the resulting prejudice were demonstrated through counsel's failure to investigate and call witnesses and his failure to speak to and properly utilize witnesses called at trial. Am. Supp. P. 64.

(BOP at p. 8). Petitioner contends the Court of Appeals, upon invitation by the State, improperly engaged in a *de novo* review of the lower court's ruling. However, a *de novo* review was not necessary to reverse the lower court's ruling where no evidence of probative value supported that ruling.

Trial

Petitioner presented testimony from Chad Tate at trial, for the sole purpose of establishing that Petitioner dated and lived with Tiffany. Chad Tate dated Tiffany Foggie for six and a half years and he is the father of her children, Chad Jr. and Desmond Tate. (App. p. 291). Chad testified his sons live with him and his wife, but before her death they lived with their mother. He testified that before Tiffany's death, he saw his boys every other weekend and talked to them every day. Chad testified he spoke to his sons on Tiffany's land line and cell phone. He testified that if Tiffany was at work, Petitioner answered the phone and this pattern continued in January of 2006. (App. p. 292).

Chad testified that, at that point, Petitioner was answering the phone most every time and Petitioner would put the children on the phone. (App. p. 292). He testified that sometimes he picked the children up and sometimes Tiffany would bring them to him. He testified Tiffany was often at work and he "usually" saw Petitioner at the apartment when he picked up and returned his children. Chad testified Petitioner "would meet them at the door" and they "seemed real fond of him." (App. p. 293, lines 20-24). Chad testified he saw Petitioner at the apartment in that manner the week before Tiffany's death. (App. p. 296, lines 13-18).

Chad Tate testified that when he lived with Tiffany, they lived in Section eight, subsidized government, housing and that he was not on the lease. He testified that the Section

eight housing documents listed only Tiffany and the children as residents. (App. p. 294). Chad testified the furniture in Tiffany's apartment in January of 2006 was, by and large, the same furniture from the apartment he shared with her. Chad testified the furniture was his and Tiffany's and he knew the source of the furniture. He explained Taffy Williams co-signed with Tiffany for the den furniture but he and Tiffany actually paid on that furniture. He testified he and Tiffany picked out the furniture from Wal-Mart and he and Tiffany paid for it. Chad testified he bought the furniture in the bedroom from his cousin. He testified the children's furniture came from their grandfather and the kitchen furniture came "from her house." (App. p. 297-301). Chad and Tiffany broke up and Chad moved out of the apartment in June of 2003. (App. p. 295, lines 18-19).

Petitioner presented the testimony of Teresa Buckson, Petitioner's mother, for the sole purpose of establishing that Petitioner dated and lived with Tiffany. Ms. Buckson testified that in January of 2006, her son was staying with Tiffany Foggie at apartment 5-A in the Bradford Grove Apanments. (App. p. 302, lines 17-25). She agreed he was spending every night there: "Yes, sir. That's where he lived." (App. p. 303, lines 1-3). However, Ms. Buckson testified Petitioner's mail and important papers came to her address. (App. p., 303). Ms. Buckson testified she saw Petitioner and Tiffany "all the time" and she and Tiffany were very close. (App. p. 303, lines 9-12). Ms. Buckson testified she talked to Tiffany "almost every day" and she talked to her on the day of her death. (App. p. 303, lines 12-14). Ms. Buckson described her relationship with Tiffany: "We would go to the beach together or I would throw parties, and she would throw parties. We cooked together. And she would come over and eat, the kids, her and the boys." (App. p. 303, lines 18-21). Ms. Buckson testified that when she wanted to talk to Petitioner, she

called him on his cell phone or she called Tiffany. (App. p. 304, lines 23-25). She testified Tiffany had a house phone at one point but it was not on in January. (App. p. 308). She testified that when she called, Tiffany "usually had to wake him up." (App. p. 305, lines 1-4). Ms. Buckson testified Tiffany sometimes called her looking for Petitioner. She testified, "She would be when he was at work or he hadn't come home yet. She called and asked me had I seen him. And if he stopped by my house and be on the floor asleep, the phone would ring, ring, ring. And usually he would get up. And I'd be like where are you going. I'm going home. It's Tiffany." (App. p. 305, lines 7-12).

