

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APR 09 2018

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Roger L. Couch, Circuit Court Judge

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

Larry Brent Horton, # 329065 Petitioner,

vs.

State of South Carolina Respondent.

APPENDIX
VOLUME II

MEGAN HARRIGAN JAMESON
Attorney General Office
PO Box 11549
Columbia, S.C. 29211

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646

SC Bar No. 100108
mjameson@scag.gov
(803) 734-3319

SC Bar No. 006188
rauchwise@gmail.com
(864) 229-5010

Attorney for Respondent

Attorney for Petitioner

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Name of Defendant: Larry Horton Warrant/Ticket No.: K 183925
 County: Spoke
 Charges: Murder Trial Court: Spoke

CHECKLIST FOR MAGISTRATES AND MUNICIPAL JUDGES

Directions: Magistrates and municipal court judges must use this checklist for ALL GENERAL SESSIONS and for ALL MAGISTRATE AND MUNICIPAL COURT CASES IN WHICH BOND HAS BEEN SET BY A JUDGE. The judge should attach this checklist to the charging document (arrest warrant or uniform traffic ticket) when the defendant first appears before a judge for a bond hearing or first appearance, and complete the appropriate sections. Defendant must be provided a completed copy of this form.

BAIL PROCEEDING

- 1 Form used at bail proceeding
 - ☐ a Bond Form I (personal recognizance)
 - ☐ b Bond Form II (surety, cash, percentage)
 - ☒ c None (Non-Bailable Offense)
- 2 For cases in which bond was set, defendant was informed.
 - ☒ a Warrant for arrest will be issued for violation of any condition of bail bond order.
 - ☒ b His right and obligation to be present at trial and that trial will proceed in his absence if he fails to attend.
 - ☒ c Failure to appear in court as required will result in the issuance of a warrant for defendant's arrest, as well as loss of any posted bond.
- 3 For cases to be tried in Court of General Sessions, defendant was informed of right to preliminary hearing if requested within ten (10) days
 - ☒ a Orally
 - ☒ b In writing

(NOTE: Defendant must be informed of right both orally and in writing.)
- ☒ 4 Defendant was informed of the right to trial by jury
- 5 In all general sessions cases, in all criminal domestic violence cases, and in all magistrate or municipal cases in which a prison sentence is likely to be imposed, defendant was informed of the following:
 - ☒ a Charges against defendant and nature of the charges.
 - ☒ b Right to counsel and right to court-appointed counsel if financially unable to employ counsel.
 - ☒ c Defendant was informed orally and provided a copy of this form advising him of his right to obtain court appointed counsel if indigent (must meet federal poverty guidelines) and instructions on how to obtain court appointed counsel. In order to apply for court appointed counsel, defendant is required to appear before _____ at _____.

Appearance or
Hearing Date

1-3-07

Public Defender's Office
 258 N. Church St.
 Spartanburg, SC 29306
 \$40.00 application fee

Judge's Signature



Victim Notification Information
SPARTANBURG COUNTY SHERIFF'S OFFICE

AGENCY I.D. SCO 420000

Victim Information

Case # 2007010099

Name of Victim:

Enita Bell Barton

Victim is ☒ deceased or ☐ minor

Mailing Address:

Telephone #: (H)

(B)

Emergency #

Relative or Contact Person:

Monica Bell

Mailing Address:

Washington State

Telephone #: (H)

(B)

Emergency #

Additional Information or Comments:

In order for Law Enforcement to make a reasonable attempt to contact you of the arrest or detention and of the appropriate bond or other pretrial release hearing or procedure, it is your responsibility to notify the appropriate agency of any change in your address or phone number.

The information given on this form will be provided to the jail, prison, detention or holding facility having physical custody of the defendant. It will also be made available to the prosecuting agency and the Department of Juvenile Justice System, if the defendant is a juvenile.

Court Date Information (if available at time of report)

State vs

Warrant # / Ticket #

Date and Time:

Location:

An arrest or juvenile detention can occur anytime during a 24 hour period. Arraignment may take place within several hours of the arrest. A juvenile detention hearing is usually held within 48 hours of the detention, excluding holidays and weekends. Please check the boxes below if you do or do not wish to be notified.

I do ☒ I do not ☐ wish to be notified when the defendant is arrested and when arraignment or juvenile detention hearing may take place, anytime day or night.

I do ☒ I do not ☐ wish to be contacted when bond is set, anytime day or night.

I do ☒ I do not ☐ wish to be contacted when the defendant is released from jail, anytime day or night.

As a victim of crime I have received a copy of the Victim Notification Information Form provided to me by the Spartanburg County Sheriff's Office and I agree that the victim information is correct. I have also received a copy of the 1997 Victims and Witness Services Statute.

Signature of person receiving information

Unikate
William R. [Signature]

Date

01-03-07

Signature of Reporting Officer

Date

01-03-07

WARRANT/DETENTION SCREENING/ARREST ONLY FOR TICKET

VICTIM NOTIFICATION OF ARREST/BOND HEARING/RELEASE

WARRANT # K183925 VICTIM Erika Horton SUSPECT Horton, Larry Brent

ARREST/DETENTION

DATE 1-3-07 TIME NOTIFIED 0600 BY Sturdivant PERSON CONTACTED Comments

ATTEMPTS:

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

COMMENTS: Victim deceased-unable to contact next of kin (mother)

BOND HEARING/JUVENILE DETENTION HEARING

DATE OF BOND HEARING _____ TIME _____ LOCATION _____

RESET DATE _____ TIME _____ LOCATION _____

DATE OF JUVENILE DETENTION HEARING _____ TIME _____ LOCATION _____

RESET DATE _____ TIME _____ LOCATION _____

ATTEMPTS:

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

COMMENTS: _____

RELEASE/TRANSFER/ESCAPE

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

ATTEMPTS:

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

DATE _____ TIME NOTIFIED _____ BY _____ PERSON CONTACTED _____

COMMENTS: _____

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

HWG
IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

INDICTMENT NOS:

WARRANT NOS: K183925

THE STATE OF SOUTH CAROLINA

AFFIDAVIT

VS.

Lamy Horton

PERSONALLY APPEARED BEFORE ME the undersigned deponent who being duly sworn, says that he/she copied the following materials:

- | | |
|---|---|
| ☐ Warrant or Ticket | ☐ Incident Report |
| ☐ Investigation Report | ☐ Supplemental Reports |
| ☐ Voluntary Statement | ☐ Witnesses Written Statement |
| ☒ Sol. Rule 5 Request | ☐ Defendant's Rap Sheet (NCIC) |
| ☐ Sol. Rule 5 Request Mailed | ☐ Drug Report |

Other: pgs 1-201, 3-23-07

Copied Number of Pages: _____

I, R. Veith, attorney for the defendant(s) or his/her designee, have reviewed copies of the above referenced documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed / Accepted this _____ day of _____, 2007.

Charles Veith
Representative or designee for Attorney
Rick Veith
Attorney-At-Law
James

Robert M. Kelly
Sworn to before me this _____ day of _____, 2007.

Robert M. Kelly
Notary Public for South Carolina
My Commission Expires: 12-12-10

MARC KITCHENS

2007 MAR 30 AM 9:17

FILED
CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

Indictment No(s):
Warrant No(s): K183925

VS.

REQUESTS FOR DISCLOSURE
(Recip. Rule 5)

Larry Horton

TO: DEFENDANT AND HIS ATTORNEY: Rick Veith:

Pursuant to Rule 5, Rules of Criminal Procedure, the State in the above captioned matter requests the disclosure of the following evidence to the State by the Defendant:

1) That the Defendant permit the prosecution to inspect and copy books, papers, documents, photographs, tangible objects or copies or portions thereof, which are within the possession, custody or control of the Defendant and which the Defendant intends to introduce as evidence in chief at the trial;

2) That the Defendant permit the prosecution to inspect and copy any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the Defendant, which the Defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the Defendant intends to call at trial when the results or reports related to his testimony.

3) The prosecution requests that the Defendant serve upon the prosecution a written notice if he intends to offer an alibi defense, stating the specific place or places at which the Defendant claims to have been on January 2, 2007, the names, address, and birthdays of the witnesses upon whom he intends to rely to establish such alibi.

The State further requests that the Defendant notify the State of the Defendant's intention to rely upon the defense of insanity or plea of guilty but mentally ill at the time of the crime.

These requests are continuing requests for disclosure and any relevant matters arising subsequent to the date hereof should be regarded as included in this request.

Hand W. Gowdy III

Trey Gowdy
Solicitor
Seventh Judicial Circuit

Spartanburg, South Carolina
Dated: March 22, 2007

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2007 MAR 22 PM 2:28
MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
STATE OF SOUTH CAROLINA,)
vs.)
Larry Brent Horton)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

MOTION FOR BOND HEARING

CHARGE: Murder

WARRANT: K183925

DATE OF ARREST: January 3, 2007

MARC KITCHENS

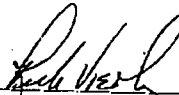
2007 MAR -2 PM 2:25

FILED
CLERK OF COURT
SPARTANBURG COUNTY

TO: Seventh Judicial Circuit Solicitor's Office

YOU WILL PLEASE TAKE NOTICE that the undersigned Richard W. Vieth, attorney for the Defendant above named, will move immediately before the presiding Circuit judge of the Seventh Judicial Circuit on April 13, 2007 at 9:00am., or as soon thereafter as counsel may be heard, for an Order allowing the above named Defendant to be released upon the filing of a Personal Recognizance Bond; or in the alternative, for an Order setting a reasonable bond for the Defendant's release.

HENDERSON, BRANDT & VIETH, P.A.



RICHARD W. VIETH
ATTORNEY FOR THE DEFENDANT
360 E. HENRY STREET, SUITE 101
SPARTANBURG, S.C. 29302-2646
PHONE: (864) 582-2962 FAX: (864) 582-2952

DATE: 3/2/07

SERVICE ACCEPTED BY:

SEVENTH JUDICIAL CIRCUIT SOLICITOR'S OFFICE

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
STATE OF SOUTH CAROLINA,)
vs.)
Larry Brent Horton)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

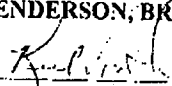
MOTION FOR BOND HEARING

CHARGE: Murder
WARRANT: K183925
DATE OF ARREST: January 3, 2007

TO: Seventh Judicial Circuit Solicitor's Office

YOU WILL PLEASE TAKE NOTICE that the undersigned Richard W. Vieth, attorney for the Defendant above named, will move immediately before the presiding Circuit judge of the Seventh Judicial Circuit on _____, at _____ m. or as soon thereafter as counsel may be heard, for an Order allowing the above named Defendant to be released upon the filing of a Personal Recognizance Bond; or in the alternative, for an Order setting a reasonable bond for the Defendant's release.

HENDERSON, BRANDT & VIETH, P.A.



RICHARD W. VIETH
ATTORNEY FOR THE DEFENDANT
360 E. HENRY STREET, SUITE 101
SPARTANBURG, S.C. 29302-2646
PHONE: (864) 582-2962 FAX: (864) 582-2952

DATE: 2/20/07

SERVICE ACCEPTED BY:

SEVENTH JUDICIAL CIRCUIT SOLICITOR'S OFFICE

2007 FEB 20 PM 3:09
MAILED
ATTORNEY

INCIDENT REPORT

CASE NUMBER

NCIC

2007010099

INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
HOMICIDE		☒ YES ☐ NO	☐ YES ☒ NO	RESIDENCE		Individual Business Financial Inst. Government Relig. Org. Soc. / Public Other Unknown Police Off.
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)		ZIP CODE		WEAPON TYPE		
01-02-07 2250 01-02-07 2255		29322		Adged Weapon		
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		DISPATCH DATE/TIME	DISPATCH TIME	TIME ARRIVED	DEPART TIME	LOCATION NO.
Sally AS SUSPECT		01-02-07 2301	2305	0001		27
ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
570 UNDERWOOD RD		Campobello	SC	29322	27	
VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	RESIDENT	RACE	SEX	AGE
HORTON, LARRY BRANT		WIFE	☒ YES ☐ NO	O	F	23
HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.		
507	185	BLK	BLU			
ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
570 UNDERWOOD RD		Campobello	SC	29322	27	
VICTIM INQ. 1: USING ALCOHOL ☐ YES ☒ NO ☐ DUNK.		DRUGS ☐ YES ☒ NO ☐ DUNK.		COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES ☒ NO		
TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/PLASMT ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ J - This Jurisdiction		S - State O - Out of State U - Unknown				
SUBJECT NO. 1		NAME (LAST, FIRST, MIDDLE)		RACE	SEX	AGE
SUBJECT NO. 1		HORTON, LARRY BRANT		O	M	33
SUBJECT NO. 1		FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.				
SUBJECT NO. 1		GUYER / MUSTACHE				
SUBJECT NO. 1		ADDRESS		CITY	STATE	ZIP CODE
SUBJECT NO. 1		570 UNDERWOOD RD		Campobello	SC	29322
SUBJECT NO. 1		SUBJECT INQ. 1: USING ALCOHOL ☐ YES ☒ NO ☐ DUNK.		ARRESTED NEAR OFFENSE SCENE ☐ YES ☒ NO		DATE/TIME OF OFFENSE
SUBJECT NO. 1		DRUGS: ☐ YES ☒ NO ☐ DUNK. TYPE:		TOTAL # ARRESTED		DATE/TIME OF ARREST
SUBJECT NO. 1				1		01-02-07/2050 01-03-07/0001
MUSCLE - DSA D.J. MALOTA & DSA M. WELTARE WERE DISPATCHED REFERENCE AN ALLEGED HOMICIDE AT 570 UNDERWOOD RD, CAMPO- BELLO, S.C. ARRIVED ON SCENE 01-02-07/2305 HRS. ENCOUNTERED WITH SUSPECT, DETAINED SAME, IDENTIFIED VICTIM, SECURED SCENE. SEE SUCCEEDING PAGES.						
JURISDICTION OF THEFT		JURISDICTION OF RECOVERY		TOTAL VALUE		
LAW ENFORCEMENT AGENCY		LAW ENFORCEMENT AGENCY				
TYPE GROUP		STOLEN		DAMAGED		BLAMED
RECOVERED		REMOVED				
SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE		ADM. CLOSED
☒ YES ☐ NO		☒ YES ☐ NO		☒ UNFOUNDED		☐ ARRESTED UNDER 18
REASON FOR EXCEPTIONAL CLEARANCE, 1. ☐ OFFENDER DEATH		2. ☐ NO PROSECUTION		3. ☐ EXTRADITION DENIED		4. ☐ VICTIM DECLINES COOPERATION
REPORTING OFFICER(S)		DATE		UNIT NUMBER		APPROVING OFFICER
MALOTA, D.J.		01-03-07		020		
FOLLOW-UP INVESTIGATION		☐ YES ☒ NO		OFFICER		DATE
						UNIT NUMBER

VICTIM NOTIFICATION FORM

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

STATE OF SOUTH CAROLINA

vs.

