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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2016-001430
Appellate Case No. 2012-209540

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

Jerome Curtis Buckson,

Petitioner,

v.

State of South Carolina,

Respondent.

AMENDED SUPPLEMENTAL APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Jerome Curtis Buckson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-209540

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2016-UP-174
Heard October 13, 2015 – Filed April 13, 2016

REVERSED

Attorney General Alan McCrory Wilson and Assistant
Attorney General James Rutledge Johnson, of Columbia,
and Assistant Deputy Attorney General Suzanne
Hollifield White, of Spartanburg, for Petitioner.

Tricia A. Blanchette, of the Law Office of Tricia A.
Blanchette, LLC, of Columbia, for Respondent.

PER CURIAM: The State appeals the grant of post-conviction relief (PCR) to
Jerome Curtis Buckson (Respondent), arguing the PCR court erred in finding trial

counsel was ineffective for (1) failing to investigate or call four witnesses in an attempt to establish Respondent was not guilty of first-degree burglary, (2) failing to utilize trial witnesses more effectively, (3) focusing more on the defense of the murder charge than the first-degree burglary charge, and (4) failing to object to an item stricken on the jury verdict form. We reverse.

1. We find the PCR court erred in concluding Respondent was prejudiced by trial counsel's failure to interview and call four witnesses who could have helped establish his habitation defense by testifying he lived with the victim. *See Walker v. State*, 407 S.C. 400, 404–05, 756 S.E.2d 144, 146 (2014) (stating to prevail on an ineffective assistance of counsel claim, a PCR applicant must demonstrate (1) "counsel was deficient" and (2) "the deficiency resulted in prejudice" (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984))); *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (explaining the petitioner must demonstrate any deficiency by trial counsel resulted in prejudice "to the point that he was deprived of a fair trial whose result is reliable"). To the extent trial counsel was ineffective for failing to interview and call the four witnesses, we find Respondent failed to demonstrate he was prejudiced by such deficiency. *See Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001) ("To prove prejudice, an applicant must show . . . a reasonable probability that[,] but for counsel's deficient performance, the result of the proceeding would have been different."). A thorough review of the record reveals the four witnesses' testimonies at the PCR hearing, consisting of assertions that Respondent lived with the victim, were cumulative to testimony offered by multiple witnesses at trial. *See Edwards*, 392 S.C. at 459, 710 S.E.2d at 66 (stating when "evidence produced during the PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward"). Accordingly, we reverse the PCR court's finding as to this issue.

2. With regard to the PCR court's finding that trial counsel was ineffective for focusing on the murder charge and neglecting the first-degree burglary charge, we find the PCR court erred in concluding trial counsel's performance was deficient. Our review of the trial transcript indicates trial counsel acted reasonably with his investigation and preparation for the burglary charge. *See Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("An attorney's performance is not deficient if it is reasonable under professional norms."). Trial counsel addressed the burglary charge and Respondent's residency status in both his opening and closing statements. Indeed, trial counsel devoted a significant amount of time to this subject during his closing statement, outlining the various testimonies and evidence tending to show Respondent lived with the victim, and he claimed

Respondent could not be guilty of burglary beyond a reasonable doubt. In addition, trial counsel frequently questioned the witnesses, when appropriate, regarding aspects related to the burglary charge. Trial counsel successfully objected on multiple occasions when the State attempted to elicit testimony showing why the victim changed her locks shortly before the incident, which would have strengthened the State's claim that the victim and Respondent ended their cohabitation prior to the incident. He cross-examined several other prosecution witnesses to show the jury Respondent could have resided with the victim, even though, at times, he used his mother's mailing address. Also, he questioned an employee of the victim's apartment complex to show the jury a valid reason why the victim could have decided against adding Respondent's name to the lease. Following the conclusion of the State's case, trial counsel moved for a directed verdict on the burglary charge alone, arguing no evidence demonstrated Respondent entered the victim's apartment without permission. During the defense's case, trial counsel called multiple witnesses that were used, in part, to create reasonable doubt on the burglary charge by supporting his contention that Respondent lived with the victim. Trial counsel called a total of four witnesses, including Respondent, who testified Respondent lived with the victim and spent a significant amount of time in her apartment and with her children. During Respondent's testimony, trial counsel questioned him extensively about living with the victim and keeping personal items in her apartment. He also showed Respondent multiple photographs of the victim's apartment so Respondent could identify the clothing and toiletry items he maintained in the apartment. In light of trial counsel's efforts, we find no evidence of probative value supports the PCR court's assertion that he "put his entire focus" on the murder charge. *See Davie v. State*, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009) ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). In our view, trial counsel acted reasonably to defend Respondent on the burglary charge, and he conducted an independent investigation by interviewing and calling multiple witnesses and reviewing the evidence. *See Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("An attorney's performance is not deficient if it is reasonable under professional norms."). Because the record of Respondent's trial shows trial counsel exhibited a reasonable amount of focus and attention on the burglary charge, while also successfully defending the murder charge, we reverse the PCR court's finding of ineffective assistance of counsel.

3. With regard to the PCR court's finding that trial counsel "was ineffective in his preparation and utilization of Tate," we find the PCR court erred in concluding trial

counsel's performance was deficient. After comparing Tate's trial testimony with his PCR hearing testimony, we find trial counsel's utilization of Tate was reasonable. *See Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("An attorney's performance is not deficient if it is reasonable under professional norms."). Trial counsel established Tate believed Respondent lived with the victim, and he elicited an explanation as to why Respondent's name would not have been on the lease. Tate also testified at trial he did not see Respondent during the week prior to this incident and, thus, could not refute the State's claim that Respondent and the victim ended their relationship shortly before this incident. We believe Tate's PCR testimony failed to add anything significant to his trial testimony. To the extent Tate's PCR testimony more clearly established his belief that Respondent lived with the victim, we find his testimony was cumulative to the testimonies of several other witnesses and Respondent suffered no prejudice from its omission. *See Edwards*, 392 S.C. at 459, 710 S.E.2d at 66 (stating when "evidence produced during the PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward"). Thus, we reverse the PCR court as to this issue because no evidence of probative value exists to support the finding that trial counsel's utilization of Tate as a witness was deficient. *See Davie*, 381 S.C. at 608, 675 S.E.2d at 420 ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.").

4. Finally, with regard to the PCR court's finding that trial counsel was ineffective for failing to "address the matter stricken through by the jury" on the verdict form, we find the PCR court erred in concluding trial counsel's performance was deficient. Respondent failed to present any actual evidence during the PCR hearing to show the verdict was somehow compromised. In any event, we believe trial counsel was not deficient for failing to raise an objection because the circuit court took reasonable and adequate precautions to confirm the guilty verdict. The circuit court polled the jury, per trial counsel's request, after the jury read the verdict. Subsequently, the court noticed the word "not" was scratched from the verdict form in front of where the jury wrote "guilty." Realizing this could be an issue, the foreman initialed the alteration, and the court questioned whether the foreman actually made the alteration. The foreman confirmed he made the alteration and the guilty verdict was correct. The court then polled the jury again to confirm the guilty verdict was correct, and the entire jury agreed. Because the circuit court thoroughly addressed the verdict form issue to ensure the jury's verdict was not compromised, we find trial counsel's decision not to further pursue the argument was reasonable. *See Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814

("An attorney's performance is not deficient if it is reasonable under professional norms."). Accordingly, we reverse the PCR court as to this issue because no evidence of probative value supports its finding that trial counsel was deficient for failing to address the jury verdict form. *See Davie*, 381 S.C. at 608, 675 S.E.2d at 420 ("In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). Further, to the extent the State argues the PCR court erred in hinging its analysis on the cumulative prejudice doctrine, we need not address this issue because our resolution of the prior issues is dispositive. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing "the threshold to asking the cumulative prejudicial question is to first find multiple errors").

REVERSED.¹

HUFF, A.C.J, and WILLIAMS and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

APR 26 2016

SC Court of Appeals

Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No.: 2012-209540

JEROME CURTIS BUCKSON,
RESPONDENT,

V.

STATE OF SOUTH CAROLINA,
PETITIONER.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING *EN BANC*

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STATEMENT OF THE CASE

Respondent was confined in the South Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court.¹ During the February 2006 term of the Spartanburg County Grand Jury, Respondent was indicted for Burglary, First Degree (Indictment No.: 2006-GS-30-0845) and Murder (Indictment No.: 2006-GS-30-0846). On January 30, 2007, a jury trial was conducted in Spartanburg County in front of the Honorable J. Derham Cole. Respondent was represented by Richard H. Warder, Esquire. The jury returned a verdict of not guilty on the Murder charge and guilty on the Burglary, First Degree, charge. On February 2, 2007, the Honorable J. Derham Cole sentenced Respondent to confinement for a term of twenty (20) years.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected by M. Celia Robinson, South Carolina Office of Appellate Defense. Following the submission of the Brief of Appellant, the South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Buckson, Op. No. 2010-UP-282 (S.C. Ct. App. filed May 20, 2010). A Petition for Rehearing was filed and denied on June 17, 2010. Respondent filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was voluntarily withdrawn. The South Carolina Supreme Court issued the Remittitur on October 6, 2010.

On October, 22, 2010, Respondent filed an Application for Post Conviction Relief (PCR) in Spartanburg County. On or about May 3, 2011, the State submitted a Return. On September 8, 2011, Respondent, through counsel, submitted an Amendment to Application for Post Conviction Relief. An evidentiary hearing into the matter was held on September 23, 2011 at the Spartanburg County Courthouse in front of the Honorable J. Mark Hayes, II. The Applicant was present at the

¹ Pursuant to the Order issued by the South Carolina Supreme Court on October 3, 2012, Respondent is currently released subject to an appellate bond.

hearing and was represented by Tricia A. Blanchette, Esquire. The State was represented by Suzanne H. White, Assistant Attorney General.

During the hearing, Respondent testified on his own behalf. Respondent also called Shirley Hall, Barry Adair, Elliott Canada, Antwan Martin, Chad Tate and Lloyd Williams to the stand. PCR counsel introduced eight exhibits. The State called Richard H. Warder, Esquire, to the stand. The lower court also had before it a copy of the Application, the Return, the Amendment, the records of the Spartanburg County Clerk of Court concerning the subject conviction, the trial transcript, and Respondent's records from the South Carolina Department of Corrections.

At the close of the hearing, the Honorable J. Mark Hayes, II, took the matter under advisement. On October 21, 2011, the Honorable J. Mark Hayes, II, issued an Order Granting Application for Post Conviction Relief. Petitioner filed a Motion to Alter or Amend the Order Granting Relief Pursuant to Rule 59(e) on November 8, 2011. Respondent submitted a Return on November 15, 2011. On March 9, 2012, the Honorable J. Mark Hayes, II, issued a written Order denying the State's Motion and clarifying the Order Granting Application for Post Conviction Relief.

On September 17, 2012, Petitioner filed a Petition for Writ of Certiorari and Appendix. On October 3, 2012, this Court issued an Order granting Respondent's Petition for Appeal Bond, and Respondent was released following a hearing and posting of bond in Spartanburg County on November 8, 2012. On December 14, 2012, Respondent filed a Return to Petition for Writ of Certiorari. Thereafter, the appeal was transferred to the South Carolina Court of Appeals.