Ms. Buckson testified that on the Sunday before the shooting, January 29, 2006, she went to the emergency room at a little after 5:00 for problems with her blood pressure. (App. p. 305, lines 15-17). She testified she called Petitioner's phone, he was sitting beside Tiffany, and she asked him to let her speak to Tiffany. (App. p. 305, lines 18-19). Ms. Buckson testified, "And I said, 'Tiffany, send Jerome by the house to stay with his little brother, I have nobody to stay with him, I'm in the emergency room.'" (App. p. 305, lines 20-24). Ms. Buckson testified Tiffany answered, "Yes, ma'am." (App. p. 305, line 24). Ms. Buckson testified she was released and made it home from the hospital about 11:00 or 11:30. App. p. 306, lines 15-16). She testified Petitioner was at her house with his brother. She testified Petitioner made sure that she was okay before he left at about 1:00 a.m. (App. p. 307).

Ms. Buckson recalled when their apartment flooded with sewage, Tiffany, Petitioner, and the boys stayed at her house. Ms. Buckson testified, "She stayed at my house because the carpet was up - - her and the kids and Jerome." (App. p. 303-304). Ms. Buckson testified that two weeks before the shooting, Tiffany, Petitioner, and the boys were all together at her house and

they had a good time. (App. p. 304, lines 6-17). Ms. Buckson testified she told Tiffany that they were welcome any time but Tiffany was "fussing" that it took too long for the lady to get the carpet put down. (App. p. 304, lines 2-20). Ms. Buckson testified she offered to call the lady about the carpet delay, but Tiffany told her that she could not make the call because Petitioner's name could not be on the lease. (App. p. 304, lines 18-22).

Petitioner presented the testimony of Deborah Poteat, Petitioner's aunt, for the sole purpose of establishing Petitioner dated and lived with Tiffany. She testified she went by the apartment occupied by Tiffany and Petitioner whenever Petitioner called her, or if she needed something. (App. p. 309, lines 2-7). She testified there wasn't a week that went by that she missed going by there. (App. p. 309, lines 9-10). Ms. Poteat testified there was no question but that Petitioner resided in the apartment with Tiffany: "He lived there. He definitely lived there." (App. p. 309, lines 20-22). Ms. Poteat testified Petitioner had "items there, because he even had his school records there." (App. p. 310, lines 3-13). She testified Petitioner had toiletries and clothes there although he often took his clothes to his mother's house to wash. (App. p. 310, lines 9-13).

Petitioner also testified to living with Tiffany. However, Petitioner was the only witness presented to defend the charge of murder. Petitioner and Tiffany became friends when Petitioner was ten years old. (App. p. 311, lines 16-19). Petitioner testified they started dating in January of 2004, and at the time of her death, he was Tiffany's boyfriend. (App. p. 311, lines 8-9; lines 22-25). Petitioner was twenty-six years old when he started living at Tiffany's apartment at Bradford Grove about a month after they started dating. (App. p. 312, lines 2-5). He testified the house was furnished and she had a closet full of clothes so he brought little more than a few of his

clothes, personal items, and his weight lifting equipment. (App. p. 312, lines 6-12). Petitioner testified his toothbrush was in the bathroom, his papers were in the bedroom, and he also had a Play Station in the apartment, but he considered that it belonged to the children. (App. p. 313, lines 9-11; p. 345, line 23-p. 346, line 9; p. 347, lines 2-15; p. 348, lines 17-18). He testified he considered Tiffany's sons his own children. Petitioner testified he watched the children after school. (App. p. 318, lines 4-6).

Petitioner testified that after a sewage-induced evacuation, he had only a few things in the apartment, such as six or seven shirts and four pair of blue jeans. (App. p. 314, lines 1-5). Petitioner explained that in January, the plumbing in their apartment was flooded with sewage from other apartments, ruining the flooring and the carpet. Petitioner testified, "We was asked to vacate the premises because it was toxic, considered that anyway." (App. p. 315, lines 13-23). Petitioner testified they were eventually allowed to go back to the apartment even before the flooring was in and they were probably there for a couple of days before they put the carpet down. (App. p. 316, lines 9-13). Petitioner testified that after this incident, "We had asked for them to change the door locks." (App. p. 316, lines 16-17). He explained, "We had multiple plumbers and maintenance men entering and exiting the apartment." (App. p. 316, lines 18-20). Petitioner testified they had two copies of the new keys made, one for Petitioner and one for Tiffany's mother, Taffie Williams. (App. p. 316, line 21-p. 317, line 7). However, Petitioner testified Tiffany's mother's copy didn't work in the lock so his key was given to her mother "maybe three days before this crime happened." (App. p. 317, lines 9-23; p. 364, lines 20-25). Petitioner explained, "I didn't give it to her mother directly. I left it on the kitchen table, and I told Tiffany that the key was on the kitchen table." (App. p. 318, lines 1-3).