Horton, Larry Brent

Check and complete one of the following:

- ☐ A representative of the Spartanburg County Detention Facility, (the facility having custody of the Defendant), acknowledges that a reasonable attempt was made to notify the victim(s) sufficiently in advance of the bond hearing.

Name of Victim(s)

Erika Horton - Deceased

Monica Bell - mother

OR

- ☐ A representative of the Spartanburg County Detention Facility, (the facility having custody of the Defendant),* indicates the victim(s) did not wish to be notified of the bond hearing.

Name of Victim(s)

Helen E. Sturdivant
(Representative's Signature)*

[Signature]
(Judge's Signature)

* Or the arresting officer if Defendant is brought directly before the judge.

LA/560

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

INDICTMENT NOS. KF83925
WARRANT NOS:

THE STATE OF SOUTH CAROLINA

AFFIDAVIT

VS

Lamy Horton

PERSONALLY APPEARED BEFORE ME the undersigned deponent who being duly sworn, says that he/she copied the following materials:

- | | |
|---|---|
| ☐ Warrant or Ticket | ☐ Incident Report |
| ☐ Investigation Report | ☐ Supplemental Reports |
| ☐ Voluntary Statement | ☐ Witnesses Written Statement |
| ☐ Sol. Rule 5 Request | ☐ Defendant's Rap Sheet (NCIC) |
| ☐ Sol. Rule 5 Request Mailed _____ | ☐ Drug Report |

Other: 1 CD 3-29-07

Copied Number of Pages: _____

I, R. Veith, attorney for the defendant(s) or his/her designee, have reviewed copies of the above referenced documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed / Accepted this 26 day of 7, 2007.

[Signature]
Representative or designee for Attorney

Rick Veith
Attorney At Law

[Signature]

Sworn to before me this _____
day of _____, 2007

Notary Public for South Carolina
My Commission Expires: _____

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
STATE OF SOUTH CAROLINA)
vs.)
Larry Brent Horton)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

ORDER FOR RELEASE OF
MEDICAL RECORDS

WARRANT: K183925

FILED
CLERK OF COURT
2008 APR 28 PM 3:21
VIAND NITCHENS

This matter comes before me on motion of counsel for the Defendant and pursuant to S.C. Code of Law section 44-22-100 for an Order requiring Coastal Empire Community Health - Beaufort Clinic to provide the Defense counsel, in a timely manner; with any medical records regarding Erika Bell Horton from October 1, 2006 through December 31, 2006.

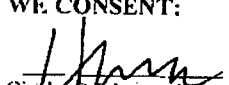
IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Coastal Empire Community Health - Beaufort Clinic will provide the attorney for the Defendant, Richard W. Vieth, with any and all medical records on Erika Bell Horton by May 10, 2008 pursuant to S.C. Code section 44-22-100.

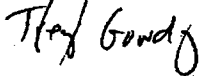
AND IT IS SO ORDERED.


HONORABLE ROGER L. COUCH
Chief Administrative Judge
Seventh Judicial Circuit

DATE: 4/28/08
Spartanburg, S.C.

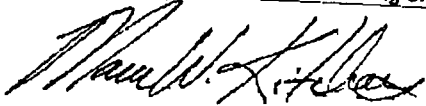
WE CONSENT:


Cindy Eylek, Assistant Solicitor
Seventh Judicial Circuit


Tracy Gandy


Richard W. Vieth
Attorney for Defendant

SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY	SPARTANBURG 0831
THE STATE OF SOUTH CAROLINA		CASE NO.	K-183925
V.		SUBPOENA FOR	
LARRY BRENT HORTON		☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)	
TO: Freddie Thompson 911/Communications			
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.			
PLACE		COURTROOM	
Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306		To Be Determined	
		DATE AND TIME	
		Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):			
Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc.			
SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello			
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.			
CLERK OF COURT		DATE	
		2/8/08	
BY DEPUTY CLERK			
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE:		ATTORNEY'S NAME AND ADDRESS	
☒ SOLICITOR ☐ DEFENDANT		TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575	

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-11-08	PLACE SO
SERVED ON (PRINT NAME) Freddie Thompson		MANNER OF SERVICE Faxed
SERVED BY (PRINT NAME) DK Martin		TITLE Masters Deputy
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on 2-11-08 DATE		DK Martin SIGNATURE OF SERVER
		ADDRESS

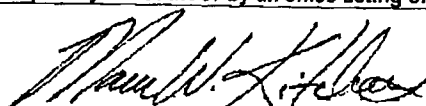
MESSAGE CONFIRMATION

FEB-11-2008 10:18 AM MON

FAX NUMBER : 5034561
NAME :

NAME/NUMBER : 95962382
PAGE : 1
START TIME : FEB-11-2008 10:18AM MON
ELAPSED TIME : 00'24"
MODE : STD ECM
RESULTS : [O.K]

SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG
THE STATE OF SOUTH CAROLINA		CASE NO. K-183925
V.		SUBPOENA FOR
LARRY BRENT HORTON		☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Tony Sellars 806 Brooks Road Mauldin, SC 29662		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined	
	DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):		
Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc.		
SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT		ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-15-08	PLACE 806 Brooks Rd.
SERVED ON (PRINT NAME) Mrs. Sellars		MANNER OF SERVICE personal
SERVED BY (PRINT NAME) Missy House		TITLE paralegal
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on	2-15-08 DATE	SIGNATURE OF SERVER Missy House ADDRESS 180 Magnolia St. Sptbg, SC 29306

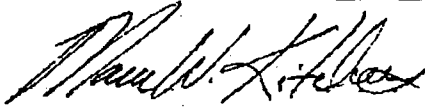
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG 0838
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON		CASE NO. K-183925 c-1 SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Dennis Maloata Spartanburg County Sheriff's Office		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 598-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK RECEIVED FEB 10 2008		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT	ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575	

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE			
SERVED	DATE 2-12-08	PLACE SO	
SERVED ON (PRINT NAME) D. Maluata		MANNER OF SERVICE In Person	
SERVED BY (PRINT NAME) DK Martin		TITLE Master Deputy	
DECLARATION OF SERVER			
I certify that the foregoing information contained in the Proof of Service is true and correct.			
Executed on 2-12-08 DATE		 SIGNATURE OF SERVER	
		ADDRESS 	

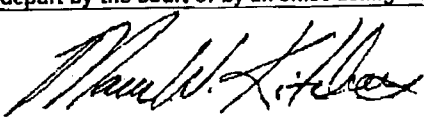
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG 0330
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON		CASE NO. K-183925 31
		SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Randy Bogan Spartanburg County Coroner's Office		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00586 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT 33-0111-01-01113	ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575	

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-11-08	PLACE 366 N Church St Spthg
SERVED ON (PRINT NAME) Deanna Corn		MANNER OF SERVICE Sub
SERVED BY (PRINT NAME) DK Martin		TITLE Master Deputy
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on 2-11-08 DATE		DK Martin SIGNATURE OF SERVER ADDRESS

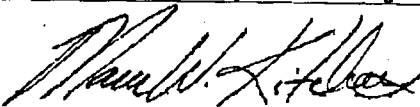
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG 0832
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON		CASE NO. K-183925 24
		SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Ashley Harris Spartanburg County Sheriff's Office		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc.		
SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT	ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575	

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-11-08	PLACE SO
SERVED ON (PRINT NAME) A. Harris		MANNER OF SERVICE In Box
SERVED BY (PRINT NAME) DK Martin		TITLE Master Deputy
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on 2-11-08 DATE		DK Martin SIGNATURE OF SERVER
		ADDRESS

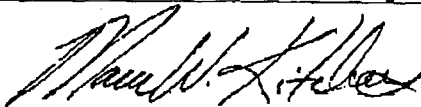
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG 0333
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON		CASE NO. K-183925 I-1
		SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Michael Sean Nix Spartanburg County Sheriff's Office		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00568 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT		ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-11-08	PLACE So
SERVED ON (PRINT NAME) S. Nix		MANNER OF SERVICE In Pass
SERVED BY (PRINT NAME) DK Martin		TITLE Masters Deputy
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on 2-11-08 DATE		DK Martin SIGNATURE OF SERVER
		ADDRESS

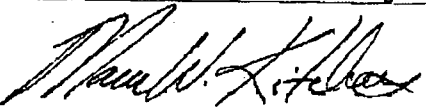
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT	COUNTY SPARTANBURG 0851
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON	CASE NO. K-183925 I-1 SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Robert Rosenberg Spartanburg County Sheriff's Office	
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.	
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello	
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.	
CLERK OF COURT 	DATE 2/8/08
BY DEPUTY CLERK	
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT 22-11111-1-11111	ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-11-08	PLACE SO
SERVED ON (PRINT NAME) R. Rosenberg		MANNER OF SERVICE In Person
SERVED BY (PRINT NAME) DK Martin		TITLE Mask Deputy
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on 2-11-08 DATE		DK Martin SIGNATURE OF SERVER
		ADDRESS

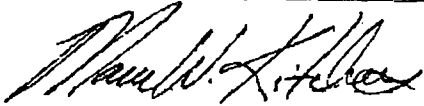
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG 0235
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON		CASE NO. K-183925 I-1 SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: William Gary Spartanburg County Sheriff's Office		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT 22:21 PM 01/03/08		ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE			
SERVED	DATE 2-11-08	PLACE So	
SERVED ON (PRINT NAME) Jane Patton		MANNER OF SERVICE Sub	
SERVED BY (PRINT NAME) DK Martin		TITLE Masters Deputy	
DECLARATION OF SERVER			
I certify that the foregoing information contained in the Proof of Service is true and correct.			
Executed on 2-11-08 DATE		DK Martin SIGNATURE OF SERVER	
		ADDRESS	

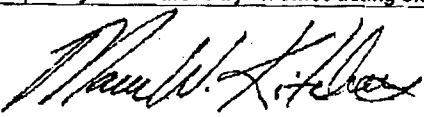
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG 0336
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON		CASE NO. K-183925 I-1 SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Allen Wood Spartanburg County Sheriff's Office		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK RECEIVED		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT		ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-11-08	PLACE So
SERVED ON (PRINT NAME) June Patton		MANNER OF SERVICE Sub
SERVED BY (PRINT NAME) DK Martin		TITLE Master Deputy
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on 2-11-08 DATE		DK Martin SIGNATURE OF SERVER
		ADDRESS

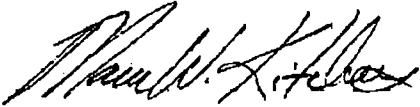
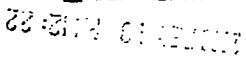
SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG	0837
THE STATE OF SOUTH CAROLINA		CASE NO. K-183925	
V.		SUBPOENA FOR	
LARRY BRENT HORTON		☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)	
TO: Demetric Glenn Spartanburg County Sheriff's Office			
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.			
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306		COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello			
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.			
CLERK OF COURT		DATE	
		2/8/08	
BY DEPUTY CLERK		RECEIVED	
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT		ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575	

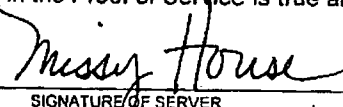
SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE		
SERVED	DATE 2-11-08	PLACE So
SERVED ON (PRINT NAME) Jane Patton		MANNER OF SERVICE Sub
SERVED BY (PRINT NAME) DK Martin		TITLE Master Deputy
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on <u>2-11-08</u> DATE		<u>DK Martin</u> SIGNATURE OF SERVER
		ADDRESS _____ _____

SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT		COUNTY SPARTANBURG
THE STATE OF SOUTH CAROLINA V. LARRY BRENT HORTON		CASE NO. K-183925
		SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: Robin Taylor SLED		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above entitled case.		
PLACE Spartanburg County Courthouse Third Floor 180 Magnolia Street Spartanburg, SC 29306	COURTROOM To Be Determined DATE AND TIME Beginning March 10 th , 2008 @ 9am until excused by the Court	
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): Please contact Assistant Solicitor Cindy Crick or Missy House at (864) 596-2575 upon receipt of this subpoena for further details and to provide contact information, including work number, home number, cell phone number, pager number, etc. SPARTANBURG COUNTY SHERIFF'S OFFICE CASE NO.: 2007010099 SLED LAB NO.: L07-00566 (victim: Erika Bell Horton) INCIDENT DATE: 01-02-2007 INCIDENT LOCATION: 570 Underwood Road, Campobello		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an office acting on behalf of the court.		
CLERK OF COURT 		DATE 2/8/08
BY DEPUTY CLERK		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☒ SOLICITOR ☐ DEFENDANT 		ATTORNEY'S NAME AND ADDRESS TREY GOWDY Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575

SCCA 253 (JULY 1, 1993) Computer Generated

PROOF OF SERVICE			
SERVED	DATE 2-8-08	PLACE Solicitor's Office	
SERVED ON (PRINT NAME) Robin Taylor		MANNER OF SERVICE Fax	
SERVED BY (PRINT NAME) Missy House		TITLE Paralegal	
DECLARATION OF SERVER			
I certify that the foregoing information contained in the Proof of Service is true and correct.			
Executed on 2-8-08 DATE		Signature of Server  ADDRESS 180 Magnolia St. Sptbg, SC 29306	

South Carolina Victim Impact Statement

Spartanburg County Courthouse
180 Magnolia Street
Spartanburg SC 29306
Phone (864) 596-2575
Fax (864) 596-2386



Cherokee County Courthouse
Floyd Baker Blvd.
Gaffney, SC 29340
Phone (864) 487-2576
Fax (864) 487-2753

Trey Gandy
Solicitor, Seventh Judicial Circuit

Defendant Larry Brent Horton
Charge(s) Murder
Co-Defendant(s) _____
Asst. Solicitor Trey Gandy/Cindy Crick

Warrant # K18395
Case # _____
Indictment #/Juv. Pet. # 20070100099
V/W Advocate Murray Elean

TO BE COMPLETED BY VICTIM OR **REPRESENTATIVE (if victim is a minor, business, deceased or incapacitated)
Please return this form within 2 weeks—assistance in completing this form is available upon request.