On April 10, 2014 an Order granting Certiorari was issued by the Court of Appeals. On August 11, 2014, Petitioner submitted the Brief of Petitioner and additional Appendices. On October 8, 2014, the Brief of Respondent was filed. An oral argument was scheduled and cancelled

in October 2015. On April 13, 2016, an Opinion was issued by this Court reversing the decision of the lower court, from which this Petition timely follows. Buckson v. State, Unpub. Op. No. 2016-UP-174 (S.C. Ct. App. filed April 13, 2016).

ARGUMENT

Pursuant to Rule 221, SCACR, Respondent would respectfully request that the entire Court review the prior filings and record as Respondent submits that the Court has overlooked or misapprehended the following in reaching the Opinion to reverse the granting of relief by the lower court.

1. Defense of the Burglary Charge

In reaching the Opinion reversing the relief granted by the lower court, it appears this Court has chosen to accept the State's invitation to improperly dissect the decision of the lower court into four findings when it is clear that the Court made two well-reasoned findings as addressed in the Brief of Respondent. In a Post Conviction Relief Appeal, great deference is to be given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). As a result, Respondent would ask this Court to properly consider the lower court's rulings and find as follows:

Trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent 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.

Brief of Respondent p. 6.

Under the any evidence standard of review, the lower court correctly held that trial counsel

rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent was facing an equally serious burglary charge. Specifically, the lower court reasoned:

At the PCR hearing, Applicant alleged that trial counsel failed to focus on the burglary charge during the preparation and investigation phase of his representation. Even though the Applicant was going to trial on murder and burglary, Applicant explained that counsel focused on the murder charge and trial counsel did not refute this assertion. Trial counsel explained that the murder charge was more complicated and was his primary focus. Interestingly, both charges carry a life sentence, yet counsel determined that he would regrettably put his entire focus on the preparation and presentation of Applicant's murder defense. This Court finds this decision to focus on the murder charge to be unreasonable and ineffective, which resulted in prejudice to the Applicant. The State has argued that the not guilty verdict on the murder is indicative of counsel's effective investigation and preparation, but this Court is not convinced of this argument. When counsel choose to focus his investigation and preparation on the murder charge, he could not anticipate a not guilty verdict nor does his preparation on one charge excuse the unreasonableness of his preparation and investigation on the other charge.

App. p. 745.

At the evidentiary hearing, trial counsel explained that he focused his preparation and time with Respondent prior to trial on the murder charge since it was more problematic and had more defenses. App. p. 694. On cross-examination, when asked if both charges, murder and burglary in the first degree, were equally important, counsel errantly explained that the risk was more on the murder, so it took up most of the focus. App. pp. 714-5. He also explained that he did not contemplate that the jury would split as he assumed a not guilty on the murder would result in a not guilty on the burglary charge. App. p. 715.

The lower court's findings regarding counsel's ineffectiveness in the defense of the burglary charge tracks very closely to the opinion set forth by the South Carolina Supreme Court in Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008). Lounds argued that counsel failed to adequately prepare for and defend him at trial. The Supreme Court agreed based upon counsel's

failure to conduct an independent investigation, which at a minimum should have included speaking to potential witnesses. Lounds, 380 S.C. at 460, 670 S.E.2d at 649, Ard v. Catoe, 373 S.C. 318, 642 S.E.2d 590 (2007). The Supreme Court relied upon the testimony of two witnesses that were called at the evidentiary hearing in their reasoning that counsel was ineffective; whereas, here, the lower court relied upon the testimony of four witnesses called at the evidentiary hearing. Similarly, to defense counsel's inability to remember and provide credible testimony as discussed further below, the Supreme Court also found that the lower court's finding of a reasonable strategy was errant since counsel failed to testify.

Here, the lower court found it was a matter of unreasonableness to not utilize the witnesses in the capacity they were utilized at the evidentiary hearing. The court also refused to accept the State's theory that the not guilty verdict on the murder amounted to a showing of effective representation on the burglary. The lower court responded to this theory in the Order by noting counsel's testimony that he believed that the burglary would simply go away if he obtained a not guilty on the murder and his admission that his focus was on the murder because it was more serious as he errantly stated that it carried more time. App. p. 745, 750. By way of the Order, the lower court responded to the State's theory as follows:

The court has searched the transcript and has considered the testimony presented at the present hearing for reasonable justification for such an opinion and can find none... counsel's above detailed failures cannot be cured by a not guilty verdict on the murder charge when the jury found the Applicant guilty on the burglary charge.

App. p. 750.

It is well established that when matters of credibility are involved great deference is given to a post conviction relief court's findings. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), McCray, 317 S.C. 557, 455 S.E.2d 686, Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540,

542 (1994) (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.). As to credibility findings, the lower court held: "This Court finds the testimony of Shirely Hall, Barry Adair, Elliott Canada, Antwan Martin, Chad Tate, Lloyd Williams and Jerome Buckson to be credible. This Court finds the testimony of Richard Warder to be credible on the matters that he specifically recalled, but this Court cannot make a finding of credibility on all the matters he could not recall." App. 743-4.

In reaching the standing decision, this Court must have chosen to ignore the credible testimony of several witnesses that testified that Mr. Warder did not speak with them prior to trial or in the case of Chad Tate, spoke with him one time immediately before trial. This Court has accepted the State's invitation to reverse the findings of Judge Hayes and rely on testimony of Mr. Warder, which was taken in firsthand by Judge Hayes and horribly limited by recall issues and emotional outbursts in courtroom. Additionally, the State has manipulated vague responses made by Mr. Warder to argue that he met with witnesses and chose not to use such witnesses as a result of a valid trial strategy. Both this Court and the State are ignoring Mr. Warder's clear admission that the witnesses would have "been helpful" at trial. App. p. 710, ln. 21.

Nevertheless, this Court has accepted the State's position that the that the testimony offered at the evidentiary hearing does not establish that Mr. Warder's failure to utilize the witnesses or more fully utilize the witnesses called affected the outcome of trial.² Again, this

² As is detailed in the Brief of Respondent, Respondent submits that each witness not called at trial provided testimony that was not merely cumulative to testimony or evidence offered at the trial and such a finding by this Court must not stand. Brief of Respondent pp. 11-15. Briefly, the testimony of the witnesses provided the following outcome determinative information:

1) Shirley Hall provided testimony as a neighbor that was aware of Respondent dwelling in the apartment and recalled providing such information to Mr. Warder.

2) Antwan Martin provided a first-hand account of the being with Respondent on the day in question, his knowledge that Respondent lived at the victim's apartment and knowledge that Respondent was currently in a relationship with the victim, which the court found directly refuted the testimony of the State's witness – Taffie Williams.

Court must review the lower court's finding to determine if there is any evidence in the record to support his finding and not conduct a de novo review since the State has not alleged an error of law. Based upon the evidentiary hearing transcript and the arguments set forth in the Brief, Respondent submits there is ample evidence to support the lower court's findings, which are clearly similarly to the findings in Lounds v. State.

Unlike the standing decision of this Court, the lower court's findings specifically address the burglary statute and controlling case law. In pertinent part, S.C. Code Ann. § 16-11-310(3)(a) (2003) provides: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." The lower court found that being charged under this statute, presented two important issues for Respondent: "First, the issue is to what degree did the Applicant have a right to claim possession to the victim's apartment; and the second issue is the implication of his lack of intent to commit a crime when he entered the victim's apartment." App. p. 744. Relying upon State v. Singley, 392 S.C. 270, 271-72, 709 S.E.2d 603, 604 (2011), the lower court reasoned that the jury must determine whether Respondent used the dwelling in such a manner that it could have been said to be his own home because one cannot commit the offense of burglary by breaking into his own home. Id. at 276, 709 S.E.2d at 606. The lower

3) Lloyd Williams provided testimony that also refuted the testimony of Taffie Williams, corroborated the testimony of Respondent and provided a first-hand account of being at the apartment on the evening in question. The court found his testimony not merely cumulative and highly important since he was listed as a State's witness, the stepfather of the victim and the husband of Taffie Williams.

4) Elliott Canada provided testimony about being in the apartment during the night in question and his interactions with the victim and Mr. Watson (the person present in the bedroom when the victim was shot). Mr. Canada testified about the victim and Mr. Watson being "jittery" about the victim's "friend" named "J" coming home, it being apparent a man lived in the apartment, Mr. Watson's intention to return to the apartment with a gun, and his willingness to speak with defense counsel prior to trial.

Brief of Respondent pp. 11-15.

court further noted that the South Carolina Supreme Court held that the proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, and the right of expectation to be safe and secure in, the dwelling burglarized. Id. at 278, 709 S.E.2d at 607.

As was addressed by the lower court, Singley requires a fact-intensive totality of the circumstances test. Here, Judge Hayes properly considered the entire record and the evidence presented at the evidentiary hearing and found trial counsel ineffective for his handling of the burglary charge, and based upon the any evidence standard of review, this Court should not disturb his finding.

As is noted in Respondent's Brief, the State alleged the following at trial:

- 1) Respondent's relationship with the victim was over, 2) Respondent was not living at the apartment with the victim and was not welcome to enter it, 3) Respondent was not paying bills at the apartment, and 4) Respondent had not given his key to Taffie Williams.

App. pp. 70-73, 106, 114-115, 121. Keeping in mind the fact intensive analysis required by Singley as the lower court did in his findings, it must be noted that the only witnesses used to attempt to refute such facts were Respondent, his family members and admittedly and obviously unprepared Chad Tate. Due to counsel's ineffective assistance, Respondent was on an island at trial trying to explain the following: 1) the regular use of the window for entry, 2) why he was not on the lease, 3) why he did not have a key 4) how the victim was trying to reach him that day, and 5) his involvement in picking up the kids / taking care of the kids. Instead of defense counsel calling witnesses that were not merely cumulative but were essential to the fact intensive analysis the last word came from a daycare working rebutting Respondent's testimony.

As is detailed in Respondent's Brief and found in the record, the witnesses that this Court now finds to be merely cumulative provided credible testimony, which the lower court properly

found demonstrated counsel's deficient performance and that would have affected the outcome of trial. See Brief of Respondent pp. 13-14. Specifically the lower court held:

This Court finds that trial counsel's failure to contact and/or utilize Shirley Hall, Elliott Canada, Antwan Martin, and Lloyd Williams was not excusable nor was it a reasonable tactical decision. Each witness provided pertinent testimony on the issues of Applicant's residency and intent to commit a crime at the apartment. These witnesses also could have refuted the State's witness testimony and affirmed Applicant's testimony. At trial, counsel only called Applicant, Chad Tate, his mother, and his aunt for the defense. Even though these witnesses provided some pertinent testimony, trial counsel only called one non-family member when these other vital non-family member witnesses were available. Interestingly, Lloyd Williams and Elliott Canada were listed as potential State witnesses and were willing to testify for the defense despite being Ms. Fogey's stepfather and Mr. Watson's friend. This Court finds that these factors combined with the credibility of the witnesses' testimony would have been highly persuasive to the jury and would have likely affected the outcome of the trial.

App. p. 749.

Additionally, this Court has also disturbed the lower court's findings regarding the testimony of Chad Tate as a stand-alone issue. It is clear from both the Order and the Brief of the Respondent that the testimony of Chad Tate was addressed in conjunction with counsel's deficient use of the Respondent's testimony, which has been unaddressed by this Court. App. p. 749-50. Furthermore, this testimony was part of the basis of the lower court's overall finding that trial counsel was provided ineffective assistance in his unreasonable focus on the murder charge. Nevertheless, standing alone, Respondent submits that the testimony of Chad Tate demonstrated counsel's failure to properly prepare for trial and properly present a defense that resulted in clear prejudice to Respondent. It appears it has become the duty of the State and now the appellate court to excuse clear ineffective assistance by conducting a de novo review of the record to find any portions thereof to justify apparent deficient representation and defeat well-reasoned findings of the lower court.