Petitioner testified that the Friday before the early morning shooting on Monday, he spent the night at the apartment. (App. p. 319). He testified that on Saturday, he stayed at his mother's house because she was having health problems, but he went back to the apartment on Sunday. (App. p. 319, lines 21-25). Petitioner testified that when he went to the apartment on Sunday at about 1:00 in the afternoon, no one was home because Tiffany was washing clothes. (App. p. 320, lines 1-6). Petitioner testified he called Tiffany probably about seven times, explaining, 'I mean, like I'd call and get the voice mail and hit the send button and call right back." (App. pp. 323-324; p. 324, lines 8-17). Petitioner testified he went back to his mother's house before going to help a friend move for approximately two and a half hours. (App. p. 320, lines 20-25). Petitioner testified that after he helped his friend move, at about 4:30, he retrieved his vehicle and his phone and checked his messages. (App. p. 321, lines 1-11). Petitioner testified, "A couple of the messages was from Tiffany and a couple was from my mom." (App. p. 321, lines 12-13). Petitioner testified he went back to his mother's house and stayed with his brother. (App. p. 322).

Petitioner testified Tiffany called him four times from 10:00 o'clock until 11:30. (App. p. 324, lines 1-3). Petitioner testified he last spoke to Tiffany on the phone at 11:30, Sunday night. Petitioner testified that after his mother got home from the hospital he went to shoot pool at the VFW until around 2:30. (App. p. 323, lines 1-10). Petitioner testified that after shooting pool, he went to the apartment. (App. p. 323, lines 11-13). He testified he had been calling Tiffany to let her know that he was on his way home, but her phone was off. (App. p. 323, lines 15-17).

Petitioner testified that when he arrived at the apartment, he went to the front and back doors, checking to see if the door was open because he didn't have his key. He testified that at the same time he was knocking, calling Tiffany's cell phone, and calling out to her. (App. p. 324,

lines 22-25). He testified that when he discovered that the back door was not unlocked, he knew the kitchen window was unlocked at all times and there was no screen because "we sometimes have to go in whenever our parents have our key." (App. p. 325, lines 1-21). He testified, "I had done this previously, in which I have also set the kids in and they walked to the door. I mean, the window stays unlocked just in case, you know, we had to get in." (App. p. 360, lines 17-20). Petitioner testified he went in through the kitchen window. (App. p. 325, lines 22-23). He testified that when he was half way in the window Tiffany came to her bedroom window above, leaned out and said, "Jay, it's going to be argument, the children are asleep, just come back later." (App. p. 326, lines 1-6). Petitioner testified he could not understand what she meant because he was living there, he had clothing, items, and documentation in the apartment. (R. p. 326, lines 6-17). Petitioner identified a folder of documents from the bedroom of the apartment, including his resume, his school records, proof of clothing he had purchased, check stubs and things of that nature. (App. p. 326; Defense Exhibit 10). He identified a picture of his toothbrush and testified his toiletries were stored in the medicine cabinet. (R. p. 328). Petitioner testified his clothes were in drawers of which no pictures were taken and he identified his clothing from a photo taken of clean clothing on the futon in the apartment; he identified a particular blue Ecco shirt as being his shirt. (App. p. 328, lines 19-25).

Petitioner testified, "I have documentation in this house, and which I pay bills here even though my name is not on the lease." (App. p. 345, lines 13-17). Petitioner testified that he and Tiffany split the bills 50/50, but when he got a better job, he began paying more of the rent and other household bills. He testified he gave his money to Tiffany and she paid the bills. (App. p. 326, line 18-p. 327, line 12). Petitioner testified, "I gave my money to Tiffany. And Tiffany may

give her [mother] the money to go pay a bill if Tiffany can't make it to pay the bill. We both worked." (App. p. 327, lines 10-12).

Petitioner testified that after he came in the window, he closed the window and walked up the steps. (App. p. 327, lines 13-17). He testified that when he saw that the bedroom door was closed, "I go over to turn the knob. And Tiffany again repeats herself, 'Jay, it is going to be argument.' I am like, Tiffany, open the door." (App. p. 327, lines 23-25). He testified he pushed the door and it came open, but then somebody on the other side pulled it shut. Petitioner testified he pushed the door open again, put his left foot in the door, and held it open with his right arm. He testified that when he leaned his head inside the door, he noticed a man's naked torso hanging half way out the bedroom window. (App. p. 328, line 5-p. 329, line 11). Petitioner testified he had figured something may have been wrong "because she repeatedly asked me what time was I coming home. And she called me three times asking me this." (App. p. 364, lines 3-8). He testified that once he saw that the bedroom door was closed and Tiffany was telling him not to come in, he thought it might be another man in the bedroom.