Victim Name Erika Bell Horton
**Representative Monica Bell
Relationship to Victim Mother
Mailing Address 1075 Springfield Rd
Belling Springs SC
29316

Phone # --Home: (864) 699-9678
--Work: ()
--Cell: (407) 729-3085
--Other: ()
*(Indicate which is your primary number)

Work Address _____

E-mail _____
Incident Date _____

FINANCIAL LOSS: YOU MUST ATTACH COPIES OF RECEIPTS, BILLS, ESTIMATES AND OTHER DOCUMENTS

Expenses:
Medical (+) \$ _____
Counseling (+) \$ _____
Funeral (+) \$ _____
Property Loss/Damage (+) \$ _____
Deductible Amount (+) \$ _____
Other (+) \$ _____
Subtotal (=) \$ _____

Recovery Amounts From:
Insurance reimbursement (-) \$ _____
Insurance Company & Address _____
Victim Compensation (SOVA) (-) \$ _____
TOTAL DUE: \$ _____

PLEASE READ AND CHECK STATEMENT(S) WITH WHICH YOU AGREE:

- ☒ I do wish to be notified of all court proceedings pertaining to this case.
☐ I do not wish to be notified unless I am needed.
☐ I do wish to be notified of all *post conviction* hearings, including appeals, probation, parole, release, or escape from prison, etc.

It is your responsibility to inform the Solicitor's Office of any changes to your address and telephone number.
(This section to be completed by agency personnel only.)

Defendant's DOB 7-4-70
Defendant's SS# _____
County of Conviction _____
Judge Duchon Lake
Date of Sentence 6-18-2008
Sentence _____

Restitution Ordered:
To victim \$ _____
To SOVA \$ _____
***TOTAL: \$** _____

Please turn over and complete other side of this form

This portion of the Victim Impact Statement requests information about the effects of the crime. Please consider the following questions and *respond only to those that apply to you and to this case*. You may use additional paper for your answers if needed. We encourage your input.

Did you suffer any physical injuries? _____ Did these injuries cause any permanent or long-term disabilities or disfigurements? Please describe:

Have you noticed any change in your lifestyle since this happened? (This may include personal habits, close relationships, the amount of tension and nervousness, or your ability to work.) Please describe:

Please describe how this crime has affected you financially?

Have you received any mental health counseling as a result of this crime? _____ If not, are you interested in receiving counseling?

Please use this space for additional comments you may have: *This is a domestic homicide. The defendant brutally killed his wife.*

Thank you for taking time to complete and return this form. This will help your voice to be heard by the criminal justice system. Please sign and return in the enclosed envelope.

Jimmy Allen for Monica Bell
Signature of victim or representative

6-18-08
Date

With your signature, you submit that the above statements are true.

RECEIVED COPIES OF THE FOLLOWING SENTENCES WERE ACCEPTED BY:

[Signature] OF THE SPARTANBURG COUNTY JAIL

DATE 6/18/08 ON Larry Horton

WARRANT AND/OR INDICTMENT NUMBER 08-950

08-950

WY

NOTICE OF APPEAL
COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

J. Derham Cole, Circuit Court Judge

Case No. K-183925

The State,

Respondent,

v.

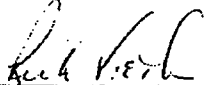
Larry Brent Horton,

Appellant.

NOTICE OF APPEAL

Larry Brent Horton appeals his conviction and sentence in this case. The sentence was imposed by the Honorable J. Derham Cole on June 18, 2008. Appellant received notice of entry of this order on June 18, 2008.

June 25, 2008


Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 E. Henry Street, Ste. 101
Spartanburg, SC 29302
(864) 582-2962
Attorney for Appellant

Other Counsel of Record:

Trey Gowdy, Solicitor
7th Judicial Circuit Solicitor's Office
180 Magnolia Street
Spartanburg, SC 29306
(864) 596-2575
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

J. Derham Cole, Circuit Court Judge

Case No. K-183925

The State

Respondent,

v.

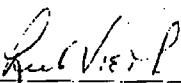
Larry Brent Horton,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on June 25, 2008, addressed to the attorney of record, Trey Gowdy, Seventh Judicial Circuit Solicitor's Office, 180 Magnolia Street, Spartanburg, SC 29306

June 25, 2008


Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 E. Henry Street, Ste. 101
Spartanburg, SC 29302
(864) 582-2962
Attorney for Appellant

Cc: Attn: Sharon Graham
South Carolina Commission of Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

State of South Carolina
County of Spartanburg

2008-25-42 0950

State of South Carolina

In The Court of General Sessions

V.

*
* Motion And Affidavit
* For Appeal Bond.

Larry Horton

*
* Case No. K183925
*
*

2008 JUL -9 AM 6:00
CLERK OF COURT
SPARTANBURG, SC

Come Now the Defendant (Larry Horton), who files this Motion and Affidavit For Appeal Bond, who filed an Appeal on the 7th Day of July 2008.

- 1) That the Defendant was not given a Fair Trial, by Means of Ineffective Assistance of Counsel.
- 2) The Defendant's Attorney erred by not presenting an Affidavit upon Release of a Drug/Alcohol Content to the Jury during trial. Omission of Prosecutive Drug Related Crime, by Reasoning of Mentally Insane.
- 3) The Courts failed when it came to the Weight of the Crime. The incident or Charges should have culminated to a Second Degree offence instead of a First Degree Murder.

The Defendant Moves the Honorable Court to set a Reasonable Bond upon the Fact that the Defendant is not as stated by the Courts a Flight risk and the Appointment of New Counsel.

Notary Sylvia Jones

SWORN Before Me on this 7th Day of July 2008.

My Commission

Expires: January 24, 2018

January 24, 2018

Respectfully Submitted

Larry Horton

Appellant (Defendant)

*7-15-08- Sent copy to inmate

ORDER

The Above Motion is Hereby ☐ Granted
☐ Denied

The Bond Shall be set at _____

Defendant to be Released under the Above
Charge.

Judge

Date:

Date at Spartanburg County, South Carolina

Notary

Sworn Before Me on this _____

Day of _____ 2008

My Commission Expires: _____

Respectfully Submitted:

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

The State,

Respondent,

v.

Larry Brent Horton,

Appellant.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JAN 17 PM 3:13
M. HOPE BLACKLEY

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2010-UP-406
Submitted September 1, 2010 – Filed September 16, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Assistant Attorney General Anthony Mabry,

FILED
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SPARTANBURG COUNTY
2012 JAN 17 PM 3:13
M. HOPE BLACKLEY

all of Columbia, and Solicitor Harold W. Gowdy, III,
of Spartanburg, for Respondent.

PER CURIAM: Larry Brent Horton appeals his murder conviction and life imprisonment sentence, arguing the trial court erred in refusing to charge the jury on voluntary manslaughter. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. In determining whether voluntary manslaughter should be charged as a lesser offense of murder, the court must view the evidence in the light most favorable to the defendant. The charge need not be given where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. We therefore review the evidence in the light most favorable to appellant, mindful that the charge request is properly rejected only where there is no evidence whatsoever of the lesser offense.") (internal citations and quotations omitted); State v. Smith, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005) ("Both heat of passion and sufficient legal provocation must be present at the time of the killing. The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.") (quoting State v. Cooley, 342 S.C. 63, 67, 563 S.E.2d 666, 668 (2000)).

AFFIRMED.

FEW, C.J., HUFF and GEATHERS, JJ., concur.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JAN 17 PM 3:13
M. HOPE BLACKLEY

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

Am

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
	)	2013-CP-42-0007
Larry Brent Horton, #329065,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed on January 2, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the February 2008 term of the Spartanburg County Grand Jury for murder (2008-GS-42-0950). The Applicant was represented by Richard W. Vieth, Esquire. On June 16-18, 2008, the Applicant proceeded to trial, where he was convicted by a jury. The Honorable J. Derham Cole sentenced the Applicant to life without the possibility of parole.

A timely notice of appeal and brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Horton, Op. No. 2010-UP-406 (filed September 16, 2010). The South Carolina Court of Appeals also denied the Applicant's Petition for Rehearing on October 29, 2010. Applicant then filed Petition for Writ of Certiorari, which was denied on January 11, 2012. The Remittitur was returned on January 13, 2012.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- a. Ineffective assistance of counsel, in that;
 - i. Counsel failed to object to testimony of Anthony Sellers when this witness' entire testimony was inadmissible and prejudicial hearsay,
 - ii. Counsel failed to cross-examine the State's witnesses to reveal evidence which would mitigate the offense from murder to voluntary manslaughter,
 - iii. Counsel failed to present available evidence of the victim's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
 - iv. Counsel failed to present available evidence of Applicant's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
 - v. Counsel undermined the credibility of the defense when he told jurors during his closing argument that they should question the credibility of the Applicant and his witnesses,
 - vi. Counsel failed to effectively argue the facts and existing law so that the trial court would instruct the jurors about the law of voluntary manslaughter,
 - vii. Counsel failed to object to the trial court's erroneous jury instruction on malice aforethought,

- viii. Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice,
- ix. Counsel failed to object to the trial court's refusal to consider any evidence or circumstances that would mitigate the punishment,
- b. Ineffective assistance of appellate counsel, in that;
 - i. Appellate Counsel failed to argue that the trial court erred by not admitting evidence of the victim's state of mind that was relevant to mitigate the offense from murder to voluntary manslaughter,
 - ii. Appellate Counsel failed to effectively argue the facts and existing law to show that the trial court erroneously failed to instruct the jurors about the law of voluntary manslaughter,
 - iii. Appellate Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813. Respondent notes that it appears the Applicant appeared and pled guilty voluntarily without the assistance of counsel.

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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant has also alleged ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain

issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

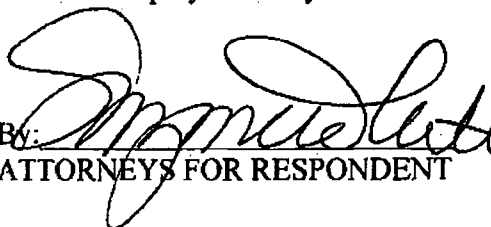
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

March 19, 2014.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 MAR 21 AM 8:51
M. HOPE BLACKLEY

1 STATE OF SOUTH CAROLINA }
2 COUNTY OF SPARTANBURG } COURT OF COMMON PLEAS NONJURY

3
4 LARRY BRENT HORTON,)
5 APPLICANT,)
6 VS.)
7 STATE OF SOUTH CAROLINA,)
8 DEFENDANT.)

TRANSCRIPT
OF
RECORD
2013-CP-42-0007

9
10 March 25th, 2015
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge.

15 A P P E A R A N C E S:

16 C. RAUCH WISE and CHARLES GROSS
17 ESQ.
18 Attorney for the Applicant

19 SUZANNE H. WHITE
20 ASSISTANT ATTORNEY GENERAL
21 Attorney for the Defendant

22
23 PAMELA E. GREEN
24 Circuit Court Reporter
25 Seventh Judicial Circuit

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E X H I B I T S

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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I'll ask the State to tell me the status of the case.

This is Case Number 2013-CP-42-0007. Mr. Horton is
presented today by Mr. Rauch Wise and Mr. Charles Gross.

There was an appeal filed. The South Carolina Court of Appeals affirmed the conviction and sentence. There was a motion for rehearing, and then a subsequent Petition for Writ of Cert to the South Carolina Supreme Court. That was denied and the remittitur was returned January 13th, 2012.

THE COURT: All right.

1 MS. WHITE: And so I will turn it over to Mr. Rauch
2 Wise at this point or Mr. Gross.
3 MR. WISE: Mr. Gross.
4 MR. GROSS: Okay.
5 THE COURT: Yes, sir.
6 MR. GROSS: Your Honor, if you look at Paragraph 11-A,
7 we're going to---
8 THE COURT: That's in the application?
9 MR. GROSS: Yes, sir.
10 THE COURT: Yes, sir.
11 MR. GROSS: We are proceeding on number one regarding
12 Tony Sellers. We would ask to amend that also, in addition
13 to the hearsay, to also encompass the confrontation clauses
14 of the South Carolina and the United States Constitutions.
15 I think all that does is add a legal argument. It doesn't
16 change any of the factual issues.
17 Number 2 we are abandoning.
18 Number---
19 THE COURT: When you say Number 2, under 11?
20 MR. GROSS: 11-A-2, yes, sir.
21 THE COURT: Thank you.
22 MR. GROSS: And 11-A-3 and---
23 THE COURT: All right.
24 MR. GROSS: ---11-A-4.
25 THE COURT: Okay.

1 MR. GROSS: We are proceeding on 11-A-5, 6, 7, and 8.

2 THE COURT: All right.

3 MR. GROSS: So, all those remain and some of those are,
4 are related issues. So, they're just spelled out
5 separately.

6 11-B-1 and 2, we abandoning the sentencing arguments.

7 11-C regarding appellate counsel, we are abandoning
8 11-C-1, but we are proceeding on 11-C-2 and 3. And we would
9 also want to amend to add a, a cumulative error argument
10 should the Court decide that there was more than one
11 ineffectiveness and those combined to potentially change the
12 outcome.

13 THE COURT: All right.

14 MR. GROSS: And, again, that just adds legal argument.
15 I don't think it changes the overall picture very much as
16 far as -- as what the State was on notice of.

17 THE COURT: Okay. Anything further before we begin?

18 MR. GROSS: Well, this is where it gets a little
19 interesting, Judge.

20 The -- these arguments -- all of what we've now
21 narrowed it down to are actually matters that are on the
22 record. For example, with regarding -- turn back the page.

23 11-A-1, failure to object to the testimony of Anthony
24 Sellers, hearsay, confrontation clause issues, all he
25 testified about was a conversation that he had with the

1 decedent earlier in the day. That does not fit under any
2 exceptions to the hearsay rule. We can not see any
3 reasonable reason not to have objected to that. We believe
4 that that is just simply a matter of law.

5 With regards to 11-A-5, regarding the closing argument,
6 there was actually a number of times in the closing argument
7 that Mr. Vieth said that they didn't have to believe Brent
8 Horton when he said he had amnesia. They didn't have to
9 believe any of the witnesses that they presented, that the
10 credibility of his mother was legitimately attacked by the
11 solicitor, that the cross-examination of his expert was
12 persuasive even to him. Again, we think these are all
13 objective and come down to a matter of law.

14 There's no reasonable justification for a lawyer to
15 undercut the defense presented by witnesses or testimony of
16 his client in closing, and we think that can be determined
17 from the record.

18 With regards to six, seven, and eight, these have to do
19 with the instructions on murder and the instructions on
20 manslaughter that was not given. Again, I think a lot of
21 this can be determined from the record.

22 There was testimony from a police officer that Brent
23 had made a statement about both he and his wife, Erica,
24 hitting each other. There was also testimony from Brent
25 about his wife throwing a object at him before he ate lunch

1 towards her.

2 We believe both of those are evidence of provocation.
3 When, when the charge conference was argued, trial counsel
4 did not cite either of those. He said there was some
5 fighting, but Solicitor Gowdy equated fighting with fussing.
6 There was also testimony about fussing. But we think the,
7 the failure of trial counsel to argue the facts that were
8 actually in evidence in the charge conference, combined with
9 the inadmissible evidence of Tony Sellers, is what persuaded
10 the judge not to give the manslaughter instructions, and,
11 again, we think this can be determined on the record.