In the Order the lower court held:

This Court agrees with Applicant's assertions that trial counsel was ineffective when he failed to prepare and investigate, failed to call witnesses, and failed to utilize trial witnesses to establish that the apartment at issue was his dwelling and/or residence and his of intent to commit a crime. This Court further finds that Applicant was prejudiced as a result of counsel's ineffective assistance.

App. p. 744. Clearly, the lower court found multiple interrelated deficiencies that that formed the basis of his reasoning that counsel provided ineffective assistance on his defense of the highly fact intensive burglary charge, which affected the outcome of Respondent's trial.³ The lower court reviewed the trial testimony and did not find, as this Court did, that the testimony he witnessed firsthand was merely cumulative to the trial testimony or that the record or testimony of Mr. Warder justified his admitted focus on the murder charge. Therefore, Respondent asks this court to adhere to the proper standard of review and find that there is evidence to support the findings of the lower court regarding counsel's ineffective assistance in the defense of the burglary charge.

2. Verdict Form

In the Order Granting Application for Post Conviction Relief the lower court held, as follows:

This Court finds that trial counsel was ineffective when he failed address the matter stricken through by the jury on the burglary indictment, and this Court finds that this issue further demonstrates the jury's indecision with their verdict on the burglary charge. As does the jury's questions, it clearly shows how close the jury may have been to a not guilty verdict and how important it was for counsel to prepare, investigate and call the witnesses discussed above on the burglary charge. On its face, this issue with the verdict form does not appear to be a matter of ineffective assistance of counsel, but trial counsel's testimony on the matter cannot

³ It must be noted that the lower court's analysis is distinguishable from a cumulative error analysis, which comes into play when there are several non-prejudicial errors that are combined to form a finding of prejudice. See Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) Here, the lower court's findings are merely interrelated and help form the basis of his reasoning for his finding that counsel provided ineffective assistance in his defense of the burglary charge detailed above.

be ignored. When asked about this issue, trial counsel stated that he thought the jury verdict was compromised. Here, trial counsel thought the jury verdict was compromised, yet he failed to bring his concern to the trial court's attention or preserve the issue for appellate review. Due to his own testimony on the matter, this Court finds trial counsel's performance was deficient and Applicant was clearly prejudiced as a result.

App. pp. 751-2. Following the State's argument on this issue in their "Motion to Alter or Amend the Order Granting Relief Pursuant to Rule 59(e)," the lower court issued an Order and clarified the above finding as follows:

The only clarification to the prior ruling is to the last paragraph on page 21 of the order in addressing the trial counsel's decision not to address the matter stricken through by the jury on the burglary indictment. The Court agrees with the State that such an action by the jury, standing alone, one cannot conclude with any degree of certainty the jury's intent. Likewise, counsel's failure to address the matter with the Court, standing alone, would not lead to the conclusion of ineffective assistance of counsel. Such an action by the jury could indicate a number of conclusions as to their intent from a clerical mistake as suggested by the State, a compromised verdict as suggested by trial counsel, or any other number of conclusions. Nevertheless, this factor, added to the totality of other credibility evidence presented before this Court, supports the conclusion that trial counsel was ineffective in his representation of the applicant on the burglary charge. He should have addressed this matter with the court.

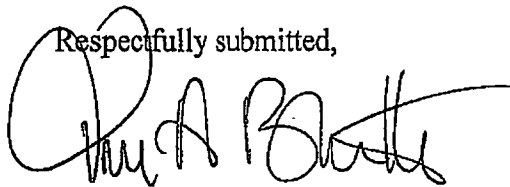
App. pp. 768-9. Respondent submits that the State has misconstrued the lower's court clarification by arguing that the lower court committed an error of law in applying a cumulative error analysis in granting relief. In post conviction relief, the lower court must examine the record as a whole and consider the totality of the circumstances. It appears that the lower court is not citing to cumulative error as the basis for his decision but simply clarifying that counsel's omission cannot be considered in a vacuum but must be considered under the unique factors and issues the instant case presents. Furthermore, the lower court makes it clear that he is finding trial counsel ineffective for his omission and failure to address the matter with the court. Contrary to the Petitioner's argument, the

lower court does not conduct a cumulative error analysis but makes a finding based upon "credibility," which is clearly a finding that is proper for the lower court to make upon review of the totality of the evidence before him. Respondent submits that this Court should not disturb the lower court's well-reasoned and well supported finding of ineffective assistance and granting of a new trial.

CONCLUSION

In consideration of the above stated arguments, Respondent respectfully requests that the Court conduct a full review of the previously submitted filings and record before this Court. Respondent urges this Court to grant rehearing, reverse the Opinion filed on April 13, 2016 and remand to the lower court for a new trial.

Respectfully submitted,



Tricia A. Blanchette – Bar # 74904
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
ATTORNEY FOR PETITIONER

This 26 day of April 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

RECEIVED

APR 26 2016

Honorable J. Mark Hayes, II, Circuit Court Judge

SC Court of Appeals

Case No.: 2010-CP-42-05670
Appellate Case No.: 2012-209540

Jerome Curtis Buckson,.....Respondent,

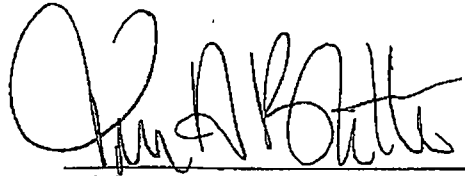
vs.

State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Respondent, hereby certify that my law clerk hand delivered this 26th day of April 2016, a copy of a Petition for Rehearing and Petition for Rehearing En Banc and Response to Motion to Revoke Appeal Bond to Alicia Olive of the Attorney General's Office, at:

Office of the Attorney General
ATT: Alicia Olive, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Respondent

April 26 2016



STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes II, Circuit Court Judge

Appellate Case No. 2012-209540

JEROME CURTIS BUCKSON,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

MOTION TO REVOKE APPEAL BOND

State of South Carolina ("Petitioner") hereby moves for an order revoking the appeal bond allowed by the Supreme Court by Order filed October 3, 2012. This Motion is based on the following:

1. Jerome Curtis Buckson ("Respondent") was incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the February 2006 term of General Sessions for murder (06-GS-42-0846) and first degree burglary (06-GS-42-0845). Mr. Richard H. Warder, Esquire, represented the Applicant at trial on the charges. On February 2, 2007, Buckson was acquitted of the charge of

murder, but found guilty of first degree burglary. The Honorable J. Derham Cole sentenced the Applicant to confinement for twenty years.

A timely Notice of Appeal was filed and an Anders brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's 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. Applicant 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.

2. Buckson thereafter filed an application for post-conviction relief on October 22, 2010. The State made its Return on May 3, 2011. Buckson filed an amendment to his application on September 8, 2011. An evidentiary hearing was convened on September 23, 2011, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Respondent was represented by Suzanne H. White of the South Carolina Attorney General's Office. The Honorable J. Mark Hayes II granted post-conviction relief by Order dated October 21, 2011, and served October 25, 2011. The State filed a motion to alter or amend pursuant to Rule 59(e), SCRCR, on November 7, 2011. By Order dated March 9, 2012, Judge Hayes denied the 59(e) motion with no additional arguments. Thereafter, the State filed and served notice of appeal.

3. On August 17, 2012, Buckson moved this Court to issue an order releasing him on bond pending the State's appeal. The State filed its Return to Petition for Appeal Bond on August 27, 2012, requesting the Court to deny Buckson's request for release on

bond. In an order dated October 3, 2012, the South Carolina Supreme Court granted Buckson's request.

4. This Court reversed the post-conviction relief court's ruling in an Unpublished Opinion filed April 13, 2016, thereby reinstating Respondent's convictions and sentences. Respondent had not completed his sentence when he was released on appeal bond in 2012, and must return to South Carolina in order to serve the remainder of his sentence.

5. The State submits that Buckson stands convicted of the crime of first degree burglary, which is both a violent and most serious offense. Buckson was convicted of entering the victim's home through the window at 3:00 am one morning. This occurred after Buckson found all the doors locked, was told by the victim to leave and while her two young boys were asleep in an adjacent bedroom. Buckson ignored the victim's request and entered the apartment anyway. Following his entry into the apartment and victim's bedroom upstairs, the victim was fatally shot. Although Buckson was acquitted of the murder charge, it is clear that Buckson's actions early that morning led to the gunfire that killed the victim, Ms. Tiffany Foggie. The violent and serious nature of the offense for which Buckson was convicted should preclude his continued release on bond, as this Court has reversed the PCR court's granting of relief.

6. Furthermore, the State asserts it is unlikely that Buckson will prevail on rehearing in this Court or on Petitioner to Writ of Certiorari to the South Carolina Supreme Court once the Court has the opportunity to review the issues. The State submits it will prevail in having this Court's reversal upheld.

7. Based upon the foregoing, the State requests an order from this Court revoking Respondent's appeal bond, and requiring him to report to the Spartanburg County Sheriff's Office for detention and transfer to the South Carolina Department of Corrections within ten days of the date the appeal is remitted to the circuit Court.

Respectfully submitted,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar #102089

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER-RESPONDENT

April 13, 2016.

STATE OF SOUTH CAROLINA
In The Court of Appeals

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge
Appellate Case No. 2012-209540

JEROME CURTIS BUCKSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Motion to Revoke Appeal Bond has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mrs. Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211

This 13th day of April, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED

Honorable J. Mark Hayes, II, Circuit Court Judge

APR 26 2016

SC Court of Appeals

Appellate Case No.: 2012-209540

JEROME CURTIS BUCKSON,
RESPONDENT,

V.

STATE OF SOUTH CAROLINA,
PETITIONER.

RESPONSE TO MOTION TO REVOKE APPEAL BOND

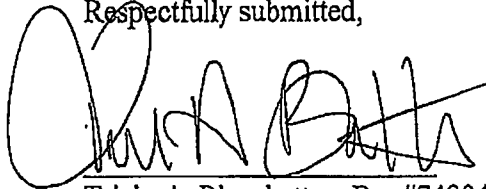
In response to the Motion to Revoke Appeal Bond, submitted by the State on April 13, 2016 and received via mail by undersigned counsel on April 15, 2016, Respondent would submit the following:

1. The South Carolina Supreme Court issued an Order for Appeal Bond on October 3, 2012. On November 8, 2012, Respondent was released on appeal bond following a hearing and posting of bond in Spartanburg County.
2. Since November 8, 2012, Respondent has been successfully on appeal bond with no complaints from the State or any party.
3. On April 13, 2016, this Court issued an Opinion reversing the granting of relief by the lower court. Buckson v. State, Unpub. Op. No. 2016-UP-174 (S.C. Ct. App.

April 13, 2016). On April 26, 2016, Respondent timely filed a Petition for Rehearing and Petition for Rehearing *En Banc*, which causes the standing Opinion to not be a final decision in the case.