Petitioner testified that after he saw the man, he looked at Tiffany and asked, "What's going on?" (App. p. 329, lines 14-18). He testified he then saw the male silhouette coming back in from the window, walking from that side of the room, and bending down to pick something up. (App. p. 330, lines 5-9). Petitioner testified Tiffany turned to see the male walking toward them. He testified, "That's when he raised the gun up beside her. When he raised the gun up beside her, he bumped into her torso. . . . When he bumped into her torso, that's when she looked down and basically seen the gun that he had in his hand. When she looked down she swung her left arm back off the wall to elbow him back. At that point with her right hand she went to swat

the gun down. At that time the gun disbursed. When the gun disbursed with me having my right arm holding the door open, I felt pitter-patters. It felt like a gush of wind or either rain drops strike my arm. By me seeing the flash of the gun and by me hearing a pop, I felt something strike my arm. Automatically, I'm assuming I'm shot. It was like it took a split second for it to analyze. I was like this man just shot a gun in my house. So 1 didn't realize I had stepped back when this was occurring. So I turned around to run. But by the time I turned around I was already too close to the steps, and I fell down the steps basically half way - - half way falling. And I hear him say if you ain't running you're a dead motherfucker." (App. pp. 330-331). Petitioner testified he heard a second shot as he was coming down the stairs. He testified he was basically sliding down the steps on his back side and he ran out the kitchen door. (App. p. 331).

Petitioner testified that as he was running to East Main Street, he called 9-1-1 and explained to them he had been shot in the arm when "there was a man I found in my home shot a weapon, he was with my girlfriend." (App. p. 335, lines 24-25). Petitioner testified he stayed on the phone for at least seven minutes, until the police arrived. (App. p. 335, lines 20-21). He testified he waved the police car down and it stopped and turned around as if the officers had seen him. (App. p. 336, lines 14-25). Deputy Greg Satterfield confirmed he received a BOLO indicating a black male had been shot and as he traveled down East Main Street, he observed Petitioner standing "right in the middle of East Main Street." (App. p. 77, lines 6-14). Petitioner testified he told the officer that he came home and found another man in the bedroom with his wife and the man shot at him, striking him in the arm. However, he testified he eventually checked himself and realized he had not been shot. (App. p. 337).

Tiffany Foggie sustained a fatal gunshot wound to the head. (App. p. 279). However, Petitioner testified that, at first, he did not know Tiffany had been shot. He testified he believed he was the other man's target and all he was worried about was getting away from the man who shot at him. (App. pp. 384-385). Petitioner testified that as he was talking to the officer, he was told Tiffany had been grazed in the arm but she was going to be okay. (App. p. 341, line 21-p. 342, line 2). He testified that while he was talking to the officer, he pointed out a grey Lincoln Town Car pulling out of the apartment complex and said, "Officer, I believe that's him." (App. p. 339, lines 2-5). Officer Satterfield testified Petitioner indicated the shooter left in a grey Lincoln and the officer indicated, "I did observe that vehicle pull out onto East Main Street headed towards the city." (App. p. 80, lines 19-22).

Petitioner testified he was eventually charged with burglary: "He served a burglary paper on me, burglary, first degree burglary charge on me. And I was like, I live at this apartment.' I kept on explaining to him I had clothes, documentation. He was like, well your name ain't on the lease." (App. p. 342, lines 7-13). Petitioner testified he called his mother; he testified he was told that Tiffany had been shot and he was advised to call her brother. Petitioner testified that when he called T. Ray Foggie, he was told Tiffany had died. (App. p. 342, line 17- p. 343, line 8).

Officer Satterfield testified that at first Petitioner was repeatedly saying he couldn't believe his girlfriend was with another man and also repeatedly saying he thought he had been shot in the arm; however, there was no injury to his arm. Satterfield testified Petitioner was crossing back and forth and at one point he had to pull Petitioner out of the path of oncoming traffic on East Main Street. (App. p. 78, lines 14-19). Satterfield further testified Petitioner also said he had come home and observed someone else in the bedroom. (App. p. 79, lines 4-5).