12 As far as the, the malice and absence of malice and the
13 issue of premeditation, we -- in a minute I have some cases
14 that we're gonna hand up. There was existing case law at
15 the time that talked about what, what could -- and I think
16 Mr. Wise would probably address a little bit in a minute
17 about the reasonable -- what is reasonable provocation.
18 Judge Cole said he didn't find any provocation.

19 In addition to the two things I talked about a minute
20 ago, there was also testimony -- well, from a 9-1-1 call
21 that was entered into evidence that Erica was gonna take his
22 children, which was argued by the State as motive for murder
23 when you look at the cases that deal with what could
24 constitute reasonable, reasonable provocation, and some of
25 the cases that say -- that are still good law, that have

1 never been overruled. I realize they're not in your charge
2 book that comes to you from Court Administration, but
3 there's case law that's not been overruled that's been cited
4 as recently as 2003 that says voluntary manslaughter is the
5 absence of malice or premeditation, and that was, likewise,
6 not argued in the trial or on appeal.

7 And then when you look at what we're proceeding with
8 regarding appellate counsel, numbers two and number three,
9 they -- the, the, the brief -- the, the -- I guess you could
10 say that they mastered the word brief.

11 The argument in the brief is actually only one page,
12 and, you know, I've known Mr. Savitz for a long time. I
13 consider him a friend. But I know, towards the end of his
14 career, he was getting criticized by the Appellate Courts
15 for writing briefs that were too brief. And none of the
16 legal arguments that we feel that trial counsel and
17 appellate counsel could of made are cited in the record.

18 So, this is a long way to say that I think we're
19 probably in a position where this could probably be decided
20 on a review of the record and by the parties submitting
21 briefs or proposed orders.

22 I don't know that there's much that -- well, there's
23 nothing that Mr. Horton can add to it. He's not gonna be a
24 witness.

25 The only possible witness would be Mr. Vieth, but we

1 feel like that some of this is just a matter -- like
2 Mr. Sellers testimony would come in or not come in. It's
3 clear on the record there was no objection to it. It's
4 clear on the record that the State built their case around
5 that, and the trial would have been different had that not
6 come in.

7 Also, you can look at the evidence and you can look at
8 the arguments that were made in the charge conference, and,
9 and determine whether that issue was presented and whether
10 or not, you know, objectively Mr. Vieth undermined the
11 credibility of Mr. Horton and the defense when he made his
12 closing argument.

13 And, at, at this time, and we can, you know, submit a
14 cover page later, but I have a, a booklet with nine cases
15 that we've prepared that I would just like to hand up for
16 the Court's review.

17 Yeah, we have an extra copy. We'll give y'all two.

18 THE COURT: Thank you.

19 MR. GROSS: There you go.

20 THE COURT: So, you're proposing to decide the case
21 based on the---

22 MR. GROSS: I'm sorry?

23 THE COURT: You're proposing that the Court decide the
24 case based on the record?

25 MR. GROSS: Proposing the Court decide the case based

1 on the record and perhaps to have the sides brief it or
2 submit proposed orders with their different positions
3 outlined so you would have that as a go by when you're
4 deciding how to, you know, view the record.

5 THE COURT: Hear from the State.

6 MS. WHITE: Thank you, Your Honor.

7 Obviously, this is something new. This would be a new
8 concept, I guess, for me, but, you know, if they don't want
9 to present from their, their client, that's fine. The State
10 would actually want to present some testimony from Mr. Vieth
11 as regards to his conversations with the client and
12 discussions of trial strategy and things.

13 THE COURT: All right. Are you prepared to do that at
14 this time?

15 MS. WHITE: Yes, sir.

16 THE COURT: All right. You may proceed.

17 MS. WHITE: The State would call Rick Vieth.

18 THE COURT: All right. Come forward and be sworn
19 please.

20 RICHARD VIETH, being first duly
21 sworn, testified as follows:

22 THE COURT: Have a seat.

23 (Witness complies.)

24 THE COURT: Your witness, Ms. White.

25 MS. WHITE: Thank you, Your Honor.

1 DIRECT EXAMINATION

2 BY MS. WHITE:

3 Q Mr. Vieth, if you can, I'm just gonna ask you some
4 background questions.

5 You represented Mr. Horton at this trial in 2008?

6 A That's correct.

7 Q Were you retained or appointed?

8 A I was retained by his parents.

9 Q Okay. And, at that time, I always hate to ask this
10 question, but how long have you been practicing law?

11 A I started practicing law actually in 1976.

12 Q Okay. And, during the majority of your time in your
13 practice, have you handled mostly criminal, civil, a mix?

14 A It was a mix. Seven years I spent in the solicitor's
15 office, and then left there in '84. And still our firm has
16 been together since then, and I'd say probably 40-percent,
17 50-percent's criminal, and then domestic, civil litigation
18 comprises generally the whole practice.

19 Q And in the range of cases you've done in criminal
20 cases, is it misdemeanor to felony?

21 Is it death penalty?

22 Can you give me kind of an idea of the seriousness?

23 A I've done six or seven death penalty cases, not all
24 went to trial, but I did have the trial with probably the
25 second or third only federal death penalty case in the State

Richard Vieth - Direct examination
by Ms. White

1 with a guy named Eric Hans. Burned down a Comfort Inn in
2 Greenville. I've had several death penalty cases here, and
3 I've represented death penalty in PCRs. So -- and I've done
4 a lot of criminal work period. I don't know what's the
5 category of felony versus misdemeanor, but I've done plenty
6 of criminal work.

7 Q Okay. Obviously, this was a -- kind of a, a unique
8 case, I guess, in the factual situation?

9 A Most unique case I've had.

10 Q Okay. And how long were you representing Mr. Horton
11 before you went to trial?

12 Do you recall what length of time?

13 A No, I really don't. I can -- I brought my file. I can
14 see when I was retained, but we were in it for shortly after
15 he was arrested.

16 Q Okay. And did you have opportunities, obviously, to go
17 speak with him throughout the time?

18 Did he stay -- was he incarcerated the entire time?

19 A He was incarcerated the entire time.

20 Q Okay. Did you meet with him at the jail?

21 A I did.

22 Q And did you have a chance to discuss with him his side
23 of the story?

24 A I did.

25 Q And without -- we don't have to go into great detail,

1 but what was, what was the defense, I guess, that, that you
2 kind of initially were brought?

3 A Right. The initial meeting that I had with Brent was
4 that he told me, and I, you know, as a -- it's one of those
5 situations that you wasn't expecting to hear what you heard,
6 and that was that he -- his wife was into witchcraft and
7 demonic possession, and that she was able to transfer the
8 demonic, either possession or, or put the demon into him to
9 take her life because she didn't have the nerve to take her
10 own life even though she had made attempts to do so.

11 And so demonic possession certainly was not anything
12 that I knew was a legitimate defense at that time, but the
13 more I got involved in it, and the more I tried to research
14 it, the more I was -- I could of been convinced that
15 something like that could happen, especially with some of
16 the testimony we took in that trial outside the presence of
17 the jury.

18 Essentially, we had to try two cases. We had to try
19 the case of which evidence Judge Cole allowed, which was
20 just the normal evidence that you see in a case, and then I
21 had to try my demonic possession case outside the presence
22 of the jury, which included a pastor with his church and
23 other people that were willing to testify as to potential
24 demonic possession, including even putting the Bible in
25 evidence to say that there are demons in the Bible.

1 And so, it was an interesting, interesting case, and
2 the problem with us was that he had -- that Brent had
3 amnesia as to the actual incident that took place. And
4 the -- to me, the most blood curdling 9-1-1 call I've ever
5 heard saying that he thinks he has killed his wife, and I
6 think that tape, in and of itself, in my mind, showed that
7 he did not do this, in my mind, maliciously. I don't think
8 I've ever heard a tape that is almost like saying what have
9 I done, I don't know that this ever happened, and that's
10 where the demonic possession issue came in, and -- but I
11 couldn't get any of that evidence in, and that was the
12 frustrating part of it cause, other than that, with a client
13 that has amnesia, but certainly was competent, I never had a
14 problem communicating with him or talking to him, it was a
15 frustrating case for, for -- I could not put up evidence of
16 self-defense cause he couldn't testify that it happened. I
17 couldn't put up testimony that she came after him with a
18 gun, a knife, or anything cause he couldn't testify. And,
19 of course, she's deceased.

20 So, it was a sad case because I really truly like his
21 family. Wish it had been somewhere I could of done better,
22 but it is what it is.

23 Q And going back to what you mentioned in trying the two
24 cases, you said one before the jury and one outside the
25 presence.

1 So, did you proffer testimony?

2 A Oh, yes. Proffered testimony from Brent, from
3 relatives of his, from a pastor of the church that testified
4 about the conduct of his wife, how she would literally get
5 up from one end of the church pew to another at times, and
6 he asked her, when they were leaving the church, why did she
7 move and she said she could feel the devil in someone
8 sitting beside her and she got up and left.

9 We had a preacher that testified that he had been in, I
10 think, West Africa and had done like missionary type work,
11 and while there preaching the Bible, a lay -- a Jamaican
12 woman, and his wife was Jamaican, and a Jamaican woman comes
13 up, stands in front of him, and with both feet on the
14 ground, actually bent her head backwards and touched the
15 ground without lifting her feet, and then came back and did
16 it the other way, and then kind of had convulsions, and then
17 some power actually lifted her off the ground and slammed
18 into the back of the wall, and later she said his sermon or
19 something exercised that demon.

20 I heard all this and this gets to be whether or not
21 that could ever be a defense. I even emailed the South
22 Carolina Defense Bar that we have and asked all these people
23 down in Beaufort, that's got roots and things of that
24 nature, is there anything I can do to make this a defense.
25 So, it was quite interesting and all that was proffered.

Richard Vieth - Direct examination
by Ms. White

1 Q Okay. And, in fact, that was raised pretrial as well.

2 Is that right?

3 A That I couldn't bring it, right.

4 Q Right.

5 A Pretrial by Mr. Gowdy, yes.

6 Q All right. And so the judge would not allow it, but
7 you did proffer it in case -- for appeal it was presented?

8 A That's correct.

9 Q Okay. You also did some pretrial motions on mentions
10 of drugs and alcohol.

11 Is that right?

12 A I think so. I think there was forensic -- I think
13 there was something about maybe both of them had traces of
14 cocaine or something in them, but I think Gowdy and I talked
15 about that. Says we're not alleging that it impacted either
16 one of the two, and we just both, I think, just elected not
17 to even bring it up.

18 Q Okay. In regards -- there was also a statement too,
19 and I'll get past the pretrial, that was raised as to the
20 voluntariness of that.

21 Is that correct?

22 Do you remember that?

23 A You mean the drug stuff?

24 Q No, a Jackson v. Denno. Y'all had a Jackson v. Denno.

25 A Oh, yeah, we did have a Jackson v. Denno hearing.

1 That's correct.

2 Q Okay. And was his statement ruled voluntary?

3 A Yes, it was.

4 Q Okay.

5 A And, again, it's because of the amnesia. You got to
6 understand, I'm bootstrapped there. I couldn't have him
7 testify it wasn't cause he said he didn't even remember
8 doing it.

9 Q In your mind, in preparing for this case, there was no
10 question of third party guilt?

11 I mean the, the applicant admitted---

12 A There was.

13 Q ---as much as he could obviously with amnesia?

14 A Right. I glanced at the file last night in my opening
15 statement, and said it was not a who done it case and it
16 wasn't.

17 Q And so, in preparing for this, what was your main
18 thought in regards to a strategy?

19 A My main thought, from the, from the get go, even trying
20 to work with Trey early on, is could we get a plea to
21 voluntary manslaughter. I mean I had to do something to get
22 to voluntary. I was not gonna get a not guilty. I had no
23 insanity issues, and I mean I -- at least I'm convinced I
24 didn't. I don't think -- I mean anyone that I sent him to.
25 I think Jim Evans looked at him, a psychologist. I had

1 Margaret Melikian, a psychiatrist, testify.

2 So, the issue, to me, was, if I wasn't gonna get in
3 demonic possession as some type of, of defense, and I think
4 the DSM, I asked Margaret Melikian was there anything like
5 that in the DSM, and, of course, there's not. So, I just
6 had a -- I just had a frustrating time. I tried to make
7 law, I guess, is what I'm trying to do and say, if you can
8 actually prove demonic possession, it ought to be a defense.
9 But, failing that, it was voluntary manslaughter all the
10 way. No question.

11 And we, we tried to do that pretrial, you know, just in
12 emails between me and Gowdy, would they accept a plea to 30
13 years or manslaughter, and I think the family of the
14 deceased wouldn't have anything to do with plea bargaining
15 it down.

16 Q Okay. So, you proceeded to trial.

17 The first allegation that the applicant's raised has to
18 do with the testimony of Anthony Sellers.

19 A Uh-huh. (Affirmative).

20 Q And Mr. Sellers, I believe, had been a co-worker?

21 A Right.

22 Q Do you recall that testimony?

23 A I do. After I refreshed my memory reading it, I do
24 remember it. This mainly about whether -- I think there was
25 several phone calls made, whether she could come back to

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1 work, and I think one of the phone calls was that she said
2 that Brent had "beat her ass," something like that, which
3 was the evening of the episode that led to his charges.

4 Q And the phone calls that he testified about, were those
5 through a period of time?

6 Was it all that night of the incident.

7 Was -- do you recall?

8 A No, I remember most of them were during that night of
9 the incident, but there may of been others. But -- and I
10 understand that the hearsay, I let that in, her saying that
11 he had beat her ass. I don't know whether they had an
12 affair or not, and I'm not sure if I was even trying to find
13 out for sure if they did, the Toyota guy and her. But they
14 had had relationship of some kind, a very close
15 employer/employee relationship, if nothing else, put it that
16 way, but I think he was talking to her when she was in
17 Beaufort at one point.

18 But, but the -- again, I couldn't get in, through my
19 client, what happened that night in that major range. Now,
20 there was a lot of things he could testify to before the,
21 before the amnesia hit. But my argument, in closing, was
22 why would a person that "got her ass beat" go back to the
23 house unless she intended to harm him or do some bodily harm
24 to him.

25 why would she have children?

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1 why would she go to Mr. and Mrs. Horton's house and say
2 he's kicked me out of the house, and they be able to testify
3 that they didn't see any bruises on her. And, yet, she goes
4 there and says he's kicked me out of the house, and they
5 said you want to stay here, and she says no, I got a place
6 to stay in Greenville, and recommended that they go get the
7 children.

8 And why would she want them to get the children out of
9 there, and then her say she's gotten her ass kicked just to
10 go back around ten o'clock or something at night, 10:30 at
11 night, whenever it was, unless she intended to do bodily
12 harm?