4. Additionally, if this Court sees fit to deny the standing Petition for Rehearing, Respondent intends to pursue Certiorari in the South Carolina Supreme Court, which is the Court that granted the current appeal bond.
5. Similarly to the State's request, Petitioner requests that revocation not be ordered until a final decision is rendered by the South Carolina Supreme Court and the case is remitted to the lower court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

Tricia A. Blanchette – Bar #74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Respondent

April 26, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes II, Circuit Court Judge

Appellate Case No. 2012-209540

JEROME CURTIS BUCKSON,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

REPLY TO RESPONSE TO MOTION TO REVOKE APPEAL BOND

In Reply to the Response to the Motion to Revoke Appeal bond submitted April 26, 2016, the State submits the following:

1. In accordance with the State's motion to Revoke Appeal Bond filed April 13, 2016, the State attaches as "Exhibit A" the Supreme Court's order filed October 3, 2012, in which the Court granted Respondent's Motion for an Appeal Bond. In its Order granting bond, the Court directed that Respondent will surrender to the Sheriff of Spartanburg County immediately upon the filing of an opinion in this matter.

2. This Court reversed the post-conviction relief court's ruling in an Unpublished Opinion filed April 13, 2016, thereby reinstating Respondent's convictions and sentences.

3. Pursuant to the Supreme Court's order granting bond, this Court may immediately revoke bond rather than awaiting the issuance of a remittitur in this case.

4. The State reiterates it is unlikely that Buckson will prevail on rehearing in this Court or on Petition for Writ of Certiorari to the Supreme Court of South Carolina once the Court has the opportunity to review the issues. The State submits it will prevail in having this Court's reversal upheld.

5. Based upon the foregoing and in accordance with the Supreme Court's order granting bond, the State requests an order from this Court revoking Respondent's appeal bond and requiring him to report to the Spartanburg County Sheriff's Office for detention and transfer to the South Carolina Department of Corrections immediately.

Respectfully submitted,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar #102089

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER-RESPONDENT

May 3. 2016.

The Supreme Court of South Carolina

Jerome Curtis Buckson, Respondent,

v.

State of South Carolina, Petitioner.

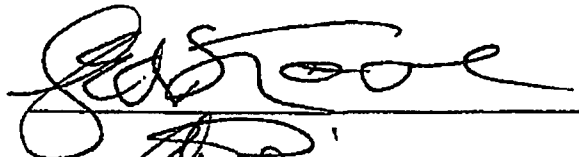
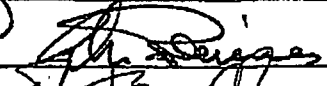
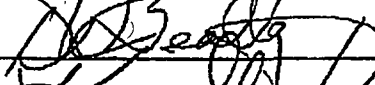

Appellate Case No. 2012-209540

ORDER

Respondent seeks to be admitted to bail while this post-conviction relief (PCR) case is pending review. The State opposes the petition. Pursuant to Rule 243(k) of the South Carolina Appellate Court Rules, the petition is granted and respondent shall be released from custody upon the following conditions:

- (1) Respondent will surrender to the Sheriff of Spartanburg County immediately upon the filing of an order dismissing this appellate case, an order denying the petition for a writ of certiorari, or an opinion in this matter;
- (2) Respondent will comply with all orders issued by this Court;
- (3) Respondent will not depart the State of South Carolina without the permission of this Court; and
- (4) Respondent will be of good behavior.

Further, respondent shall not be released until respondent and a good and sufficient surety have signed a recognizance in the amount of \$100,000, witnessed by the judge of the circuit court, which shall be forfeited to the State upon the failure of respondent to comply with the terms of this order. The form of the bond and the surety thereon shall be approved by the circuit court judge. The recognizance shall be filed with the clerk of court of Spartanburg County. Deposit of a cash percentage in lieu of bond pursuant to S.C. Code Ann. §17-15-15 will be permitted.


C.J.

J.

J.

J.

I would deny the petition for an appeal bond.


J.

Columbia, South Carolina

October 3, 2012

cc:

Tricia A. Blanchette

Suzanne Hollifield White

Hope Blackley, Clerk of Court

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Spartanburg
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2012-209540

JEROME BUCKSON,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Reply to Response to Motion to Revoke Appeal Bond has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Mrs. Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211**

This 3rd day of May, 2016


ASHLEY HAWORTH
LEGAL ASSISTANT



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 10, 2016

Mrs. Tricia A. Blanchette, Esquire
PO Box 12725
Columbia SC 29211

Re: Jerome Curtis Buckson v. State
Appellate Case No. 2012-209540

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzanne Hollifield White".

CLERK

cc: Suzanne Hollifield White, Esquire
Alan McCrory Wilson, Esquire
James Rutledge Johnson, Esquire
Alicia A. Olive, Esquire
The Honorable J. Mark Hayes, II

The South Carolina Court of Appeals

Jerome Curtis Buckson, Respondent,

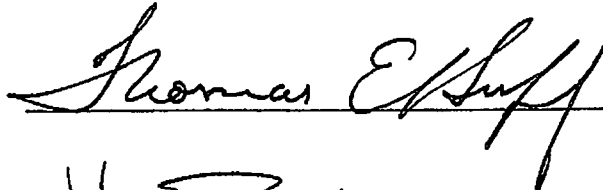
v.

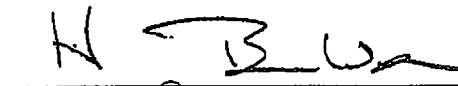
State of South Carolina, Petitioner.


Appellate Case No. 2012-209540

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 A.C.J.

 J.

 J.

Columbia, South Carolina

cc:

Tricia A. Blanchette, Esquire
Suzanne Hollifield White, Esquire
Alan McCrory Wilson, Esquire
James Rutledge Johnson, Esquire
Alicia A. Olive, Esquire
The Honorable J. Mark Hayes, II

FILED

June 10, 2016
Jt

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes II, Circuit Court Judge

Case No. 2010-CP-42-5670
Appellate Case No. 2012-209540

Jerome Curtis Buckson, Respondent,

v.

State of South Carolina, Petitioner.

**BRIEF OF
PETITIONER**

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

Was there any probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to investigate or call witnesses in an attempt to establish that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the witnesses offered by Respondent lacked credibility or relevance and Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel called more witnesses and investigated more?

Was there any probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to utilize trial witnesses more effectively, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel utilized trial witnesses differently?

Was there any probative evidence to support the PCR Court's finding that Counsel was ineffective for focusing more on the defense for the murder charge, rather than prepare for the defense that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel prepared differently?

Did the PCR Court improperly hold that Counsel was ineffective for failing to object to the item stricken on the jury verdict form based upon the cumulative error analysis, when South Carolina has not acknowledged that as a proper analysis for post-conviction relief?

STATEMENT OF THE CASE

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

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

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

A timely Notice of Appeal was filed on Petitioner's behalf and both a Petition for Writ of Certiorari and Return to Petition for Writ of Certiorari were filed. The South Carolina Court of Appeals granted Certiorari and ordered the parties to brief the issues. This Brief of Petitioner follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENTS

- I. **There was no probative evidence to support the PCR Court’s finding that Counsel was ineffective for failing to investigate or call witnesses in an attempt to establish that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel called these witnesses and investigated more.**

The PCR Court found that Counsel was ineffective for failing to investigate and failing to contact and utilize witnesses presented at the hearing because they offered “pertinent” testimony regarding the Respondent’s residency or intent to commit a crime within the apartment. (App. p. 746-47, 749). Although Respondent offered four witnesses that claim they would have testified at trial, the majority of the information that they offered was not in dispute or was completely irrelevant to the defense that the Respondent was living in the apartment at the time of the incident and could therefore, not have committed a burglary.

Shirley Hall

Shirley Hall testified that she had been a neighbor in the apartment complex at the time of the burglary and shooting. (App. p. 564). Respondent offered into evidence a handwritten note that Ms. Hall testified she had provided to Respondent prior to trial, for him to provide to his attorney, which indicates that Ms. Hall saw Respondent living with the victim for a year and up

until the time of the shooting. (App. p. 725). However, Ms. Hall testified that she “recall[ed] him over there.” (App. p. 565). Ms. Hall testified that she would have been willing to testify at Respondent’s trial, had she been contacted by Counsel, but denied that she had ever spoken with Counsel or his investigator. (App. p. 565). Nevertheless, Ms. Hall testified that she lived two doors down from the victim’s apartment and there was a partition between them, so she could not see anything but the Respondent leaving. She also testified that she had no knowledge as to whether or not the Respondent had a key to the apartment or whether or not the victim had broken up with Respondent in the weeks prior to the burglary and shooting. (App. p. 566).

Counsel testified that he did recall receiving the note from Ms. Hall and the fact that his investigator did go meet with Ms. Hall. (App. p. 698). Counsel testified that he and his investigator discussed the fact that Ms. Hall would not be able to offer much helpful information and the information she could provide at the time was not beneficial. (App. p. 598).

Petitioner first submits that the uncontroverted testimony is that Counsel was aware of and did investigate calling Ms. Hall as a witness. However, Counsel made a strategic decision based upon the witness interview, that calling Hall would not be beneficial to the defense. The lower court found Counsel’s testimony to be credible on the issues he specifically recalled. (App. p. 743). Ms. Hall could only testify to facts which were not in dispute. There was no question as to the fact that the Respondent and the victim had dated and the Respondent had stayed with the victim in her home for a period of time. However, the State presented testimony which indicated that the victim had broken up with Respondent and Respondent was no longer staying with the victim in her home. Ms. Hall was unable to provide any testimony to support Respondent’s defense that he was still living at the home at the time of the shooting. Hall testified that she had no direct view of the apartment door and had no knowledge of whether the

Respondent ever had a key to the victim's apartment or whether the victim had broken up with the Respondent recently. (App. p. 566). Petitioner submits that not only was Counsel not deficient in not calling Ms. Hall because he thoroughly investigated her potential testimony, but Respondent was not prejudiced by Counsel's failure to call Ms. Hall because she could only testify to facts which were not in dispute.

Elliott Canada

The second witness produced by the Respondent was Elliott Canada. Mr. Canada testified that he had been to the victim's apartment on the night of the shooting and twice previously. (App. p. 569). Canada knew the victim through family, but worked with the victim's cousin Charlene and Mr. Watson, the gentleman that the victim was seeing that evening. (App. p. 568-9). In fact, Mr. Watson was the person that brought and took Canada home that evening. (App. p. 571). Canada also admitted through cross-examination that he was dating the victim's cousin Charlene at the time. (App. p. 575).

Canada testified that he had seen men's items in the apartment upstairs in the bedroom area on the prior visits, and also that night. (App. p. 569-570). He testified that it appeared to him that a man had been living in the apartment. (App. p. 570). However, he admitted that he did not see men's clothing items in the apartment on the night of the shooting. (App. p. 579). On cross-examination, he also admitted that he had been in the apartment a total of three times in the month prior to the shooting, but only went upstairs twice, contradicting his previous testimony. (App. p. 576). He also testified that he could not recall if he went upstairs on the night of the shooting. (App. p. 576). However, he did testify that he did not see any items to indicate that a man lived in the apartment on the night in question in the downstairs area. (App. p. 577). Canada testified that he never heard the victim refer to Respondent by his full name and

never referred to Respondent as her boyfriend. (App. p. 577-8). Canada testified that he did not know if Respondent had a key to the apartment either. (App. p. 579).