Satterfield testified Petitioner said that was his residence but he did not have a key with him. (App. p. 79, lines 15-18). Officer Satterfield testified he did not pursue the grey Lincoln because he was the only officer present and he was dealing with Petitioner at the time. (App. p. 81, lines 16-23).

Sharmarcus Watson worked at Adidas with Tiffany's cousin, Charlene Ellis. He testified Charlene introduced him to Tiffany and they had started calling each other. (App. p. 152, lines 17-25). Watson testified he and Tiffany went out to dinner on Friday, January 27. (App. p. 154). He further testified he and his good friend, Elliott Canada, played cards at the apartment on Sunday with Tiffany and Charlene. (App. p. 154, line 14-p. 155, line 20). Watson testified he and Elliot left in the evening, shortly after Tiffany's mother arrived. (App. p. 157, lines 5-21). However, he testified he came back later that evening. Watson testified Tiffany called him to tell him Petitioner had come to get the rest of his stuff so Sharmarcus could come back. (App. p. 158, lines 1-7). Watson testified he did go back and he and Tiffany watched some television and then started having intercourse. (App. p. 158, lines 11-14). He testified they were sleeping when Tiffany's phone rang at 3:00 a.m. and Tiffany looked at the number, said it was Jay, and went back to sleep. (App. p. 158, line 22-p. 159, line 4). Watson testified the phone again continued ringing and at the same time, someone began beating on the back door and calling Tiffany's name. (App. p. 159, lines 5-9). He testified the beating then moved to the front door and then returned to the back door, while continuing to call Tiffany's name. (App. p. 159, lines 10-12). Watson confirmed Tiffany called down from her bedroom window to Petitioner asking him, "would you please leave, you're going to wake my boys..." (App. p. 159, lines 14-15). At that point, Watson heard Petitioner enter the home and Watson told Tiffany to call the police. (App.

p. 159, lines 19-21). Watson heard Petitioner coming up the stairs and attempted to flee out of the bedroom window while Petitioner kicked at the bedroom door saying Tiffany, "let me in." (App. p. 159, lines 22-25).

Watson, a former police officer, admitted he had intended to retrieve his gun from his home before he returned to Tiffany's apartment; however, he testified he did not go by his home or pick up his gun, a .38 revolver. (App. p. 162, lines 18-21; p. 170, lines 15-23). Watson testified he did not pick up his gun because it was at his home he shared with his six-month pregnant girlfriend and if he returned to get the gun, he would not be able to explain to her why he was leaving again. (App. p. 162). Watson testified he did not have his gun, but Petitioner entered the bedroom with a gun and fired a shot as Watson pushed past him, running out the door and down the stairs. (App. p. 160, lines 5-13). Watson heard another gunshot and a bullet "whiz" past him as he ran down the stair and out the back door. (App. p. 160, lines 11-13). Watson admitted that after the shooting he drove away in his grey Lincoln and stayed out-of-sight for thirty-six hours without ever calling 9-1-1. (App. pp. 160-163). Watson testified he did not call 9-1-1 because he was not hit, he did not think Tiffany was hurt, and he did not want his own girlfriend to find out he was at Tiffany's house. (App. p. 162, lines 1-7).

Results from SLED indicated the bullet fragments recovered were roughly consistent with a .38 caliber weapon. (App. p. 246; 256). However, the weapon used was never found. Watson was charged with the murder of Tiffany; however, the charges were dismissed. The jury found Petitioner not guilty of the murder. (App. p. 477).

The State presented the testimony of Tiffany's mother, Taffie Williams, and cousin, Charlene Ellis. Both testified that Petitioner was not living with Tiffany, nothing in the apartment

belonged to Petitioner, and Tiffany had broken up with Petitioner. Taffie and Charlene were at the apartment Sunday afternoon. Charlene played cards with Tiffany, Shamarcus Watson, and Elliott. Tiffany's mother testified she had a key to the apartment, but Petitioner did not. (App. pp. 105-106). She testified Tiffany had changed the locks and that she got her key a couple of weeks before the shooting. (App. p. 106, lines 21-25). She testified Petitioner came by the apartment that Sunday evening. She testified Charlene was at the door when Petitioner asked to come in so he could get something he left. Charlene asked Tiffany if Petitioner could come in and Tiffany told Charlene to let Petitioner in, indicating, "I'm not afraid." (App. p. 110, lines 3-4). Charlene testified she told Tiffany to leave Petitioner's stuff outside and not to let him in (App. p. 140, line 25-p.141, line 4). Taffie and Charlene testified Petitioner came in and went straight upstairs without speaking. (App. p. 110, lines 5-6; p. 134, lines 14-18). Taffie and Charlene testified that after two or three minutes, Petitioner came back downstairs and went out the back door. (App. p. 110, lines 7-12; p. 134, lines 14-18).