13 And that was the motive to say you don't get your tail
14 kicked and not call the police if you want to go back to the
15 house to pick up some jewelry. I mean that doesn't make any
16 sense to me, and that was the reason that I felt it relevant
17 to let it in because it was gonna be the best argument I
18 could make to say why in the world would she go back there
19 under the guise of having to beat up, telling her mom and
20 dad she's been beat up or his mom and dad when they didn't
21 see any bruises, get the kids out of harms way cause I'm
22 gonna go back over there.

23 She did go back over there, and, within minutes,
24 there's a fight, obviously, and a killing and someone's
25 died.

1 So, that was the -- that was what I was hoping to
2 convey to the jury in closing arguments as to why she, why I
3 let that in.

4 Q So, the timeline in this case was kind of an issue with
5 phone calls and, and where she had been at what time and the
6 time length I guess between visits---

7 A Sure.

8 Q ---versus the killing?

9 A Right.

10 Q Okay. And, Mr. Sellers, you did -- you cross-examined
11 her -- him about a possible relationship---

12 A I'm sure I did.

13 Q ---with the victim?

14 And so was that -- what was the thought process with
15 that in regards to --?

16 A Well, probably just to say that he wouldn't -- he, you
17 know, he's got a reason to lie for her, to, to -- it wasn't
18 anything to attack him, him about what happened at the home
19 that night. So, I didn't really care what he was gonna say
20 because I was gonna use it to say they had a relationship.

21 I mean -- and, you know, so I -- he wasn't gonna hurt
22 me as far as what he said, but the hearsay, I think, at
23 least I assume that's what the argument is, I shouldn't of
24 let her say that he kicked her ass or something like that,
25 but -- and that -- maybe that's true. And, if so, I hope he

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1 gets a new trial on it if I made a mistake.

2 Q Okay. And you did present testimony from both the
3 applicant's mom and dad?

4 A Yes, I did.

5 Q And were they the ones that had seen the victim that
6 night --

7 A Yes.

8 Q -- prior to?

9 A They did.

10 Q And you testified, I think a few minutes earlier, that
11 their testimony was that they saw no bruises, no indication
12 of---

13 A As I recall, that's exactly right, that she goes over
14 and says I've been kicked out or something about like that,
15 I'm going -- got a place -- cause they, I think, asked her
16 if she wanted to stay there. I may be wrong. I've read
17 this transcript briefly last night to refresh my memory.
18 And she said I had a place to go in Greenville, and it
19 seemed like we were looking for cell phone records to see if
20 she had even contacted anyone in Greenville and she had not.
21 So, we were gonna have that as a credibility issue that
22 she had no intention of going to live with someone in
23 Greenville. Maybe she was gonna go stay with Anthony
24 sellers or something like that.

25 Q Looking at the other allegations, and I'm gonna try to

1 look back and see which ones we're going -- make sure I
2 don't skip on the right ones.

3 One of the things that was mentioned was closing
4 argument, and the fact that, during your closing argument,
5 you said some things to the jurors about you can consider
6 whether he's lying as he took the stand. You can decide if
7 he was lying when he talked to me, and that's why you're
8 jurors.

9 Was there a thought process behind that?

10 A I guess that's just my mannerisms sometimes. I know a
11 judge is going to tell a jury you can believe one over many
12 or many over one, and I know, you know, everybody's
13 credibility is an issue. So, I just tried, sometimes in
14 front of jurors, to, to be more down to earth with them and
15 say look, you can believe anybody you want. If you don't
16 want to believe my client, you don't have to. If you don't
17 want to believe so and so, you don't have to.

18 It's not to say he, he's not believable. I'm just
19 trying to almost reinforce that the weight of credibility is
20 on your shoulders. Not mine, not the Judge's, and, and so,
21 it's -- maybe it's an -- maybe it's not the right way to
22 handle it, but I try to do it that way in a way that a jury
23 knows I'm not trying to blow smoke at them. I'm trying to
24 say if you don't want to believe my guy, don't, but let me
25 tell you why I think the way I do.

1 Q Okay. In regards to voluntary manslaughter---

2 A Yeah.

3 Q ---obviously you said that was kind of the push. We
4 knew or you knew not, not guilty was probably not gonna be
5 an option.

6 What evidence did you think you had to present that
7 would mitigate this to a involuntary manslaughter?

8 A Well, I can tell you a little bit. I don't know what
9 the Appellate Court did. I, I felt, if I can just have the
10 floor and tell you some of this cause I mean I really
11 believe this, that, and, and the Court here does not know
12 the facts of this case, but when I met with Brent and I
13 found out corroboration that his wife, about a month
14 earlier, had gone -- they had separated. He had gone to
15 Beaufort. She had gone to Beaufort where she was from in
16 that area.

17 She had gone down there and they were separated, and
18 they're talking to each other trying to reconcile the
19 marriage, and, at some point, she tells Brent that she's
20 very depressed, wants to take her own life, and that's not
21 hearsay. That's corroborated by police incident reports
22 down in Beaufort.

23 So, Brent calls down there and says will you mind going
24 checking on my wife because I think she's trying to maybe
25 commit suicide, kill herself. So, they go out there, find

1 her. She says she's depressed, got multiple sclerosis,
2 can't take care of her children, and, in a form or fashion,
3 says I'm kind of ready to end it all. They take her to a
4 facility to get some help, and my argument would be why in
5 the world would Brent Horton give a flip about her killing
6 herself if he didn't care, and that -- that's only a month
7 before this incident took place.

8 So, I wanted to get that evidence in, and, of course,
9 Judge Cole heard us on motions on it. Said I think that's
10 not relevant and that, you know, you could be married 30
11 years and then kill someone in a minute, and that you can't
12 say because you were happy 30 years that this ought to come
13 into evidence, but, in this situation, when I'm looking for
14 voluntary, not to say it didn't happen, I'm just trying to
15 say that there was no premeditation, no malice aforethought,
16 when you look at the big picture if he were separated, and
17 want to get rid of her, why not let her take her own life
18 down in Beaufort instead of trying to save her life.

19 So, that was one issue that I felt should of come in.
20 I don't know why the Appellate Courts or whatever -- I mean
21 it's Rick Vieth on why it should of come in, but I wish it
22 had of.

23 The other things were that, that -- just what I said.

24 Why would she come back in harms way after she's
25 allegedly been beat up unless she was just upset coming back

1 to kill him, and she could of come in there. He was in
2 pajamas getting ready to go to bed, had to get up the next
3 morning at six o'clock and go to work. It wasn't -- there
4 was no reason, rhyme or reason why he's in a mood to try to
5 kill somebody.

6 So, something happened. Now, whether it came in and
7 she really just went to get her jewelry, and he said, you
8 know, I'm gonna take your jewelry, we don't know cause he's
9 got amnesia. It's a fact.

10 But I felt like that was relevant to get rid of the
11 kids for her to go back in harms way, and the, you know,
12 that was part of it. And then just his whole life-style.
13 He was -- he worked. They had worked that day. There was
14 just nothing to indicate an intentional killing to me.

15 Now, on the other side of the coin, I realize it's a
16 slam dunk. You got a -- what I understand a, you know, her
17 head was just hanging on by a thread. The knife (sic) had
18 been cut from ear to ear. It's brutal. I'm knocked out and
19 all that.

20 So, from a prosecutor's side, I understand where they
21 are, but that 9-1-1 tape, I'll never forgot as long as I
22 practice law, that tape does not indicate to me someone
23 who's a murderer. There's -- something happened. whether
24 it's demonic possession. He snapped out of it. whether he
25 just went into a trance because of the trauma that was done

1 that day, and, and, something happened, coupled with the
2 Beaufort episode, why he would just kill her in pajamas at
3 home ready to go to work.

4 So, I did -- it was frustrating not being able to get a
5 voluntary charge out of that.

6 Q And I know I might, I might be repeating myself, I
7 guess.

8 When we were talking about evidence, there was a brief,
9 I guess, bit of testimony that maybe he thought she was
10 throwing something at him or turned to throw something at
11 him.

12 A Right.

13 Q And that was pretty much the only testimony that the
14 Applicant had from the time, I guess, of the incident and
15 on.

16 Is that right?

17 A Right. Yeah, just he thought maybe she had turned and
18 thrown something it seems like, and that was about -- yeah,
19 I didn't have any concrete evidence to work with. It was
20 trying to add as many pieces to the puzzle together, 9-1-1
21 tape, the Beaufort thing, her coming back when the kids are
22 gone, all that together, was just a -- something happened
23 and I think -- and I asked the judge to consider charging
24 voluntary.

25 Q All right. Okay. And that evening, the testimony

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1 about whether or not there had been, you know, some kind of
2 fight or not --

3 A Right.

4 Q -- when you argued that to the judge, as a way of
5 getting -- trying to get voluntary for a jury charge, what
6 was -- do you recall what his response was?

7 A No, whether it was fussing or fighting, I really don't
8 remember at the time, but, you know, the Court heard it all.
9 We argued -- you know, we argued for it, but I don't
10 remember in detail the argument I made on that.

11 Q Do you recall discussing with the judge, I guess, in
12 argument with Mr. Gowdy as to whether or not there was
13 either a heat of passion or legal provocation and how that
14 played into it?

15 A Well, that would be a problem cause I couldn't argue
16 it. I didn't have anything. That was the -- that was my
17 argument to the, to a, to a jury. It's not a legal
18 argument. A factual argument where, where Mr. Gowdy was
19 saying how a coincident -- how, how convenient it is for
20 Brent to have memory losses at a -- one time, but can
21 remember everything else. So, he's trying to show Brent as
22 being a malingerer, that he's just making this up.

23 I'm telling the jury that it's hurting me. It's the --
24 you know, if I had a client and we want to get up and say
25 she came at me with a switch blade knife and lie under oath,

1 we could of had it.

2 So, I've got a client that's being truthful, whose got
3 amnesia, and we're not making up a story. If we were gonna
4 make up a story where his life's on the line, we would of
5 just made up something. She came at me with a gun. She did
6 this or did that.

7 So, it's frustrating I didn't have him being able to
8 tell me what happened, but it was equally, I think, as
9 important to convict -- tell that jury that amnesia was
10 hurting me more than it was hurting the State. That's for
11 sure, and that's, that's really for sure.

12 Q You mentioned the 9-1-1 tape.

13 Was that introduced at trial?

14 A Oh, yes. Yeah, that tape was something you just don't
15 ever forget.

16 Q And in, in addition to that, did you present other
17 testimony or attempt to present other testimony, I guess, in
18 mitigation both before the guilty verdict and after?

19 A Well, afterwards, we certainly did. We had a family
20 get up and talk about him, and, of course, during, and, I
21 guess, we had Margaret Melikian, psychiatrist, testify to
22 what her observations were about amnesia and how, how it
23 could be. So -- and, and, of course, of course, we went
24 through his work and his education and so forth to show that
25 he was a good guy. I mean all intents -- all -- everything

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1 indicates he was, and we did put up mitigating factors at
2 the end of it, and I think Judge Cole said that he felt
3 sorry for both families, but he couldn't get over the
4 seriousness of the, the way the incident took place. He
5 gave a life sentence. You know, I -- it's tough, tough when
6 you're hoping 30 is plenty.

7 MS. WHITE: Just one minute briefly, Your Honor.

8 THE COURT: Yes, ma'am.

9 (Pause.)

10 MS. WHITE: Your Honor, I think that's all the
11 questions, at this time, I have.

12 THE COURT: All right. You may cross-examine.

13 MR. GROSS: Thank you, Your Honor. If it's all right,
14 I'm gonna move over here cause---

15 THE COURT: Yes, sir.

16 MR. GROSS: ---I can only see half of Mr. Vieth from
17 where I'm sitting in the corner.

18 THE COURT: That's quite all right.

19 THE WITNESS: That's probably best.

20 CROSS-EXAMINATION

21 BY MR. GROSS:

22 Q Good afternoon.

23 A Good afternoon.

24 Q Do you have your file with you?

25 A I do. I got it right there.

Richard Vieth - Cross-examination
by Mr. Gross

1 Q And do you have a copy of the transcript?

2 A I think that's the one thing I didn't bring cause I
3 didn't think I'd need the transcript.

4 Q All right.

5 MS. WHITE: I can hand that up.

6 Q Let me do this.

7 A Got it.

8 Q I'm gonna, I'm gonna get---

9 A I've had the transcript. I don't have it in here.

10 Q ---Mr. Wise's copy.

11 A Do I need all of this?

12 Q I'm not sure if you're gonna need all of it.

13 A Okay. I'll just put---

14 Q You might need---

15 A I'll put what you---

16 Q I'm gonna ask you to look for something in a minute.

17 So, I don't know which half it might be in.

18 A Let me see this.

19 Q Let's start with the transcript.

20 A Yes, sir.

21 Q Well, before, before I do that, I mean she asked you a
22 minute ago about putting up mitigation in sentencing.

23 Do you remember that question?

24 A I do.

25 Q And I think that you were trying to show that Brent was

Richard Vieth - Cross-examination
by Mr. Gross.

1 a good guy?

2 A Right.

3 Q And, in fact, I think you said that his parents are
4 good people, and, and you felt sorry for the whole family
5 when you were testifying.

6 A Sure.

7 Q And they're---

8 A Judge Cole did.

9 Q Yeah.

10 A Right.

11 Q And -- well, and I think you said earlier that you
12 thought Brent's parents were good people too?

13 A Oh, definitely.

14 Q Yeah.

15 A Definitely.

16 Q And, in fact, when you look at Brent's life, you know,
17 he was a, a worker and did have a pretty good life, and this
18 was one very tragic day in his life?

19 A Yes, sir.

20 Q All right. Now, I think that's probably what made it a
21 tragic case for you to handle as a defense lawyer?

22 A Terribly.

23 Q And I think, when you were testifying, you talked a
24 number of times about how important the voluntary
25 manslaughter concept was in this case?

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by Mr. Gross

1 A Yes, sir.

2 Q And you obviously went to great lengths to look at the
3 demonic possession?

4 A Yes, sir.

5 Q And you looked at, you know, her mental health records?

6 A Of --?

7 Q Erica's.

8 A The deceased?

9 Q The deceased, Erica.

10 A We did.

11 Q Yeah.

12 All right. And so it was important to, you know, try
13 to find whatever angle you could get to get that information
14 in the record for the judge to make that instruction?

15 A That was my certain intent.

16 Q All right. Well, what I want to do then is I want to
17 start with the charge conference.

18 A Yes, sir.

19 Q And if you could turn to Page 337 in the record cause
20 it's kind of in the middle of some testimony---

21 A Okay.

22 Q ---and some proffers and that sort of thing, and I
23 believe -- let me know if -- when you find that page number.

24 A I'm on it.

25 Q Okay. After you renewed your directed verdict motions,

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by Mr. Gross

1 Judge Cole asked if there was any jury instructions from the
2 State, right?

3 A You're on 337?

4 Q Yes, sir.

5 A Okay.

6 Q At, at Line 8 I believe.

7 A You -- okay. Yeah. Sure.

8 Q All right. And, and Solicitor Gowdy said no, but he
9 did say, right after that, that he wanted to be heard on the
10 issue of voluntary manslaughter.