Canada acknowledged that at the time of trial, he was in the county jail. He stated that the prosecutor came to meet with him in jail and he knew that he was listed as a potential State witness. (App. p. 572). However, he testified that he would have been willing to speak with Counsel or his investigator and would have been willing to testify for the defense if he had been subpoenaed. (App. p. 573). Because of his relationship with Mr. Watson, who at one point was also arrested for and accused of the murder of the victim, any assertions that he would have testified on Respondent's behalf are incredible.

Petitioner submits that the Respondent was not prejudiced by Counsel's failure to call Mr. Canada because, like Ms. Hall, Canada only offered testimony relating to undisputed facts. The State concedes that, at some point, the Applicant stayed in the victim's apartment as a resident. However, Respondent needed witnesses to support that he was *still* living in the apartment on January 29th, and Mr. Canada's testimony could 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). Mr. Canada's testimony suggested the Applicant was not living in the apartment at the time. Canada did not observe men's items in the home the evening of the shooting and Canada testified that the victim and Mr. Watson both appeared nervous about the Respondent showing up at the apartment. (App. p. 580). If the Respondent had been welcome in the home on January 29th, Petitioner submits that the victim would not have been so nervous about his return. The victim was the clear owner with rights to invite people into her home as guests and evict them when she so desired. The

Respondent was welcome in the home so long as he was in the victim's "good graces." See Singley, 392 S.C. at 275, 709 S.E.2d at 606. Mr. Canada's testimony suggests that the Applicant was no longer in those "good graces."

Respondent failed to establish that the outcome of the trial would have changed had Canada testified. The Petitioner submits that the Respondent was not prejudiced by Counsel's failure to call Mr. Canada.

Antwan Martin

Respondent also offered his childhood friend, Mr. Antwan Martin, as another witness. Although he testified that he and Respondent were lifetime friends, Mr. Martin testified that he had only been by the victim's apartment twice to see Respondent because of his work and family schedule. (App. p. 588). Martin could not recall when he had visited the apartment, but did know that it had not been the week or so prior to the shooting. (App. p. 591). He testified that he was aware that the apartment had flooded previously, which required the victim and Respondent to move in with Respondent's mother briefly. (App. p. 587). Martin also testified that he thought the locks had been changed at the apartment because of a break-in. (App. p. 587). However, he did not testify how he knew this information. Martin also testified that he did not know whether Respondent had a key to the apartment at the time of the burglary and shooting or "anything about that situation." (App. p. 587-8).

Martin testified that he was with Respondent the entire day prior to the shooting and Respondent never mentioned being kicked out or fighting with the victim. (App. p. 588). Martin also testified that when he returned Respondent to his car following the work that day, Respondent told him that he had numerous missed phone calls from the victim. (App. p. 590). Martin acknowledged that he did not see the phone, but relied on Respondent telling him that

there were numerous calls from the victim throughout the day. (App. p. 591). Mr. Martin testified that he was never contacted by Counsel or his investigator, but would have been willing to speak with them or testify at trial. (App. p. 586). Counsel testified that he did recall Mr. Martin being with Respondent on the day prior to the shooting, but believed that he did not call him because there was some good and bad on Martin, and Martin and Respondent had been at a club at some point that night. (App. p. 704).

Although Mr. Martin was the only witness present at the PCR hearing who claimed to have knowledge relating to the Respondent's relationship with the victim, the Petitioner submits he lacked credible foundation for that knowledge and the outcome of the trial would not have changed had he testified. Martin's basis for knowledge about the Respondent's relationship with the victim was solely based on information Respondent provided. In fact, Martin's testimony that he was with Respondent from 3:00 pm until shortly after 8:00 pm, directly contradicts the Respondent's trial testimony that he only spent about two and a half hours, until 4:30 pm, helping Martin move. (App. p. 321; 591). Mr. Martin had not been to the apartment in the weeks prior to January 29th and had not seen any interactions between the Respondent and the victim. Martin was merely present when the Respondent returned to his phone and Respondent informed Martin that there were numerous voicemail from the victim. From that information alone and no personal or first-hand knowledge, Mr. Martin concluded that the Respondent was still in a relationship with the victim and he was still living in her apartment. The Petitioner submits that this testimony does not support the defense that the Respondent was living with the victim at the time and the Respondent was not prejudiced by Counsel's failure to call Mr. Martin.

Lloyd Williams

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

Williams testified that he knew the Respondent was at the apartment often, but Williams could not say if the Respondent was living there or not. (App. p. 607; 613). Williams stated that Respondent was at the apartment most of the time Williams visited and was told by the victim once that Respondent was upstairs sleeping because he had to work third shift. (App. p. 608-9). Williams also testified that he had seen Respondent put one of the victim's children through the kitchen window so that they could unlock the door once, and Respondent claimed at that time that he did not have his key to the apartment yet because he had given his key to the victim's mother. (App. p. 609-611). Williams could not testify as to the time frame of when he saw that occur though. (App. p. 619). Williams also testified that he never saw any men's clothing items at the apartment. (App. p. 614). When shown his previous statement, Williams simply stated that "in the early stages," he believed that Respondent was living at the victim's apartment because he made that assumption when the victim would indicate that the Respondent was upstairs sleeping. (App. p. 617). In fact, Williams stated that he "[made] the assumption that [Respondent] was living there." (App. p. 617). Williams testified that he did not know if

Respondent would leave the home after Williams visited or if Respondent would stay the night. (App. p. 607; 620)

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

Although Williams' testimony supports the fact that Respondent, at some point, lived with the victim, Williams offered no direct knowledge if Respondent and victim were dating at the time of the incident. Williams did not know if the Respondent had a key to the apartment at the time of the incident. His testimony corroborates the Respondent'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 the Respondent's method of entry. Insofar as the State was trying to prove that his method of entry indicated that he did not live at the apartment, Mr. William's testimony could have potentially rebutted that. However, the defense still needed to rebut the State's evidence, offered by Mrs. Williams, that Respondent and the victim had ended their relationship and Respondent was no longer welcome to stay in the apartment. No witnesses offered at the PCR hearing, including Mr. Williams, offered testimony to refute that. Evidence relating to the use of the back window as a method of entry does not address whether the Respondent was still permitted to stay at the apartment at the time of the incident. Additionally, Petitioner submits that the testimony could have been harmful to the defense, because Williams testified that the victim

did not want to open the door the night of the incident because she thought it was Respondent. That testimony appears to indicate three things: one; the Respondent was not welcome at the victim's apartment, two; the Respondent did not have a key to the apartment and would have had to knock for entry, and three; the victim was frightened by or had cause to be concerned about allowing Respondent in her home. The Petitioner therefore submits that the Applicant was not prejudiced by Counsel's failure to call Mr. Williams.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner 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. Here, even if there was evidence to support a finding of deficiency on Counsel's behalf, Petitioner submits that the Respondent failed to establish the second prong of the Strickland test and failed to show that Counsel was ineffective.

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). While Petitioner acknowledges that Respondent offered four witnesses to support his claim that Counsel was ineffective for failing to investigate and call more witnesses in his defense, the clear lack of relevance of the witnesses' testimony is not probative evidence to support the lower court's finding that Counsel was ineffective. Counsel should not be found ineffective for his failure to call any of these four witnesses, either by themselves or as a group.

Furthermore, Counsel testified that his strategy regarding calling witnesses is not only to make sure that it is a witness that he can get something out of, but also that the State will not have a stronger case once Counsel sits down. (App. p. 704). Counsel testified that even if a witness can bring something good, sometimes the cross-examination can be a disaster, leaving you with losing more ground than you gain. (App. p. 704). A criminal defense attorney has a duty to perform a reasonable investigation. "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum; counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (citing Ard v. Catoe, 372 S.C. 318, 331-2, 642 S.E.2d 590, 597 (2007)).

It is clear that Counsel had completed an independent investigation of the case and interviewed potential witnesses. Counsel testified to meeting with Respondent and his mother

numerous times and reviewing discovery materials with Respondent. (App. p. 693-7). Counsel testified that he investigated calling Ms. Hall and he testified that he believed he looked into Mr. Williams and Mr. Martin, but decided against calling them because of some potential negative testimony as well. (App. p. 698, 702-4). Counsel was aware of and had reviewed the phone records of Respondent and the victim, stating that he did not feel it was helpful at trial because the numerous phone calls back and forth, as testified to by Mr. Martin as well, could just as well have indicated a couple that is feuding following a break-up instead of people living together. (App. p 712). Counsel testified that the reason he called the Respondent, his mother and aunt to testify on Respondent's behalf was because they made good witnesses and brought no baggage with them. (App. p. 714). Counsel also testified that having the mother testify showed that Respondent was close to his family and had cared for his brother and family. (App. p. 701).

Petitioner submits that the lower court's findings that Counsel's failure to contact or utilize these four witnesses was inexcusable and unreasonable are not supported by any probative evidence. The lack of credibility and direct knowledge as to Respondent'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. Petitioner asserts that the lower court's ruling that Counsel was ineffective for failing to investigate and call these witnesses should be reversed.

- II. There was no probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to utilize trial witnesses more effectively, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel utilized trial witnesses differently.**

The lower court also found that Counsel was ineffective for failing to prepare and utilize Chad Tate at trial. Chad Tate was the ex-boyfriend of the victim, and father to her two children.

(App. p. 593). Tate testified at the trial on behalf of the defense. (App. p. 291-302). At the PCR hearing, Tate testified that prior to the trial he spoke with Counsel or the investigator, but he claimed that they did not meet with him to prepare him to testify at trial. (App. p. 594). However, Tate testified that he was aware that his purpose in testifying was to support the defense that Respondent lived at the apartment with the victim and her children. (App. p. 594-5). Tate testified that he had no firsthand knowledge as to whether or not Respondent had a key to the apartment. (App. p. 596-7). However, Tate testified that he thought he had more to offer as a defense witness. (App. p. 604).

The Petitioner submits that the Respondent was not prejudiced by Counsel's preparation of or questioning of Mr. Tate. Mr. Tate's testimony established that he believed the Respondent was living at the apartment. The testimony he offered at the PCR hearing relating to a break-in which occurred while he was living in the apartment was completely irrelevant to whether the Respondent lived in the apartment at the time. Tate offered no testimony at the hearing to support the claim that had there been additional preparation with him, the outcome of the trial would have changed. Petitioner submits that there was no probative evidence to support the finding that Counsel was ineffective for failing to properly prepare or utilize Mr. Tate at trial.

III. There was no probative evidence to support the PCR Court's finding that Counsel was ineffective for focusing more on the defense for the murder charge, rather than prepare for the defense that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel prepared differently.

Petitioner argues that there was no probative evidence to support the court's finding that Counsel was ineffective for focusing more on the defense for the murder charge and for failing to prepare to defend Respondent on the charge of burglary – 1st degree. In fact, Petitioner argues

that this finding is directly refuted by Counsel's testimony, which was deemed credible by the lower court, and the record itself. (App. p. 743). Counsel testified that the case was clearly two crimes, which were intertwined and occurred within a short period of time. (App. p. 694). Counsel testified that he did focus on the issues that he thought had the most problems and probably did discuss the murder more than the burglary because they had to convince the jury that the perpetrator was Mr. Watson, not the Respondent. (App. p. 694-5). In fact, the only witness for the defense regarding the murder was the Respondent, whereas Counsel focused on the important job of cross-examination of Mr. Watson. (App. p. 696).