Taffie asserted her daughter was not dating or living with anyone other than her little boys. However, she admitted Tiffany had been dating Petitioner but added they had been apart "a week or so" at the time of Tiffany's death. (App. p. 121, lines 10-24). She testified Petitioner was not on the lease and he had no belongings in the apartment. (App. pp. 113-114). She testified she gave the furniture in the apartment to Tiffany or she was with her when she purchased the furniture. (App. pp. 116-120). Taffie further testified Sharmarcus Watson was Tiffany's new friend, but he was not staying with her. (App. p. 125, lines 7-12). Charlene Ellis testified she set Shamarcus and Tiffany up when Shamarcus gave Charlene his number to give to Tiffany. (App. p. 136, lines 1-10).

The State also presented the testimony of Jimmy Ray Caroroll. Jimmy was a maintenance man at Bradford Grove Apartments at the time of the incident. (App. p. 142, lines 15-19). Jimmy testified he had to change the front and back door locks at Tiffany's apartment. He started to testify Tiffany told him she was "having some problems," when Petitioner made a successful objection to the testimony. (App. p. 144, lines 1-8). Upon redirect examination, Jimmy testified the carpet change was not the reason for the locks being changed, but that Tiffany told him she was having problems with her boyfriend. (App. p. 147, lines 4-7). Petitioner objected and moved for a mistrial outside the presence of the jury. The trial judge denied Petitioner's motion, struck the testimony, and gave the jury a curative instruction not to consider the stricken testimony. (App. p. 148, line 4-p. 150, line 25).

Tasha Allen testified on behalf of the State. Tasha was the assistant manager at Bradford Groves Apartments who did the leases for tenants. Tasha testified only Tiffany and her two children were on the lease for Tiffany's apartment. (App. p. 199, lines 19-21; p. 200, lines 5-10). Tasha also testified she had never known Petitioner to live in Tiffany's apartment, and had she known, she would have had to report it to her case worker and Tiffany's housing would have been terminated immediately. (App. p. 200, lines 14-18).

STANDARD OF REVIEW

A reviewing court must affirm the post-conviction relief court's factual findings if there is any evidence of probative value in the record to sustain them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, the reviewing court should reverse the PCR court where there is no probative evidence to support the decision or the decision is controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). In a PCR proceeding, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a PCR action, the applicant bears the burden of proving the allegations in his application. Id. at 442.

Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984); Butler, 286 S.C. at 442. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. at 669; Cherry, 300 S.C. at 117. First, the applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this

presumption to receive relief. Cherry, 300 S.C. at 118. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

ARGUMENTS

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

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

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

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

Shirley Hall

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

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

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

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

Elliott Canada

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

for the victim's murder, rather than Petitioner. (App. p. 700). Elliott also admitted he was dating the victim's cousin, Charlene, at the time. (App. p. 575).

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

There is no evidence of probative value in the record to support the PCR court's finding that Petitioner proved he was prejudiced by Counsel's failure to call Elliott because, like Shirley,

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

Antwan Martan

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

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

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

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

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

Lloyd Williams

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

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

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

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

Although Lloyd's testimony tends to support that Petitioner, at some point, lived with Tiffany, he had no direct knowledge if they were dating at the time of the incident. He did not know if Petitioner had a key to the apartment at the time of the incident. His testimony corroborates Petitioner's testimony that the window was once used as a point of entry into the house, but this testimony at best reduces the suspicion surrounding Petitioner's method of entry. However, evidence relating to the use of the back window as a method of entry does not address whether Petitioner was still permitted to stay at the apartment at the time of the incident. Additionally, it is equally likely that Lloyd's testimony would have been harmful to the defense because he testified that Tiffany did not want to open the door for him because she thought it was

Petitioner. That testimony suggests both that Petitioner was not welcome at Tiffany's apartment, and that he did not have a key. Therefore, Petitioner also failed to demonstrate he was prejudiced by Counsel's failure to call Lloyd as a witness.

Counsel Richard H. Warder

Counsel testified that his strategy regarding calling witnesses is to make sure that it is a witness that he can get something out, but that the State will not have a stronger case once Counsel sits down. (App. p. 704). Counsel testified that even if a witness can bring something good, sometimes the cross-examination can be a disaster, leaving you with losing more ground than you gain. (App. p. 704).