11 Is that correct?

12 A Yes, sir.

13 Q So, that must of been discussed off-the-record or even
14 earlier in the record before you got to this point cause the
15 solicitor knew it was coming?

16 A Yes, sir.

17 Q All right. And so, in fact, the only charge that you
18 asked for in this case, other than standard charges, was for
19 the voluntary manslaughter?

20 A Yes, sir.

21 Q All right. And the judge wanted to know what would
22 support that instruction, right?

23 A Okay. Yes, sir.

24 Q All right. And I think the first thing that you talked
25 about, still on Page 337, is Doctor Melikian had touched on,

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by Mr. Gross

1 you know, the heat of passion aspect of what causes amnesia,
2 right?

3 A Yes, sir.

4 Q All right. And then, on the next page, 338, you go
5 into the concept of legal, legal provocation, provocation,
6 right?

7 A Okay. Yes, sir.

8 Q All right. And what you say there is that you thought
9 that an officer's testimony, and you were referring, at that
10 time, to Mr. Williams testimony that acknowledged that there
11 had been fighting?

12 A Yes, sir.

13 Q Right?

14 A Yeah, I do see that, yes, sir.

15 Q Okay. And you didn't refer to Officer Gary's
16 testimony, did you?

17 A No.

18 Q Okay. And then you, in the next paragraph, you cite
19 two cases, State versus Davis and State versus Pamela
20 Grubbs.

21 A Yes, sir.

22 Q All right. And you talk about the timeframe, right?

23 A Yes, sir.

24 Q All right. And then, when you get down to the bottom
25 of the page, you felt it necessary to address Tony Sellers

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by Mr. Gross

1 testimony going from Page 338 into 339?

2 A Right.

3 Q And, of course, Tony Sellers was the co-worker at the
4 Toyota dealership that had known Erica for some period of
5 time?

6 A That's right.

7 Q All right. And there had been calls earlier that day?

8 A Yes, sir.

9 Q And so, at this point, you were trying to explain to
10 Judge Cole why Mr. Sellers testimony should not negate the
11 voluntary manslaughter instruction?

12 A Okay.

13 Q Isn't that fair to say?

14 A Right, even if you look at his testimony.

15 Q Right.

16 A Right.

17 Q All right. Because the whole idea -- and, and you
18 would agree that you never objected to Mr. Sellers
19 testifying?

20 A I agree.

21 Q Either on hearsay grounds?

22 A Correct.

23 Q Or confrontation clause grounds?

24 A Correct.

25 Q Under the State Constitution or the Federal

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by Mr. Gross

1 Constitution?

2 A Correct.

3 Q All right. And the, the essence of his testimony,
4 other than the general, this is who I am, this is how I know
5 her, the essence of his testimony was -- is that he had
6 talked to Erica on the phone some time earlier in the
7 evening?

8 A Correct.

9 Q And that she had claimed that Brent, her husband, had
10 "beat her ass" or something to that effect?

11 A Yes, sir.

12 Q Right?

13 A Yes, sir.

14 Q And you pointed out that there was no objective
15 evidence of that from other witnesses that were there --

16 A Yes, sir.

17 Q -- that saw, that saw Erica between the, the time that
18 this should of happened and the time she was killed?

19 A That's right.

20 Q Okay. And so we don't even know if Mr. Sellers
21 testimony is true, do we?

22 A We do not. I mean---

23 Q All right. In fact, I---

24 A I mean my reaction is it's not.

25 Q All right. And then I think you, you questioned him

1 about whether or not that they had had an extra marital
2 affair and he denied that?

3 A Yes, sir.

4 Q Is that right?

5 A Right.

6 Q And you were arguing that there might be some motive
7 for him to give his testimony that essentially helped the
8 State's case?

9 A Yes, sir.

10 Q Because it helped the State's case in the ideal that,
11 earlier in the evening, there had been a fight and Brent's
12 angry and, when she comes home again, he's still angry and
13 he's gonna kill her, right?

14 A Right.

15 Q All right.

16 A That would be the State's version and I tried to twist
17 it to another version.

18 Q All right.

19 A Right.

20 Q Well, in fact, the State relied on that pretty heavily
21 in their closing argument, didn't they?

22 A If you say so. I don't remember.

23 Q We'll come back to that in a second.

24 All right. Where we've talked to now in the transcript
25 up to 339 is essentially your initial argument to Judge

1 Cole, right?

2 A Yes, sir.

3 Q Okay. And then they turn into Mr. Gowdy, Solicitor
4 Gowdy rather, and he states -- he argues against sudden heat
5 of passion and against legal provocation, doesn't he?

6 A Yes, sir.

7 Q All right. And, in fact, in the very next paragraph,
8 he raises the concept that words alone, no matter how
9 preposterous, are never sufficient legal provocation.
10 Fighting is a synonym for fussing, which is a word that is
11 used when he testified. He did not say any other word.

12 Right?

13 A Yes, sir.

14 Q Okay. Then he argues, in the final paragraph on 339,
15 the only episode of physical contact between the two of them
16 was when he got her cell phone and she tried to get it back.
17 When, as the Court knows, this is a exercise of the legal
18 right. She's entitled to use force and that that's several
19 hours early, and there was a cooling off period.

20 Right?

21 A Yes, sir.

22 Q Okay. And then the solicitor argues that Brent
23 testified he was sitting there in his pajamas and the next
24 thing he knows he's lunging at her. There is no -- where
25 there's a provocation or not, there's no sufficient legal

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by Mr. Gross

1 provocation, and, frankly, there's no evidence of sudden
2 heat or passion.

3 Right?

4 A Yes, sir.

5 Q All right. And then the, the judge, Judge Cole,
6 addresses you and says assuming that you can infer heat of
7 passion from the record, and, of course, you have a crime of
8 passion with the -- just the level of physical violence and
9 the intimacy of, of how it was accomplished.

10 Right?

11 A Yes, sir.

12 Q And you had Margaret Melikian's testimony about heat of
13 passion causing amnesia?

14 A Yes, sir.

15 Q All right.

16 A Yes, sir.

17 Q All right. So, Judge Cole almost seems to be accepting
18 that, but then he focuses you on the lack, in this case, of
19 any evidence that would support heat of passion based on the
20 legal provocation.

21 Right?

22 A Yes, sir.

23 Q And then he asked you to help him with that further.

24 Right?

25 A Yes, sir.

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by Mr. Gross

1 Q And you come back to that the officer that had been
2 talking testified about fighting.

3 Right?

4 A Yes, sir.

5 Q And, of course, you had referred earlier to Officer
6 Williams.

7 Right?

8 A Yes, sir.

9 Q And, of course, the solicitor had equated that to, to
10 fussing.

11 Right?

12 A Yes, sir.

13 Q And the judge comes right back and says but that
14 doesn't give rise to legal provocation. I'm talking about
15 legal provocation. What evidence of that. And then you say
16 I have -- on Page 341---

17 A Yes.

18 Q ---I have no pinpoint evidence because she's deceased
19 and purportedly -- he purportedly can't remember. So, you
20 don't know what happened from 10:00 to 10:30.

21 Right?

22 A Yes, sir.

23 Q Okay. Now, what I want you to do, if you could, and
24 bear with me for just a second.

25 (Pause.)

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by Mr. Gross

1 Q Okay. I want you to go to Page 126 of the transcript,
2 and this is in the testimony of William Robert Gary.
3 Investigator Gary, who is a homicide detective.

4 Right?

5 THE COURT: I'm sorry.

6 What page did you refer to?

7 MR. GROSS: Your Honor, I'm on Page 126.

8 THE COURT: Thank you.

9 MR. GROSS: And really what I'm looking at is gonna be
10 on the next page or two pages.

11 THE COURT: All right.

12 MR. GROSS: Actually it's on the next several pages.

13 But anyway, when -- basically -- and, and tell me
14 whether you remember this or not, but, Investigator Gary, I
15 mean he has a lot of experience in Spartanburg.

16 Right?

17 A Yeah. Yes, sir.

18 Q And he went to the scene where Erica was killed?

19 A Yes, sir.

20 Q And Brent was there and he Mirandized Brent?

21 A Okay.

22 Q And then he took him to the Sheriff's Department for an
23 interview and Mirandized him again?

24 A Okay.

25 Q Right?

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by Mr. Gross

1 A Yes, sir.

2 Q All right. And the -- Investigator Gary talks about
3 his conversations with Brent, right, in, in the transcript?

4 A Yes, sir.

5 Q Okay. If you go to Page 129, and we're still in this
6 line of testimony, and if you look at Lines 19 through 23,
7 there's a paragraph there.

8 Right?

9 A Yes, sir.

10 Q And you would agree that says, "and I told him, the way
11 it looked in the house, whether they got into a fight, he
12 got a knife and he hurt her, and I asked him if he could
13 tell me about what happened with that. He said they did get
14 physical and they did hit each other."

15 Do you see that?

16 A I do.

17 Q All right. And the fact that they got physical and did
18 hit, hit each other was not mentioned in the charge
19 conference that we went through a minute ago, was it?

20 A That's true.

21 MR. GROSS: Okay. Can I mark this as Applicant's
22 Exhibit 1?

23 (WHEREUPON, an investigative report was marked as
24 Applicant's Exhibit No. 1 for identification purposes only
25 at this time.)

1 Q I'm gonna show you -- just for the record, we marked
2 this on the back of the page, the second page, just because
3 there's really not room on the front page.

4 Do you recognize that as one of the investigative
5 reports that you had?

6 A I do.

7 Q All right. And so that's in your file?

8 A Yes, sir.

9 Q And that's from an Investigator Gary?

10 A Yes, sir.

11 Q All right. If you could turn to Page 2 of that.

12 A Okay.

13 Q You see where I've underlined it in blue?

14 A I do.

15 Q All right. And, in fact, there, Investigator Gary
16 reports, in that incident report, that Brent said that they
17 did hit each other?

18 A Said they did get physical and did hit each other, yes,
19 sir.

20 Q Okay. Now, I'm gonna ask that you -- we're gonna turn
21 to Brent's testimony.

22 If just bear with me a second.

23 If you could turn to Page 257?

24 A Okay.

25 Q If you look at Line 6, Brent testified she was going

1 through a drawer and turned around like she threw something
2 at me. Everything went gray and I lunged for her.

3 A Yes, sir.

4 Q Is that right?

5 A Yes, sir.

6 Q Okay. So, there was testimony, in addition to
7 Mr. Gary's testimony about them hitting on each other, there
8 was testimony about something being thrown at him?

9 A Yes, sir.

10 Q Okay. And that was not brought up in the charge
11 conference either, was it?

12 A Correct.

13 MR. GROSS: All right. Can we mark this as Applicant's
14 No. 2 please.

15 (WHEREUPON, a statement was marked as Applicant's
16 Exhibit No. 2 for identification purposes only at this
17 time.)

18 Q Okay. All right. Now, I have supplemental incident
19 report that's Applicant's Exhibit No. 2. It looks like it's
20 from -- is that Wilhire, Michael?

21 A Yeah, I guess. Yes, sir, I don't---

22 Q Okay.

23 A Michael Wilhire, yes, sir.

24 Q And, of course, there -- the, the 9-1-1 tape was, was
25 entered---

Richard Vieth - Cross-examination
by Mr. Gross

1 A Yes, sir.

2 Q ---into evidence?

3 And you thought that that indicated somebody who
4 wouldn't of had malice aforethought?

5 A Yes, sir.

6 Q Or wouldn't have premeditated a murder?

7 A Yes, sir.

8 Q That incident report where we have kind of the blue
9 mark down the side also confirms that Brent had said, to law
10 enforcement when they arrived, that she was gonna take his
11 kids away from him?

12 A That's what the report says, yes, sir.

13 Q Okay. And so both of these reports are reports that
14 you had available to you preparing for trial?

15 A Yes, sir.

16 Q Is that correct?

17 A Yes, sir, I did.

18 Q Okay. Let's go to Ms. Crick's closing argument, and,
19 of course, I think you went first and she went---

20 A Yes, sir.

21 Q ---second?

22 A Yes, sir.

23 Q And I'm looking at Page 367.

24 She doesn't mention Tony Sellers by name, but that is
25 essentially exactly where she starts, isn't it?

1 Erica Horton went back to her house on January 2nd,
2 2007---

3 A Right.

4 Q ---after her husband had already --

5 A Hit her.

6 Q -- hit her?

7 A Yes, sir.

8 Q She was planning to stay there the night or she was not
9 planning to stay there the night. The only reason she went
10 back was wanting to get a few things for the night.

11 Right?

12 A Yes, sir.

13 Q She had already arranged to get her old job back. She
14 had already arranged to stay with a friend. She was getting
15 out of a bad situation.

16 Right?

17 A That's correct.

18 Q All right. Those three paragraphs, 367, Lines three
19 through 11, is essentially a summary of what Tony Sellers
20 testified to?

21 You would agree with that?

22 A Yes, I do.

23 Q All right. And if you go -- if you start at Page 337,
24 Line 24, Ms. Crick talks about how Erica couldn't come to
25 this courtroom to take the stand to testify.

Richard Vieth - Cross-examination
by Mr. Gross

- 1 A Wait a minute.
2 What page are you on?
3 Q I'm sorry. 371.
4 A 371.
5 Q Line 24.
6 A 371.
7 24?
8 Q Yes, sir.
9 A Okay. No, Mrs. Horton -- okay.
10 Q All right. And then she starts talking about we know
11 what was going on in her mind.
12 Right?
13 A Yes, sir.
14 Q On the next page.
15 A Uh-huh. (Affirmative).
16 Yes, sir.
17 Q And it -- beginning in -- at Line 4 of 372, "she tells
18 us through her actions, and we know what was on her mind
19 because she told Tony Sellers on the telephone. I left the
20 house. He just beat my ass. I left the house. He just
21 beat my ass."
22 Right?
23 A Yes, sir.
24 Q Then they go -- she goes into getting the old job back
25 in the next paragraph beginning at Line 8.