Counsel testified that he thought they presented a strong case as to the fact that Respondent lived at the apartment through the introduction of pictures from inside the apartment and from the testimony of the defense witnesses. (App. p. 697). Counsel's opening statement at trial points out that Respondent was the victim's live-in boyfriend and explains why he entered through the window. (App. p. 74-45). Respondent acknowledged during his testimony that Counsel discussed at trial several pictures from the scene, which included a photo of what appeared to be men's clothing on the futon in the victim's bedroom, a photo of personal papers of Respondent's and a photo of a toothbrush in the bathroom, (App. p. 683-4, 687). Counsel asked Respondent about those items and pictures at trial. (App. p. 345-9). Counsel testified that he thought that Respondent's mother was a very effective witness, but that all four defense witnesses provided good information about the Respondent's relationship with the victim and their living situation. (App. p. 701). Counsel testified that there might have been individual things or testimony that he elected to not put up at trial to support Respondent living at the apartment, but he thought he tried a strong case to establish that the Respondent did live at the apartment. (App. p. 705-6).

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Other than the testimony of the four witnesses, none of whom had direct knowledge as to whether or not the victim had broken up with or evicted the Respondent from her home, Respondent failed to produce any evidence or testimony that Counsel would have discovered had he done additional investigation into or focused more on the burglary charge.

The facts of this case are similar to those found in State v. Coffin, 331 S.C. 129, 502 S.E.2d 98 (1998). In that case, the victim had recently evicted her boyfriend from staying in her mobile home. Id. at 130-31, 502 S.E.2d at 98-99. The evidence supported the testimony that the victim had the only key and her name was the only one on lease. Id. However, in that case, the appellant argued that because he had paid rent several times, he should be considered a resident. Id. Additionally, the facts indicated that the appellant had shown up at the mobile home and was not let in by the victim. Id. The evidence supported the inference that appellant was a guest in the victim's home and she was entitled to terminate appellant's lawful possession by evicting him as she did before the stabbings occurred, so the charge of burglary properly went to the jury. Id. at 132, 502 S.E.2d at 99. In this matter, Counsel provided testimony from those closest to Respondent to support his testimony that he had not been evicted from the apartment, but in fact was still living there. Trial testimony from several witnesses, including Charlene and the victim's mother, indicated that Respondent had come to the apartment earlier in the evening and was let in to go upstairs. (App. p. 109-110, 134).

As discussed above, the South Carolina Supreme Court has established that “[t]he 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)(emphasis added). The PCR Court relies on State v. Singley in its determination that Applicant was prejudiced by Counsel’s failure to call additional witnesses. The Petitioner agrees that this is the appropriate test, but submits that the additional witnesses presented at the PCR hearing would not have changed the outcome of the trial because none of the witnesses could testify as to whether the victim had evicted the defendant.

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.” When the defendant’s girlfriend evicted him from her mobile home, he no longer had “the right and expectation to be safe and secure” in that home. The Court went further in Singley, when it found that a possessory interest was not even enough to entitle the defendant to a finding of custody and control of the dwelling. Singley at 277. These cases make clear that although the determination of habitation is a fact intensive one, 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.

Petitioner submits that Counsel brought credible and effective witnesses forward during the trial to support the defense that the Respondent still lived in the victim’s apartment. Counsel prepared and planned on presenting a defense to both charges at trial. There was no probative

evidence to support the lower court's findings that Counsel was ineffective for focusing more on the murder charge than the burglary charge Respondent was faced with.

IV. The PCR Court improperly held that Counsel was ineffective for failing to object to the item stricken on the jury verdict form based upon the cumulative error analysis, when South Carolina has not acknowledged that as a proper analysis for post-conviction relief.

Although Respondent was acquitted of the murder charge, he was found guilty of burglary – 1st degree and received a sentence of twenty years. (App. p. 477). At the end of the trial, the jury returned the verdict forms to the trial court and an issue was brought up by the judge regarding a few letters that appeared to have been written in and then struck out and initialed by the jury foreman. (App. p. 479). The judge addressed that issue with the jury foreman and the jury foreman stated that there had been a mistake as to where things were written. (App. p. 479). The jury was also polled following the issuance of the verdicts to confirm that the verdicts were correct. (App. p. 477-8).

The lower 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. 751-2). However, in the Order denying the Petitioner'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 lower court also agreed that it would be speculation to determine that the strike through indicated indecision by the jury. (App. p. 769). Nevertheless, the court found that it was a factor, that when considered alongside the totality of other credibility evidence, supports the conclusion that trial counsel was ineffective in his handling of the Respondent's burglary defense. (App. p. 769).

Petitioner submits that the lower court's reasoning articulated in the Order denying the State's 59(e) Motion demonstrates that a cumulative error test was applied, which is an error of law. It is yet unsettled in this State "whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002). This Court has previously held that it will reverse a PCR court's decision when it is controlled by an error of law. Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008).

Petitioner submits that this finding of the lower court should be reversed because it is based upon an error of law. Additionally, the only evidence to support this decision which does not require pure speculation on the PCR Court's part is the transcript from the trial, where the jury states that the cross through on the verdict form was a mistake of placement.

CONCLUSION

For the reasons stated above, Petitioner requests that this Court reverse the PCR Court's ruling.

Respectfully submitted,

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August 11, 2014.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable J. Mark Hayes, II, Circuit Court Judge

Case No.: 2010-CP-42-05670
Appellate Case No.: 2012-209540

Jerome Curtis Buckson,.....Respondent,

vs.

State of South Carolina,.....Petitioner.

BRIEF OF RESPONDENT

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The lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent’s defense when Respondent was also facing an equally serious burglary charge. The lower court further correctly held 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 trial6

The lower court did not incorrectly hold that trial counsel was ineffective for failing to object to the item stricken on the jury verdict on the burglary indictment based upon the cumulative error analysis since the lower court clarified, at the State’s request, that the verdict issue simply added to the totality of the prejudice analysis or possibly demonstrated that the jury was close to reaching a not guilty verdict but what it meant was left open to assumption since trial counsel failed to address the matter with the trial court18

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ISSUES PRESENTED

PETITIONER'S ISSUES PRESENTED:

- I. Was there was no probative evidence to support the PCR Court's finding that Counsel was ineffective in failing to investigator or call witnesses in an attempt to establish that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the witnesses offered by Respondent lacked credibility or relevance and Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel called more witnesses and investigate more?
- II. Was there was no probative evidence to support the PCR Court's finding that Counsel was ineffective for failing to utilize trial witnesses more effectively, when Respondent failed to demonstrate that the outcome of the trial would have been different had Counsel utilized witnesses differently?
- III. Was there was no probative evidence to support the PCR Court's finding that Counsel was ineffective for focusing more on the defense for the murder charge, rather than prepare for the defense that Respondent was not guilty of burglary – 1st degree because the apartment at issue was his home, when the Respondent failed to demonstrate the outcome of the trial would have been different had counsel prepared differently?
- IV. Did the PCR Court improperly hold that Counsel was ineffective for failing to object to the item stricken on the jury verdict form based upon the cumulative error analysis, when South Carolina has not acknowledged that as a proper analysis for post-conviction relief?

RESPONDENT'S COUNTER STATEMENT OF ISSUES PRESENTED:

- I. Whether the lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent was also facing an equally serious burglary charge. Whether the lower court further correctly held 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.

- II. Whether the lower court incorrectly held that trial counsel was ineffective for failing to object to the item stricken on the jury verdict on the burglary indictment based upon the cumulative error analysis since the lower court clarified, at the State's request, that the verdict issue simply added to the totality of the prejudice analysis or possibly demonstrated that the jury was close to reaching a not guilty verdict but what it meant was left open to assumption since trial counsel failed to address the matter with the trial court.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

STATEMENT OF THE CASE

Respondent was confined in the South Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court.¹ During the February 2006 term of the Spartanburg County Grand Jury, Respondent was indicted for Burglary, First Degree (Indictment No.: 2006-GS-30-0845) and Murder (Indictment No.: 2006-GS-30-0846). On January 30, 2007, a jury trial was conducted in Spartanburg County in front of the Honorable J. Derham Cole. Respondent was represented by Richard H. Warder, Esquire. The jury returned a verdict of not guilty on the Murder charge and guilty on the Burglary, First Degree, charge. On February 2, 2007, the Honorable J. Derham Cole sentenced Respondent to confinement for a term of twenty (20) years.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected by M. Celia Robinson, South Carolina Office of Appellate Defense. Following the submission

¹ Pursuant to the Order issued on October 3, 2012, Respondent is currently released subject to an appellate bond.

of the Brief of Appellant, the South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Buckson, Op. No. 2010-UP-282 (filed May 20, 2010). A Petition for Rehearing was filed and denied on June 17, 2010. Respondent filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was voluntarily withdrawn. The South Carolina Supreme Court issued the Remittitur on October 6, 2010.

On October, 22, 2010, Respondent filed an Application for Post Conviction Relief (PCR) in Spartanburg County. On or about May 3, 2011, the State submitted a Return. On September 8, 2011, Respondent, through counsel, submitted an Amendment to Application for Post Conviction Relief. An evidentiary hearing into the matter was held on September 23, 2011 at the Spartanburg County Courthouse in front of the Honorable J. Mark Hayes, II. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The State was represented by Suzanne H. White, Assistant Attorney General.

During the hearing, Respondent testified on his own behalf. PCR counsel also called Shirley Hall, Barry Adair, Elliott Canada, Antwan Martin, Chad Tate and Lloyd Williams to the stand. PCR counsel introduced eight exhibits. The State called Richard H. Warder, Esquire, to the stand. The lower court also had before it a copy of the Application, the Return, the Amendment, the records of the Spartanburg County Clerk of Court concerning the subject conviction, the trial transcript, and Respondent's records from the South Carolina Department of Corrections.

At the close of the hearing, the Honorable J. Mark Hayes, II, took the matter under advisement. On October 21, 2011, the Honorable J. Mark Hayes, II, issued an Order Granting Application for Post Conviction Relief. Petitioner filed a Motion to Alter or Amend the Order Granting Relief Pursuant to Rule 59(e) on November 8, 2011. Respondent submitted a Return

on November 15, 2011. On March 9, 2012, the Honorable J. Mark Hayes, II, issued a written Order denying the State's Motion and clarifying the Order Granting Application for Post Conviction Relief.

On September 17, 2012, Petitioner filed a Petition for Writ of Certiorari and Appendix. On October 3, 2012, this Court issued an Order granting Respondent's Petition for Appeal Bond, and Respondent was released following a hearing and posting of bond in Spartanburg County on November 8, 2012. On December 14, 2012, Respondent filed a Return to Petition for Writ of Certiorari. Thereafter, the appeal was transferred to the South Carolina Court of Appeals. On April 10, 2014 an Order granting Certiorari was issued by the Court of Appeals. On August 11, 2014, Petitioner submitted the Brief of Petitioner and additional Appendices, from which this Brief follows.

ARGUMENT

- I. The lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent was also facing an equally serious burglary charge. The lower court further correctly held 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.

In pertinent part, S.C. Code Ann. § 16-11-310(3)(a) (2003) provides: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." The lower court found that being charged under this statute, presented two important issues for Respondent: "First, the issue is to what degree did the Applicant have a right to claim possession to the victim's apartment; and the second issue is the implication of his lack of intent to commit a crime when he entered the victim's apartment." App. p. 744. State v. Singley, 392 S.C. 270,

271-72, 709 S.E.2d 603, 604 (2011), the lower court reasoned that the jury must determine whether Respondent used the dwelling in such a manner that it could have been said to be his own home because one cannot commit the offense of burglary by breaking into his own home. Id. at 276, 709 S.E.2d at 606. The lower court further noted that the South Carolina Supreme Court held that the proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, and the right of expectation to be safe and secure in, the dwelling burglarized. Id. at 278, 709 S.E.2d at 607.