The PCR judge found that there were others who, had Mr. Warder done his job properly, would have possibly made for a different outcome by sheer force of numbers. However, there is more to this analysis than a balancing between the number of state witnesses versus the number of defense witnesses testifying on the issue of Petitioner's residency. The testimony was clear that the apartment complex as testified to at trial and as redacted in the transcript was a product of *Section 8 Housing* opportunities offered as assistance by the federal government. (App. p. 203 line 25 – p. 204, line 1; App. p. 294, lines 7-11). *Section 8 Housing* is among the most desirable of all housing for low income tenants. It involves a more involved screening, the demand is high, and the waiting lists are long. Housing Lists, https://section-8-housing.org/Housing-List, (last visited June 7, 2017). One of the witnesses at trial, Tasha Allen, an assistant manager at Bradford Groves Apartments, even made clear that had the Petitioner actually "lived" with the victim then she, the witness, would have been obligated to report it to her case worker. (App. p. 200, lines 14-18). Had Counsel hammered away using witnesses who were testifying against the plain language of the lease, Counsel would no doubt be facing the more daunting claims of invited

error – using the witnesses to open up cross-examination and impeachment concerning the admission of welfare fraud, a federal crime, or exposing his client to charges for the same once the trial was over – rather than what was a much simpler question of strategy and fact: who are the best witnesses and how to use them.

A criminal defense attorney has a duty to perform a reasonable investigation. "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (citing Ard v. Catoe, 372 S.C. 318, 331-2, 642 S.E.2d 590, 597). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Although Petitioner offered these four witnesses to support his claim that Counsel was ineffective for failing to investigate and call more witnesses in his defense, there is no probative evidence contained in their testimony to support the PCR court's finding that Counsel was ineffective. None of the witnesses demonstrated any personal knowledge concerning whether Tiffany and Petitioner still lived together. The lack of any direct knowledge as to Petitioner's living situation on the day of the shooting would have done nothing more than provide ample opportunity for the State to attack these witnesses on cross-examination. Therefore, Petitioner failed to prove with respect any of these witnesses, that but for Counsel's failure to present them, he would not have been convicted of first-degree burglary. Accordingly, the Court of Appeals did not err in reversing the PCR court's ruling that Counsel was ineffective for failing to investigate and call these witnesses.

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

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

Petitioner failed to demonstrate either deficiency or prejudice as to Counsel's preparation of or questioning of Chad. Though Chad testified that he thought he had more to offer as a defense witness, (App. p. 604), Chad's trial testimony established he believed Petitioner was living at the apartment with Tiffany, which is what he understood to be his purpose for testifying at trial. Furthermore, at the PCR hearing, Chad did not offer anything more than what he presented at trial. Petitioner failed to show how Counsel's preparation of Chad was lacking or what how more preparation would have changed his testimony at trial. See Jackson v. State, 329

S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."); see also Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.").

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

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

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

The PCR court found Counsel's testimony was credible as to the issues that he recalled. (App. p. 743). Counsel testified the case was clearly two crimes, which were intertwined and occurred within a short period of time. (App. p. 694). Counsel testified that in his meetings with Petitioner, he focused on the ones that he saw were most problematic and they probably discussed the murder more than the burglary, because it had more problems generally and they had to convince the jury that the perpetrator was Watson, not Petitioner. (App. p. 694-95). In fact, of the four witnesses called by the defense, the only witness for the murder defense was

Petitioner. The other three witnesses were called solely to address the issue of Petitioner's residence and his relationship with Tiffany.

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

To establish counsel was inadequately prepared, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson, 329 S.C. at 349; Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Other than the testimony of the four witnesses, none of whom had direct knowledge as to whether or not Tiffany had broken up with or evicted Petitioner from her home, Petitioner failed

to produce any favorable evidence or testimony that would have affected the outcome at trial and that Counsel would have discovered had he conducted any additional investigation into the burglary charge. Counsel presented testimony from those closest to Petitioner to support his testimony that he had not been evicted from the apartment, but in fact was still living there. Trial testimony from several witnesses, including Charlene and Tiffany's mother, indicated Petitioner had come to the apartment earlier in the evening, asked to come in, and was permitted to go upstairs. (App. p. 109-110, 134).