- 1 A Yes, sir.
- 2 Q And then she goes into, in the next paragraph,
3 beginning on Line 12, about not intending to reconcile.
4 Right?
- 5 A Yes, sir.
- 6 Q And then, at Line 19, why she went back to the house.
7 Right?
- 8 A Correct.
- 9 Q All right. So, essentially, Ms. Crick built a good bit
10 of her closing argument around Mr. Sellers testimony?
- 11 A Yes, sir.
- 12 Q Okay. Now, you had, I believe, testified earlier that
13 you wanted to suggest that the reason, to the jury, that the
14 reason that Mr. Horton, or, I'm sorry, the reason that Erica
15 went back was because she was intending to harm Mr. Horton,
16 Brent Horton?
- 17 A A definite inference---
- 18 Q All right.
- 19 A ---to that being true, yes, sir.
- 20 Q All right. Well, you, you say inference. There,
21 there, there -- there's no hard evidence of that anywhere,
22 is there?
- 23 A No, sir.
- 24 Q All right. We could go through your file and, and
25 there's not a statement from any witness to that effect?

1 A Correct.

2 Q Right?

3 A Correct.

4 Q Mr. Sellers, in his hearsay testimony or testimony
5 about the hearsay conversation, doesn't say Erica told me
6 I'm gonna go back there and harm Brent?

7 No?

8 A No.

9 Q All right. I've looked at your closing argument, and,
10 of course, the judge is gonna have that, and I see in there,
11 around Page 353 at Line 4, going over to 355, Line 17, at
12 least---

13 A Uh-huh. (Affirmative).

14 Q ---where you spend three pages talking about Tony
15 Sellers.

16 Now, it seems to me that you're suggesting that there,
17 there -- that he could have a motive because of a
18 relationship or a close friendship or something like that.

19 Right?

20 A Yes, sir.

21 Q But I don't see where you directly argue to those
22 jurors that there's an inference that Erica was going there
23 to harm Brent.

24 A I -- I'd have to look at it.

25 Q Well, take your time.

1 A I'm not saying that -- I'm saying why -- let's see.

2 All right. And I'm just glancing right now, but on
3 Line 18 of 355, I say now, those -- okay. Let's go back to
4 fourteen. She's telling somebody, Tony Sellers, I've been
5 beaten up, and the first time Tony hears it is after a 224
6 second phone call earlier where she never mentions it.

7 Now, those are credibility issues. So, it begs to me,
8 when I first got involved in this thing and I heard about
9 this, I'm sitting there saying why would she go back to that
10 house. Why would she go back there if she just beat --
11 gotten beaten up without a cop to get some necklaces. It
12 just doesn't have the truth to it. Something is wrong.

13 Q Right.

14 A And that's what I'm trying to say, what is---

15 Q Well -- and the truth is is that she didn't get beat
16 up.

17 A That's exactly right.

18 Q And, and, and there was no forensic evidence to suggest
19 that she been beaten up earlier in the day?

20 A And---

21 Q Right?

22 A And the parents corroborate she didn't get beat up.

23 Q All right. So, I mean, I mean, in all probability,
24 what Tony Sellers is saying is not true?

25 A That's precisely right.

1 Q All right. And a way to keep the jury from hearing
2 about this motive or, or this earlier confrontation that
3 solicitor Crick built her closing argument around is just to
4 keep it out of the trial all together.

5 You would agree with that?

6 A Sure. I've got no problem with that.

7 Q Yeah.

8 All right. Now, let's see. Let's stay in your closing
9 argument for a second.

10 A Sure.

11 Q Well, actually, before we do that, let's go back to
12 solicitor Crick's closing argument.

13 Have you had a chance to look at that?

14 A I, I looked at it now with you. I don't remember
15 looking at it last night.

16 Q Okay.

17 A I'm sure I glanced. You know, I took it home and
18 looked at it for sure to get familiar with it as best I
19 could with it.

20 Q Uh-huh. (Affirmative).

21 I beg, I beg the Court's indulgence for a moment.

22 THE COURT: Yes, sir.

23 (Pause.)

24 Q Okay. I'm just gonna give you one example.

25 If you go to 378, Line 23 through 25, where that

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by Mr. Gross

1 sentence begins, Solicitor Crick says "I guarantee you he
2 has not forgotten one punch, one lunge. He hasn't forgotten
3 one cut."

4 All right?

5 A I see it.

6 Q In fact, part of their case was calling into question
7 whether or not Brent had amnesia?

8 A Yes, sir.

9 Q And, of course, you had a doctor say that he did.
10 Right?

11 A Right.

12 Q And wasn't malingering?

13 A Right.

14 Q But they were trying to suggest that?

15 A Right.

16 Q And they didn't have a doctor saying that he was
17 malingering?

18 A Right.

19 Q Okay. Now, if we go back to your closing argument?
20 If you look at Page 349?

21 I told you -- I'm sorry. Line 13 through 18.

22 A Yes, sir.

23 Q I told you, in my opening statement, that the issue of
24 amnesia hurts me more than it helps me, and I realize Mr.
25 Gowdy jumped all over Doctor Melikian about amnesia, and I

1 think, after hearing Mr. Gowdy give his argument about it,
2 that there's no such thing as amnesia because it is
3 always -- would be contrived and always would be
4 malingering.

5 I mean that goes a little bit beyond just saying you've
6 got to decide who to believe or not to believe, don't you?

7 A That's going to say, if you believe Gowdy, there's no
8 such thing as amnesia.

9 Q All right. But you also say, and I think, after
10 hearing Mr. Gowdy give his argument about it, that there's
11 no such thing as amnesia?

12 A That's right.

13 Q All right.

14 A If you believe him.

15 Q So, that kind of plays into their position, which is
16 this is just all made up?

17 A Well, yeah, if that's the way that you want to take it,
18 that's fine.

19 Q Okay.

20 A That suits me.

21 Q Well -- and a, and a juror could take it that way,
22 couldn't they?

23 A Yes, sir.

24 Q All right. And if you look at---

25 A Well---

1 THE COURT: Now, I'm reading it -- the rest of the
2 context of that paragraph, and I don't---

3 A Well---

4 THE COURT: So, probably all those books ought to be
5 just erased of amnesia under that theory of
6 cross-examination. It's just a joke. I'm just reading the
7 rest of it.

8 MR. GROSS: Our position is that the juror could
9 conclude that he's saying that what his client did that---

10 THE COURT: Okay.

11 MR. GROSS: ---we said was all a joke.

12 THE COURT: Well, I understand your position.

13 Q If you look at page---

14 THE COURT: I haven't seen this before.

15 MR. GROSS: I understand.

16 THE COURT: So, I'm just trying to read in -- I didn't,
17 I didn't think the entire context was read. So --.

18 MR. GROSS: Okay.

19 THE COURT: Thank you.

20 MR. GROSS: Well, and that's why, and that's why the
21 transcript is in the record.

22 THE COURT: I will read it.

23 MR. GROSS: Yeah.

24 If you look at Page 358 at Line 8, there's some
25 questioning about or an argument about Brenda's credibility.

1 Brenda is Brent's mother.

2 Right?

3 A Correct.

4 Q All right. And you say that her credibility is gonna
5 be attacked by the solicitor's office and, rightly so,
6 because she gave a statement of minimal length about three
7 hours after she had heard of this case and didn't indicate
8 that stuff had happened.

9 Right?

10 A Yes, sir.

11 Q All right. And you do go through trying to argue for a
12 rehabilitation of that?

13 A Yes, sir.

14 Q But, but you do kind of suggest it's right for the
15 solicitor to attack her credibility because her testimony --
16 the scope of her testimony exceeded what was in her
17 statement?

18 A Sure.

19 Q Okay.

20 A Yes, sir.

21 Q Now, I think I indicated, at the very beginning, that I
22 was gonna ask you to look for something in your file.

23 A Yeah.

24 Q Do you have a copy of Glenn versus Maryland in your
25 file?

Richard Vieth - Cross-examination
by Mr. Gross

- 1 A No, sir.
- 2 Q You don't?
- 3 A I wouldn't---
- 4 Q Can you look?
- 5 A well, I, I---
- 6 Q Cause I think you do.
- 7 A Oh, do I?
- 8 well, good. I didn't know I did research.
- 9 All right. Where am I gonna find it on that?
- 10 I don't have any order to this. Okay. So, if you've
- 11 got it, and you say I've got it, I trust you on that.
- 12 Just -- I've got some cases sitting around here. Let me
- 13 see.
- 14 Q Glenn versus Maryland.
- 15 A I'll stipulate it's in there if that will help you.
- 16 Q They said it would be with this other stuff.
- 17 Okay. So, you have your cases there?
- 18 A I don't know. I've just got a witness list and case
- 19 law. Let me see what's in here. Here you go. Glenn versus
- 20 Maryland.
- 21 Q All right.
- 22 A All right.
- 23 Q All right. And so that's actually -- it's in your
- 24 notebook.
- 25 Right?

Richard Vieth - Cross-examination
by Mr. Gross

- 1 A Yes, sir.
- 2 Q All right. And that's a trial notebook.
- 3 Right?
- 4 A Yes, sir.
- 5 Q And can you just read the cite into the record?
- 6 A Let's see. It's the Court of Appeals of Maryland,
- 7 Glenn versus State of Maryland, 1607, September term 1985.
- 8 Cite is 68 Md. App at 379, 511 At. 2d at 1110.
- 9 Q All right. And do you know how you came across that
- 10 case?
- 11 You might not, but if you do---
- 12 A I really don't.
- 13 Q All right.
- 14 A It's been eight years, seven years ago. I mean I'm
- 15 sure I'm looking for it for a reason.
- 16 Q All right.
- 17 A And I can't tell you what it says now if you ask me.
- 18 Q All right.
- 19 A I'll have to go back and look at it.
- 20 Q All right. Would it refresh your memory to know that,
- 21 that that's a case where the, the Maryland Courts talked
- 22 about some myths or misconceptions dealing with the concepts
- 23 of, of malice aforethought, and premeditation, and things
- 24 like that?
- 25 A I will trust you a hundred percent on this. I'll even

1 give it to the Court to read if you---

2 Q well, and actually you were here when we handed up the
3 notebook.

4 A It's in there?

5 Q It's in there---

6 A Yes, sir, whatever.

7 Q ---in the booklet we gave His Honor.

8 A Yes, sir.

9 THE COURT: I'm there now.

10 Q All right. And did you do any research for South
11 Carolina cases that were existing law, at the time of
12 Brent's trial, that hadn't been overruled that dealt with
13 some of the concepts that that Maryland -- Glenn versus
14 Maryland case dealt with?

15 A Honestly, I'm not gonna be able to answer that
16 question. I will except that I -- if I missed something,
17 I'll accept responsibility for it.

18 MR. GROSS: Beg the Court's indulgence.

19 THE COURT: Yes, sir.

20 (Pause.)

21 MR. GROSS: And if I can have just a moment to look at
22 it?

23 We're probably gonna have one or two more questions,
24 Your Honor, but I want to look at the application.

25 THE COURT: Sure. I'll give you a minute.

1 (Pause.)

2 THE WITNESS: I do see where I highlighted some it.

3 So, I did read it.

4 Q Oh, what, what -- that was gonna be my question, if you
5 read it.

6 What did you highlight?

7 A Well, I highlighted, on Page 16, there must be -- must
8 of been adequate provocation. The killing must of been in
9 the heat of passion. There must of been a sudden heat of
10 passion. That is the killing must of followed the
11 provocation before there had been a reasonable opportunity
12 for the passion to cool. There must of been a causal
13 connection between the provocation and the passion and the
14 fatal act. That's one of the things I've highlighted in it.

15 Q Okay. If you -- would you go to Page 15---

16 A Yes, sir.

17 Q ---of that case?

18 A Okay.

19 Q You see where it says the second full truth preliminary
20 draft?

21 A Right, and I've got that in parentheses. One of the
22 component parts of malice, the absence of mitigation.

23 Is that what you're talking about?

24 Q Right.

25 And so you actually marked that?

Richard Vieth - Cross-examination
by Mr. Gross

1 A Yes, sir, I have marked that.

2 Q All right.

3 MS. WHITE: If I can just ask real quick.

4 You said Page 15.

5 Are you going on the 1, 1, 150?

6 MR. GROSS: I'm going on that.

7 MS. WHITE: Okay. I'm looking at y'all's.

8 MR. GROSS: Oh, I'm sorry.

9 MS. WHITE: So, you have that. If you---

10 THE WITNESS: Well, I think, where he's reading, is the
11 second full truth, preliminary draft.

12 Is that what you're looking at?

13 Q Right.

14 A Yeah. One of the component parts of malice, the
15 absence of mitigation is that which separates murder from
16 manslaughter.

17 Q All right.

18 A Right. Yes, sir.

19 Q And then, on the next page, they talk about the absence
20 of mitigation is that which separates murder from
21 manslaughter.

22 A Yes, sir.

23 Q All right. And do you know if they talk in there about
24 this whole concept of you can, you can have a manslaughter
25 and it be -- still be a malicious killing?

Richard Vieth - Cross-examination
by Mr. Gross

1 For example, one of the---

2 A For sure.

3 Q One of the textbook examples that we've heard forever,
4 since I've been practicing, which is starting to get up
5 there, is a person coming home and finding their spouse---

6 A Exactly.

7 Q ---in bed with somebody else. I mean if that rage and
8 that hate, I mean you're killing that sucker. You want them
9 dead.

10 There's malice there, right?

11 A Classic law school thing. Yeah, that's right.

12 Q But it's malice. There's just no premeditation.

13 A He did it on purpose.

14 Q Right. He did it on purpose. You wanted that person
15 dead.

16 But so, so the ideal of malice does actually creep into
17 what we consider as manslaughter. And so one of the
18 concepts that could separate it is, is the premeditation or
19 the absence of premeditation.

20 A Yes, sir, I'll agree with that.

21 Q All right. And, and off the top of your head, are you
22 aware of any cases where they talk or South Carolina Courts
23 talk about that manslaughter is the absence of malice or,
24 O-R, or premeditation?

25 A Well, I'm familiar with all the theories of it. I'm

Richard Vieth - Cross-examination
by Mr. Gross

1 not a teacher of lawyers. I don't remember all the case
2 names.

3 Q All right.

4 A But I know what you're talking about, yeah.

5 Q All right. But you know if there was any cases that
6 existed at the time of Brent's trial that hadn't been
7 overruled?

8 A I do not.

9 Q Okay.

10 A I do not.

11 Q Okay. All right. Are you aware that, subsequent to
12 Brent's trial, the South Carolina Supreme Court has actually
13 adopted Glenn versus Maryland very favorably and relied on
14 it?

15 A Subsequent to the trial?

16 Q Yes, sir.

17 A And that -- is that the, the inference issue?

18 Q The Belcher case.

19 A Yes, sir.

20 Q Okay.

21 A Yes, sir.

22 Q All right. And, of course, you had Glenn in your trial
23 notebook before you went to trial?

24 A Yes, sir. Yes, sir.

25 MR. GROSS: That's, that's all, Your Honor. Thank you.

Richard Vieth - Redirect examination
by Ms. White

1 THE COURT: Redirect?

2 MS. WHITE: Just briefly, Your Honor.

3 THE COURT: Yes, ma'am.

4 REDIRECT EXAMINATION

5 BY MS. WHITE:

6 Q I'm gonna try to go through cause I'm writing notes
7 furiously while we're talking.

8 One of the things I want to ask you about was in
9 regards to your closing when you, in the discussion we had,
10 when you talked about what Trey Gowdy had said about, you
11 know, amnesia, and, if you believed him, it's all a joke.
12 We talked about how the jury might have perceived that.