Under the any evidence standard of review, the lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder charge in his preparation and presentation of Respondent's defense when Respondent was facing an equally serious burglary charge. Specifically, the lower court reasoned:

At the PCR hearing, Applicant alleged that trial counsel failed to focus on the burglary charge during the preparation and investigation phase of his representation. Even though the Applicant was going to trial on murder and burglary, Applicant explained that counsel focused on the murder charge and trial counsel did not refute this assertion. Trial counsel explained that the murder charge was more complicated and was his primary focus. Interestingly, both charges carry a life sentence, yet counsel determined that he would regrettably put his entire focus on the preparation and presentation of Applicant's murder defense. This Court finds this decision to focus on the murder charge to be unreasonable and ineffective, which resulted in prejudice to the Applicant. The State has argued that the not guilty verdict on the murder is indicative of counsel's effective investigation and preparation, but this Court is not convinced of this argument. When counsel choose to focus his investigation and preparation on the murder charge, he could not anticipate a not guilty verdict nor does his preparation on one charge excuse the unreasonableness of his preparation and investigation on the other charge.

App. p. 745.

At the evidentiary hearing, trial counsel explained that he focused his preparation and time with Respondent prior to trial on the murder charge since it was more problematic and had more defenses. App. p. 694. On cross-examination, when asked if both charges, murder and

burglary in the first degree, were equally important, counsel explained that the risk was more on the murder, so it took up most of the focus. App. pp. 714-5. He also explained that he did not contemplate that the jury would split as he assumed a not guilty on the murder would result in a not guilty on the burglary charge. App. p. 715.

Based upon Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) and Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the lower court held that trial counsel failed to conduct an independent investigation into the burglary charge and speak with witnesses prior to trial. The court found that counsel's prejudicial lack of investigation and preparation on the burglary charge was demonstrated by the witnesses he failed to utilize at trial and the witnesses he failed to utilize effectively at trial.² Interestingly, Petitioner argues that this Court should reverse the lower court due to the credibility of the witnesses called at the evidentiary hearing.³ When matters of credibility are involved this Court has consistently given great deference to a post conviction relief court's findings. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), McCray, 317 S.C. 557, 455 S.E.2d 686, Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.). Furthermore, the lower court's findings regarding the witnesses presented at the evidentiary hearing are fully supported by the record.

When Respondent took the stand, he provided the court a detailed account of the events in question and affirmed his trial testimony. App. pp. 559-60, 624, 641-4, 660-3. While on the stand, the following testimony was elicited by PCR counsel:

² Additionally, the lower court held that trial counsel's deficient preparation and investigation was demonstrated by his failure to utilize the phone records admitted at the evidentiary hearing and explained during Respondent's testimony. App. pp. 746, 633-36.

³ As to Richard Warder, Esquire, the lower court held: "This Court finds the testimony of Richard Warder to be credible on the matters that he specifically recalled, but this Court cannot make a finding of credibility on all the matters he could not recall." App. pp. 743-4.

PCR Counsel: Did you and Mr. Warder have extensive conversations about the burglary charge?

Respondent: We didn't. It was concerning the murder because he felt like if we get rid of the murder the burglary would also go.

PCR Counsel: And why did he not or what was your understanding as to why the burglary was not your primary problem?

Respondent: He said it was the intent, effect of the burglary, and basically just telling me if we got rid of the murder, the matters in the intent of the crime would possibly go away.

PCR Counsel: And did he ever talk with you about whether or not you could burglarize your own home?

Respondent: Yeah, he told me that's impossible when I lived there. If I was living in the home, you can't burglarize it.

PCR Counsel: So, it was very important to establish that you were living at the residence and did not have the intent to commit a crime at that residence, is that correct?

Respondent: Yes, ma'am.

App. pp. 627-8, lns. 11-25, 1-4. Respondent explained that he did not understand the elements of the burglary statute and counsel did not explain to him what the State had to prove. App. p. 660, lns. 6-12. When asked, he also answered that he did not understand the legal principle that burglary is a crime against possession and habitation not ownership, so the trial evidence and argument's about the lease or ownership did not matter. App. p. 660, lns. 13-17. When asked about his thoughts about taking the stand at trial, Respondent stated: "I felt like I was obligated to defend myself with the, murder and the burglary. I mean both of them carried life sentences." App. p. 659, lns. 20-25.

Respondent recalled asking trial counsel to speak with each witness discussed below, and he explained that he and his mother would have been willing to assist trial counsel in locating or contacting the witnesses. App. p. 629. Respondent briefly addressed his reasoning for wanting

counsel to contact and/or utilize each witness. Respondent identified the letter he provided counsel from apartment neighbor Shirley Hall. App. pp. 629-30. He explained that Ms. Hall “lived next door to us” and she saw him come and go from the apartment and would come get him when the kids were acting up outside the apartment.⁴ App. p. 630. Respondent indicated that he thought his attorney may have spoken to Elliott Canada and that he wanted him called at trial since he was a “key witness” due to his friendship with Mr. Watson and his presence at the apartment shortly before the alleged crimes took place. Additionally, he was in the apartment when events took place that were testified to by the State’s witnesses. In contrast to the family member witnesses called by trial counsel, he explained that Mr. Canada had no reason to help him, so he felt his testimony would carry a lot of weight with the jury. App. pp. 631-2. Respondent acknowledged that Antwan Martin was present at his trial and willing to testify, but counsel failed to utilize him or available telephone records to refute the testimony the State presented regarding Respondent’s phone calls with the victim. App. pp. 632-3. Due to the absence of the phone records and Mr. Martin’s testimony, Respondent explained that the State made it appear as if he was the only calling the victim and the calls made to him by the victim were not addressed by trial counsel. App. pp. 633-36. Regarding Lloyd Williams, Respondent recalled asking his attorney to speak with him since he was the victim’s stepfather. He further explained his reasoning, as follows: “I feel like this man is a good person that I know of, and he wouldn’t lie just for the simple fact of relationship to family. I felt like they, the prosecution didn’t call him because he had something else to say other than agreeing with whatever the prosecution was going for.” App. pp. 637, ln. 24 – 638, ln. 4. As is detailed below, it is apparent from Mr. Williams’ testimony that Respondent’s reasoning was correct. As was cited to by the

⁴ Respondent agreed that in applying common sense it was true that the witnesses’ memory would have been clearer in 2006 when he asked trial counsel to speak with them and utilize them at trial. App. p. 630.

lower court, Respondent also noted that Mr. Williams could have been used at trial to impeach the testimony of Taffy Williams. App. p. 638. Finally, Respondent concluded that Chad Tate was not used correctly by counsel and there were a number of additional questions he wanted counsel to ask Mr. Tate. App. pp. 637, 657. Respondent made it clear that he just did not understand why counsel failed to utilize available witnesses and failed to fully utilize Chad Tate. App. p. 666.

Turning first to the witnesses that were not called at trial, the lower court held: "This Court finds that trial counsel's failure to investigate and utilize the testimony of Shirley Hall, Elliott Canada, Antwan Martin and Lloyd Williams was beyond reasonableness... As noted by the South Carolina Supreme Court, a burglary charge requires a very fact intensive analysis, which would have been aided by the testimony of Shirley Hall, Elliott Canada, Antwan Martin, and Lloyd Williams." App. p. 746. Respondent submits there is ample evidence in the record to support the lower court's finding. Interestingly, trial counsel admitted that the witnesses called at the evidentiary hearing "would have been helpful at trial." App. p. 710, ln. 21.

At the evidentiary hearing, Shirley Hall testified that she was a neighbor to the victim and provided a letter for Respondent to provide to his defense counsel that stated in pertinent part: "I saw him living with Tiffany for about a year and up until the shooting." App. p. 567, lns. 1-2. When asked, trial counsel said "you recall funny things" and he explained that he recalled receiving the letter and having his investigator speak with Ms. Hall. App. p. 698, lns. 17-21. He recalled that she provided "nothing that was beneficial." App. p. 698, lns. 21-24. After hearing Ms. Hall's testimony at the evidentiary hearing, the lower court concluded that when residency was one of the primary issues it was unreasonable for counsel to have this information available through Ms. Hall or potentially any other neighbor and to "not provide it to the jury to assist in

their fact intensive analysis of the burglary charge.” App. p. 747.

Elliott Canada testified that he was at the victim’s apartment on the night in question with Mr. Watson (the person present in the bedroom when the victim was shot) and had been there a total of three times in the month prior with the victim’s cousin Charlene. App. pp. 568-9, 576. He recalled seeing a man’s stuff upstairs in the bedroom area and stated that it was apparent there was a man living in the apartment. App. p. 569-570. He recalled both the victim and Mr. Watson being “jittery” about the victim’s “friend” coming home. App. pp. 570, 578. He further recalled the victim using the name “J.” He concluded from their actions it was clear there was a man living there and he could return home. App. p. 580. He recalled that Mr. Watson planned to return to the apartment after dropping him off and he planned to bring his gun to protect himself. App. p. 571. He recalled meeting with the Solicitor and the victim’s family at the jail, and he thought he would be called as a witness at trial. App. pp. 572, 574. He testified that he never spoke to defense counsel, but he would have been willing to talk to counsel or an investigator for the defense. App. p. 573. Specifically, he testified:

PCR Counsel: Do you think that the information you had actually might be helpful to Mr. Buckson’s defense?

Mr. Canada: Well, if they asked the same that you’re asking now I would assume so.

App. p. 573. As Mr. Canada concluded and the lower court correctly agreed, Mr. Canada had testimony that should have been investigated by trial counsel and presented to the jury. On several occasions, PCR counsel attempted to ask Mr. Warder about his failure to speak to or utilize Mr. Canada, but Mr. Warder failed to provide an answer. App. pp. 699, 713.

Antwan Martin testified that he attended trial, was willing to testify but was not called as a witness for the defense. App. p. 586. He explained that he was with Respondent for a majority

of the day on January 29, 2006 since the Respondent helped him with a move. App. p. 588. He recalled everything appearing normal in Respondent's relationship with the victim and that the victim appeared to be tracking Respondent down with a number of calls to come home. App. pp. 589-90. He explained that he knew that Respondent's home was at the apartment shared with the victim and that he could have testified that Respondent lived at that apartment on January 29, 2006 with the victim. App. pp. 589-90. He testified that he had no knowledge of a fight or that Respondent was staying with his mom due to a fight with the victim, as was alleged by the State. App. p. 590. He was aware that the victim and Respondent had recently stayed with Respondent's mother when the apartment in question flooded. App. p. 587. When asked about speaking with Mr. Martin or calling him as a witness, trial counsel thought he remembered something about a nightclub but admitted he could not remember. App. pp. 704, 711. The lower court addressed Mr. Martin's testimony at length and found that it could have directly refuted the testimony of Taffie Williams (state witness, victim's mother) that Respondent and the victim were not dating and had been broken up for about two weeks. App. p. 121, Ins. 18-24. Additionally, he was an eyewitness to the events that took place in the hours leading up to the alleged crimes and had firsthand knowledge about Respondent residing with the victim.