Petitioner contends the Court of Appeals erred in not analyzing this case under the facts of State v. Singley, 392 S.C. 270, 278, 709 S.E.2d 603, 607 (2011) (holding "defendant's ownership interest in the dwelling will not preclude a conviction of burglary as a matter of law."). However, in Singley, the Court upheld the trial judge's denial of the defendant's motion for directed verdict. Therefore, while Singley is informative concerning the elements of burglary first degree, it is not controlling. See also State v. Coffin, 331 S.C. 129, 502 S.E.2d 98 (1998) (holding charge of burglary was properly submitted to the jury because evidence supported inference that Petitioner was a guest in victim's home where Petitioner did not have key and was not on lease and victim was entitled to terminate Petitioner's lawful possession by evicting him as she did before stabbings occurred). In both Coffin and Singley, a person with a clear possessory interest evicted the individual accused of burglary. In Coffin, the defendant had no possessory right, and "his rights were dependent solely on his girlfriend's good graces." Id. When the defendant's girlfriend evicted him from her mobile home, he no longer had the right of expectation to be safe and secure in that home. Id. Further, a possessory interest is not enough to entitle a defendant to a finding of custody and control of the dwelling. Singley, 392 S.C. at 277. Regardless, the additional witnesses presented at the PCR hearing would not have changed the

outcome of the trial because, as argued above, none of the witnesses could testify as to whether Tiffany had evicted Petitioner as of the time of the shooting. Although the determination of habitation is a fact-intensive one for the jury, if the undisputed owner of the house indicates that the defendant is no longer welcome in the home, the defendant will not succeed in claiming he entered his own dwelling, even where the defendant owns a possessory interest in that home.

The Court of Appeals correctly held there is no evidence of probative value in the record indicating Counsel failed to present an adequate defense to the burglary charge or he focused more on the murder charge rather than the burglary charge. Counsel credibly testified he prepared and planned on presenting a defense to both charges at trial. Counsel testified, and the record demonstrates, he brought credible and effective witnesses forward during the trial to support the defense that Petitioner still lived in Tiffany's apartment. Counsel presented three witnesses in addition to Petitioner at trial, and only Petitioner's testimony was offered in relation to the murder charges. Counsel's testimony and the record demonstrate Counsel reviewed all discovery and conducted an independent investigation by interviewing and calling multiple witnesses. Furthermore, Counsel demonstrated he understood what evidence needed to be presented at trial to acquit Petitioner of the burglary charge and he presented that evidence. Petitioner contends Counsel errantly testified "the risk was more on the murder" and the Court of Appeals ignored this portion of Counsel's testimony. (App. p. 715, line 1). Legally, one can be sentenced to imprisonment for fifteen years to life for burglary and thirty years to life or death for murder. § 16-11-311, § 16-3-20, S.C. Code Ann. (1976). Petitioner was sentenced to twenty years' imprisonment which, even if served day for day with no possibility of early release, is ten years less than the minimum mandatory for murder. While burglary may be punishable up to a life term, it is rarely paralleled with the punishment imposed for murder in actual practice and is

not punishable by death. Therefore, it is not a misstatement of the law to say the risks are higher for a murder charge. Based on the foregoing, there was no evidence of probative value to support the PCR court's finding that Counsel was deficient for focusing more on the murder charge than the burglary charge, or that Petitioner was prejudiced as a result.

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

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

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

The Court of Appeals properly held the PCR court erred in concluding that Counsel's performance was deficient because there was no evidence of probative value to support its finding that Counsel was deficient for failing to address the jury verdict form. In determining whether Counsel was deficient, the courts must measure attorney performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Here, the trial court polled the jury at Counsel's request, the trial court questioned the jury foreman regarding the alteration, and polled the jury again to confirm the verdict was correct. Petitioner produced no evidence at the PCR hearing to show that the verdict was compromised in any way. Therefore, there was no evidence of probative value in the record to support the PCR court's finding that counsel was deficient in this regard. Accordingly, the Court of Appeals correctly held Petitioner produced no evidence at the PCR hearing to show Counsel was deficient in deciding not to pursue the argument further.

CONCLUSION

For the reasons stated above, Respondent requests that this Court affirm the opinion of the South Carolina Court of Appeals filed on April 13, 2016, reversing the relief granted by the lower court.

Respectfully submitted,

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June 12, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 2016-UP-174 (S.C. Ct. App. filed April 13, 2016)
Appellate Case No. 2012-209540

Appellate Case No. 2016-001430

JEROME CURTIS BUCKSON, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing one copy in the United States mail, postage prepaid:

Tricia Blanchette, Esquire
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This 12th day of June, 2017.

Brianna Arnone

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