Lloyd Williams testified that he became the victim's stepfather when she was four and he was married to Taffie Williams at the time of Respondent's trial. App. p. 606. He explained that he knew that he was on the State's witness list and was prepared to be called as a witness. App. p. 606. He explained that he was not called by the State as a witness and he was concerned about it. App. p. 615. He further explained that he was very upset that the man that killed his daughter (Mr. Watson) was walking around free and "nobody cares about that." App. pp. 615-6. He acknowledged that he would have been willing to testify for the defense, but he was never

contacted by trial counsel. App. p. 615. He affirmed that Respondent was known as “J” and that victim informed him that Respondent helped pay the bills at the apartment. App. p. 608. He recalled seeing Respondent at the apartment with and without the victim since he came by at least once a week. App. pp. 606-609. He also recalled Respondent being at the apartment with the victim’s sons and Respondent bringing them home. App. p. He explained:

Yeah, sometimes he would be there and she wouldn’t. Like once I saw J, he’s, he just drove up with the boys and he told me Tiffany was at work, but he had the boys, and he put one of them in the window so he would unlock the door so they could go in.

App. p. 609, lns. 6-10. He testified that the window was used since Respondent did not have a key to the apartment after the locks were changed and Respondent informed him that he had given his key to Taffie Williams. App. pp. 610-11, 619. Turning to the hours before the alleged crimes took place, Mr. Williams recalled bringing the victim a new car and no one came to the door when he arrived. When he was finally let in, he saw Charlene and two guys in the apartment and he talked with the victim about “creeping” behind the Respondent’s back. App. pp. 612-13. He was adamant that he knew that the victim was still dating Respondent on January 29, 2006 and he would have known if she was not. App. p. 614. After giving several responses, he concluded that he assumed that Respondent lived at the apartment and he knew that he did not live with his mother. App. pp. 607, 617, 621. In addressing Mr. Williams testimony, the lower court found that his testimony would have directly refuted the trial testimony of Taffie Williams and provided testimony on the events immediately preceding the alleged crimes. App. p. 748-9.

As to the witnesses not called at trial, the lower court held:

This Court finds that trial counsel’s failure to contact and/or utilize Shirley Hall, Elliott Canada, Antwan Martin, and Lloyd Williams was not excusable nor was it a reasonable tactical decision. Each witness provided pertinent testimony on the issues of Applicant’s residency and intent to commit a crime at the apartment. These witnesses also could have refuted the State’s witness testimony and

affirmed Applicant's testimony. At trial, counsel only called Applicant, Chad Tate, his mother, and his aunt for the defense. Even though these witnesses provided some pertinent testimony, trial counsel only called one non-family member when these other vital non-family member witnesses were available. Interestingly, Lloyd Williams and Elliott Canada were listed as potential State witnesses and were willing to testify for the defense despite being Ms. Fogey's stepfather and Mr. Watson's friend. This Court finds that these factors combined with the credibility of the witnesses' testimony would have been highly persuasive to the jury and would have likely affected the outcome of the trial.

App. p. 749. Respondent submits that the lower court's ruling clearly meets the any evidence standard of review as is demonstrated through the above summary of the evidentiary hearing testimony of each witness and a complete review of the record. Additionally, Respondent submits that Petitioner is ultimately asking this Court to disturb findings on credibility that are properly vested in the lower court.

As to the witnesses called at trial, the lower court noted that Chad Tate was the only non-family member of Respondent called at trial. As is supported by his testimony at the evidentiary hearing, the lower court found that trial counsel failed to properly utilize Chad Tate at trial and Respondent was prejudiced as a result. App. p. 750. When he took the stand, Chad Tate explained that he had previously been in a relationship with the victim and they had two boys together. App. p. 593. He explained that he had also lived with the victim at the apartment complex in question and had not been on the lease due to Section Eight housing restrictions. App. pp. 593-4. He explained that he did not meet with trial counsel prior to trial and that he was very confused by the questions he was asked at trial. App. pp. 594-5. He explained that he knew that Respondent paid bills at the apartment and he knew that Respondent lived at the apartment. App. pp. 596, 604. When asked about his testimony, he responded: "I felt like I had more to offer." App. p. 604, lns. 13-17. He agreed that there were more questions trial counsel should have asked him and his knowledge about Respondent residing at the apartment was not

properly conveyed through his testimony. App. pp. 604-5. As a result of Mr. Tate's credible testimony and review of his trial testimony, the lower court correctly held that "trial counsel was ineffective in his preparation and utilization of Mr. Tate and that Applicant was prejudiced as a result." App. p. 750.

Contrary to the State's argument, the prejudice suffered by counsel's ineffective assistance is readily apparent and was directly addressed by the lower court. During opening arguments and throughout Respondent's trial, the State alleged the following: 1) Respondent's relationship with the victim was over, 2) Respondent was not living at the apartment with the victim and was not welcome to enter it, 3) Respondent was not paying bills at the apartment, and 4) Respondent had not given his key to Taffie Williams. App. pp. 70-73, 106, 114-115, 121. When asked at the evidentiary hearing, trial counsel concluded: "The real issue was had he lived there had they split up and was, and was he no longer living there." App. p. 706, lns. 8-13. Before being cut off by another question, trial counsel explained: "I think that the transcript reflects that – I think there is more favorable that he lived there than he didn't. But they brought a great deal of information contrary to it that kind of..." App. pp. 705-6, lns. 24-25, 1-2. As is detailed in the summary of their testimony above, alleged by Respondent and held by the lower court, the testimony that was not elicited by trial counsel could have refuted all of the State's allegations and the great deal of "contrary" information noted by trial counsel. App. pp. 666, 673. Yet, for some unexplained reason, trial counsel chose to not elicit that testimony and to put Respondent in a position where he felt that he had to use his testimony to fight for his life.⁵ As Respondent testified at the evidentiary hearing, he was simply going home that night and counsel advised him that you cannot burglarize your own home, but counsel failed to call the witnesses

⁵ At the evidentiary hearing, trial counsel spoke generically about cross examination and why a witness would not be utilized at trial, a point which is argued in the State's Petition, but counsel failed to connect any of his conjecture to a specific witness called at the evidentiary hearing. App. p. 704, lns. 6-19.

that could have established that fundamental issue and directly refuted the State's witnesses. App. pp. 627, 658.

Additionally, the lower court made it abundantly clear that he did not agree with the State's argument that the jury's not guilty verdict on the murder charge showed effective assistance and a lack of prejudice. App. pp. 745, 750. Respondent submits the lower court properly concluded:

This Court finds that counsel's above detailed failures cannot be cured by a not guilty verdict on the murder charge when the jury found the Applicant guilty on the burglary charge. This Court further finds that trial counsel's ineffective assistance directly affected the verdict on the burglary charge, and but for counsel's ineffective performance the outcome of the trial would have been different.

App. p. 750.

Finally, Respondent submits that the not guilty verdict on the murder charge is indicative of how close the jury may have been to finding him not guilty on the both charges. This indication is also supported by the jury verdict on the burglary indictment, which the lower court examined and found that it appeared that the jury wrote the word "not" and crossed it out and wrote their initials above it. App. p. 719, lns. 15-19, 771. When asked, trial counsel surmised that the jury entered a "compromised" verdict, which he explained happens when "they acquit on one and convict on another." App. p. 711, lns. 1-7. The lower court found that the verdict on the indictment "shows how close the jury may have been to a not guilty verdict and how important it was for counsel to prepare, investigate, and call the witnesses discussed on the burglary charge." App. p. 751.

Based upon the above arguments and the well-reasoned and supported decision of the lower court, Respondent would urge this Court to find that the lower court correctly held that trial counsel rendered ineffective assistance of counsel when he primarily focused on the murder

charge in his preparation and presentation of Respondent's defense when Respondent was also facing an equally serious burglary charge. Additionally, Respondent would urge this Court to find that the lower court further correctly held 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.

II. The lower court did not incorrectly hold that trial counsel was ineffective for failing to object to the item stricken on the jury verdict on the burglary indictment based upon the cumulative error analysis since the lower court clarified, at the State's request, that the verdict issue simply added to the totality of the prejudice analysis or possibly demonstrated that the jury was close to reaching a not guilty verdict but what it meant was left open to assumption since trial counsel failed to address the matter with the trial court.

In the Order Granting Application for Post Conviction Relief the lower court held, as follows:

This Court finds that trial counsel was ineffective when he failed address the matter stricken through by the jury on the burglary indictment, and this Court finds that this issue further demonstrates the jury's indecision with their verdict on the burglary charge. As does the jury's questions, it clearly shows how close the jury may have been to a not guilty verdict and how important it was for counsel to prepare, investigate and call the witnesses discussed above on the burglary charge. On its face, this issue with the verdict form does not appear to be a matter of ineffective assistance of counsel, but trial counsel's testimony on the matter cannot be ignored. When asked about this issue, trial counsel stated that he thought the jury verdict was compromised. Here, trial counsel thought the jury verdict was compromised, yet he failed to bring his concern to the trial court's attention or preserve the issue for appellate review. Due to his own testimony on the matter, this Court finds trial counsel's performance was deficient and Applicant was clearly prejudiced as a result.

App. pp. 751-2. Following the State's argument on this issue in their "Motion to Alter or Amend the Order Granting Relief Pursuant to Rule 59(e)," the lower court issued an Order and clarified the above finding as follows:

The only clarification to the prior ruling is to the last paragraph on page 21 of the order in addressing the trial counsel's decision not to address the matter stricken

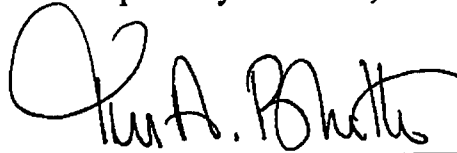
through by the jury on the burglary indictment. The Court agrees with the State that such an action by the jury, standing alone, one cannot conclude with any degree of certainty the jury's intent. Likewise, counsel's failure to address the matter with the Court, standing alone, would not lead to the conclusion of ineffective assistance of counsel. Such an action by the jury could indicate a number of conclusions as to their intent from a clerical mistake as suggested by the State, a compromised verdict as suggested by trial counsel, or any other number of conclusions. Nevertheless, this factor, added to the totality of other credibility evidence presented before this Court, supports the conclusion that trial counsel was ineffective in his representation of the applicant on the burglary charge. He should have addressed this matter with the court.

App. pp. 768-9. Respondent submits that the State has misconstrued the lower's court clarification by arguing that the lower court committed an error of law in applying a cumulative error analysis in granting relief. In post conviction relief, the lower court must examine the record as a whole and consider the totality of the circumstances. It appears that the lower court is not citing to cumulative error as the basis for his decision but simply clarifying that counsel's omission cannot be considered in a vacuum but must be considered under the unique factors and issues the instant case presents. Furthermore, the lower court makes it clear that he is finding trial counsel ineffective for his omission and failure to address the matter with the court. Contrary to the Petitioner's argument, the lower court does not conduct a cumulative error analysis but makes a finding based upon "credibility," which is clearly a finding that is proper for the lower court to make upon review of the totality of the evidence before him. Respondent submits that Petitioner is attempting to convert the lower court's finding into a cumulative error analysis in an attempt to convince this Court to disturb the lower court's well reasoned and well supported finding of ineffective assistance and granting of a new trial.

CONCLUSION

For the above stated reasons, Respondent respectfully requests that this Court find that Certiorari was improvidently granted or deny Petitioner's request that the lower court's granting of a new trial be reversed.

Respectfully submitted,



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This 8th day of October, 2014.