13 A Yeah.

14 Q When you're doing your closing, do you ever use any
15 tone to convey things to the jury?

16 A Well, yes, certainly. I mean there's sarcasm. There's
17 all kinds you use. Yes, ma'am, there is.

18 Q And can you recall if, in your closing argument when
19 you made those statements, what your probable tone was?

20 A I mean obviously my tone is if you believe Gowdy, you
21 might as well not have any books on amnesia. Just don't
22 exist. And I mean it's just -- so, it's almost like come
23 on, you believe that junk, but --.

24 Q Okay. In regards to -- I want to touch base -- touch a
25 little bit back on Sellers real quick. We talked a little

1 bit about you said that his testimony you wanted to allow in
2 because it kind of addressed the timeline, and whether or
3 not she had actually been beaten or not.

4 A (Witness nods affirmatively.)

5 Q She -- and I just point out -- and I'll clarify it.

6 The Hortons testified that she had come to their house
7 around 8:00 or 8:30.

8 Does that sound accurate?

9 A Yes, it sounds accurate. It's in that timeframe for
10 sure.

11 Q Okay. And, and Mr. Sellers testified he talked to her
12 in the 9:15, 9:30 range?

13 A Right.

14 Q And then we know that, based on the 9-1-1 call and some
15 other things, that the killing probably occurred between
16 10:30 and 10:58?

17 A That's correct.

18 Q So, we've got kind of a two hour period of time before
19 anyone saw her again, and maybe an hour from the time she
20 said she was beaten until the 9-1-1 call?

21 A Yeah, I think there was a timeframe where Brent was
22 trying to get on the phone---

23 Q Okay.

24 A ---I believe in that window in there.

25 Q Some texts, maybe called, and she---

Richard Vieth - Redirect examination
by Ms. White

1 A Some texts or phone calls trying to find her.

2 Q All right. Now, I know that we've talked a lot about
3 the fact that she -- you don't believe that she had been --
4 her ass had been beaten as she had said in the --
5 Mr. Sellers said.

6 A Do not.

7 Q But there is no question that she had been beaten prior
8 to the stabbing.

9 Is that right?

10 A Based on the---

11 Q Based on the injuries?

12 A Based on the evidence that was presented, yes.

13 Q And there was -- there was some lacerations to her face
14 as well as a collapsed eye socket, a torn -- the, the skin
15 underneath her front, her front lip.

16 A (Witness nods affirmatively.)

17 Q So, so, Doctor Wren testified to those injuries?

18 A That's correct.

19 Q Okay. And in addition to that, the testimony that was
20 presented about a possible fight they had had earlier.

21 Your client had told William Gary about that in his
22 interview, but, when he testified, could he recall any of
23 that in his testimony?

24 A When he testified?

25 Q Right.

1 A I'd almost have to look and see. I don't remember that

2 --

3 Q Okay.

4 A -- whether he did or didn't.

5 Q And would you, would you take my word for it maybe---

6 A I'll take it -- certainly, yeah.

7 Q ---based on the transcript that---

8 A The transcript speaks for itself. That's right.

9 Q He testified he really couldn't remember having hit her
10 or set or even having told her that he had hit her?

11 A Right. Oh, yeah, I agree with that.

12 Q Okay. All right. So, so, there was some testimony,
13 based on Williams Gary's investigation or his statement to
14 Mr. Gary, that maybe they had gotten into a fight about the
15 cell phone before she had bitten his hand or something, but
16 that was hours before the murder.

17 Is that right?

18 A That's right.

19 Q Okay. And, in fact, she had left the home after that
20 time period?

21 A (Witness nods affirmatively.)

22 Q And then the incident occurred at one point when she
23 had come back?

24 A That's correct.

25 Q Okay. There was also testimony presented that showed

Richard Vieth - Redirect examination
by Ms. White

1 that her car was even in the front yard kind of running like
2 she had left it running and gone in the house.

3 Is that right?

4 Do you recall that?

5 A Right.

6 At the time of the, of the death?

7 Q Right.

8 A Yes.

9 Q Okay.

10 A That's right.

11 Q Did that help or hurt you in any way?

12 Do you think that supported your argument or defense
13 or, or did it not make a difference?

14 A I, I don't recall making anything of the car running.

15 I may have, but I don't recall if I did or didn't. I

16 distinctly remember an earlier episode when the parents went

17 to pick up the children and she was kind of in the area to

18 make sure the children were gone, which was one of my

19 arguments as why would she lay in wait to make sure the

20 children were gone before she went back in there later on,

21 unless she was intending to do bodily harm. That was one of

22 my -- but coming in to pick up jewelry or shooting and

23 leaving the car running, I don't remember if I made anything

24 out of that or not to be honest with you.

25 Q Okay. And the testimony you were just referencing

Richard Vieth - Redirect examination
by Ms. White

1 about the lying in wait, that was Mrs. Horton and -- that
2 testified that, once she got the kids, she kind of followed
3 them out.

4 Is that right?

5 A That's correct.

6 Q Okay.

7 (Pause.)

8 MS. WHITE: Your Honor, I think that's all I have at
9 this time.

10 MR. GROSS: Just---

11 THE COURT: Recross?

12 MR. GROSS: Just very brief follow-up.

13 THE COURT: Yes, sir.

14 RECROSS EXAMINATION

15 BY MR. GROSS:

16 Q If he turned to Page 127. This is Investigator Gary's
17 testimony.

18 A Yes, sir.

19 Q At Line 21 -- and this is talking about the cell phone
20 incident.

21 A Okay.

22 Q Do you see that?

23 A Yes, sir, I do.

24 Q All right. And what that says is that she was trying
25 to leave -- and this is when the investigator is talking

Richard Vieth - Recross examination
by Mr. Gross

1 about Brent's statement by the way.

2 A About whose statement?

3 Brent's?

4 Q Brent's statement.

5 A Okay.

6 Q She was---

7 A So, he is Brent?

8 Q Huh?

9 A He is Brent in this?

10 Q Yes?

11 A Where it says he?

12 Q Yeah.

13 A Okay. Brent said. Okay.

14 Q He said -- Brent said that he was going to leave, and
15 that her car was parked in the driveway, and he went and got
16 in the car to stop it, and then got her cell phone. During
17 this, I noticed a bite mark on his hand and asked him about
18 that, and it was between his thumb and his index -- like in
19 the middle part of the hand, and it said -- Brent said that
20 she had bit him there to get the cell phone back.

21 Right?

22 A Yes, sir.

23 Q All right. There's absolutely nothing in Brent's
24 statements about beating Erica at that time, is there?

25 A No. No.

Richard Vieth - Recross examination
by Mr. Gross

1 Q All right. All right. And so, to suggest that this
2 was evidence of Brent "kicking her ass" would be a little
3 misleading, wouldn't it?

4 A Certainly.

5 Q Okay. And there was questions about whether or not
6 Brent remembered certain things at the time that he
7 testified, but, of course, stuff came into -- evidence came
8 in the trial, not only through his testimony, but through
9 his statements.

10 Right?

11 A His statements, yes, sir.

12 Q All right. And, and, and you would agree that, when
13 the Court's looking at what law to charge the jury, they
14 look at all of the evidence.

15 Right?

16 A I -- yes, sir.

17 Q And, and it could come from the defendant's trial
18 testimony, right?

19 A It could, yes, sir.

20 Q And it could come from other evidence that's introduced
21 such as a defendant's statement?

22 A That's correct.

23 MR. GROSS: All right. That's all, Your Honor. Thank
24 you?

25 THE COURT: Anything further?

1 THE WITNESS: Thank you.

2 MS. WHITE: Nothing further, Your Honor.

3 THE COURT: Does the State wish to call any additional
4 witnesses?

5 MS. WHITE: No, we don't, Your Honor.

6 THE COURT: All right.

7 MR. WISE: I'm gonna need to get my transcript back
8 from Rick.

9 THE WITNESS: Yeah, I was gonna give it back.

10 MR. GROSS: Your Honor, we would just want to make
11 certain, since we raised the ineffective assistance of
12 appellate counsel, that the final brief of the appellate and
13 the respondent that, of course, they're already part of the
14 record from having them in the Supreme Court, but we just
15 wanted to call those to your attention to make certain that
16 you have a copy.

17 THE COURT: I do not think I have copies of those.
18 Do I?

19 MS. WHITE: You should, Your Honor. I think---

20 THE COURT: Okay. I have not looked.

21 Is it in this part of it?

22 MS. WHITE: It should be the packet -- in the packet
23 that I have for my work packet. We do those kind of
24 different.

25 THE COURT: It is, it is here. I see it.

1 MS. WHITE: Okay.

2 MR. GROSS: Okay. And also, in addition to the cases
3 that I handed up earlier, I'm gonna hand up Patrick versus
4 the State of South Carolina, which is 349 S.C. 203 from
5 2002. I have two copies for you and your law clerk.

6 THE COURT: All right.

7 MR. GROSS: And that has to do with the issue of
8 adequately briefing on appeal, and what I'll do is, is just
9 so that we have a record of the booklet that we handed up, I
10 don't know that we need to put a complete copy of that in
11 the record, but I will mail a copy of the coversheet with
12 the index to the Clerk of Court just so that---

13 THE COURT: All right. That will be fine.

14 MR. GROSS: ---there's a record of that.

15 THE COURT: Do you intend to submit a brief?

16 MR. GROSS: I think that we should either submit briefs
17 or proposed orders.

18 THE COURT: I think the Court would appreciate a brief.

19 MR. GROSS: All right. We will be happy to do that.

20 THE COURT: And how long do you need to produce one of
21 those?

22 MR. GROSS: Is 30 days too much?

23 THE COURT: No, that's fine.

24 Thirty days to respond?

25 MS. WHITE: Yes, Your Honor.

1 THE COURT: All right. Thank you very much.

2 MR. GROSS: And I hope we don't need that long, but I
3 know what I've got coming up in the next 30 days.

4 THE COURT: I understand. That's quite all right.

5 MR. GROSS: All right.

6 THE COURT: Thank you very much.

7 MS. WHITE: Okay.

8 MR. GROSS: Thank you, Judge.

9 MR. WISE: Thank you.

10

11

12 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 25th day of March, 2015.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 1st, 2018

Pamela E. Green

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	Case Number: ²⁰¹³ 2011-CP-42-0007
Larry Brent Horton, SCDC# 329065,	)	
Applicant,	)	Applicant's Memorandum in Support of
vs.	)	Application for Post Conviction Relief
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

The applicant, Larry Brent Horton, Jr. submits the following memorandum in support of his application for post-conviction relief (hereinafter "PCR").

I. Introduction.

Brenda and Larry Brent Horton, Sr. retained Rick Vieth to represent their son, Larry Brent Horton, Jr., for killing his wife, Erika Horton. At the PCR hearing, Vieth testified Brenda, Larry, Sr., and Brent, Jr. are good people. From the beginning, Vieth recognized Horton's only defense would be voluntary manslaughter, and he presented that defense at trial. The trial court judge, however, declined to instruct the jurors about voluntary manslaughter. By arguing facts contained in the record and then-existing South Carolina case law supporting giving the instruction under the circumstances of this case, trial counsel would have persuaded the trial court to give a voluntary manslaughter instruction. Likewise, by arguing facts contained in the record and then-existing South Carolina case law supporting giving the instruction under the circumstances of this case, appellate counsel would have persuaded the appellate court to reverse and remand for a new trial where the voluntary manslaughter instruction would be given.

II. Procedural History.

On January 2, 2007, the Spartanburg County Sheriff's Office charged Horton with the murder of his wife, Erika Horton. On June 16-18, 2008, the State tried Horton before the

Honorable J. Durham Cole and a jury. Solicitor Trey Gowdy and Cindy Crick prosecuted the case. Rick Vieth represented Horton. Despite a timely request, Judge Cole did not instruct the jurors about voluntary manslaughter. The jurors convicted Horton of murder. Judge Cole sentenced Horton to life imprisonment without the possibility of parole.

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

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

III. Brief Statement of Facts.

The prosecution called Violent Crimes Investigator William Robert Gary, a thirteen-year

veteran of the Spartanburg County Sheriff's Office, to testify about his interviews of Horton. Gary first encountered Horton "sitting in a chair in the carport with a blanket over him." Horton had blood on his hands, feet, and face. Investigator Gary read Horton his *Miranda* Warnings¹ from a card. Because it was cold, law enforcement transported Horton to the Sheriff's Office where it was warmer. At the Sheriff's Office, Investigator Gary used a "Pre-interrogation Waiver Form" to provide Horton with his *Miranda* Warnings a second time. Tr. 123, line 24 – 126, line 13; State's Trial Ex. 1.

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

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

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

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

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

Tr. 129, lines 19-23 (emphasis added).

Horton told Investigator Gary that he grabbed Erika by the hair, kept hitting her, and grabbed a knife. Horton didn't recall where he got the knife from, but it was a kitchen knife."

Horton said, "[I]t all happened so fast." Tr. 129, line 24 – 130, line 9.

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

IV. Applicable Legal Standards.

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

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

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

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

Due process of law also requires that a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under the same test as other ineffectiveness claims. *Smith v. Robbins*, 528 U.S. 259 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). Certainly, appellate counsel has no constitutional duty to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). In most cases, the reason for abandoning one issue is to enable counsel to focus on the more meritorious issues, since a “brief that raises every colorable issue runs the risk of burying good arguments.” *Jones*, 463 U.S. at 752-53. Appellate counsel, however, is ineffective for not raising a meritorious issue entitling an appellant to relief. See, e.g., *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999) (appellate counsel provided ineffective assistance of counsel that required a new capital sentencing trial by failing to assert, as trial counsel had, that the defendant was entitled to a charge that life is to be understood in its “ordinary and plain meaning,” pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1935)). See also *Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001) (appellate counsel was ineffective in failing to assert as error that the trial court failed to instruct the jury, as required by state law, that if it failed to make a unanimous finding that the death penalty was warranted by evidence in aggravation of punishment, it was required to return a life sentence); *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002) (appellate counsel ineffective for failing to assert as error the trial court’s instruction that once the jurors “have unanimously found an aggravating circumstance, before they can weigh aggravating circumstances against any mitigating circumstances, they must all find the existence of at least one mitigating circumstance. This is not a correct articulation of the law”).

V. Arguments.

The PCR Application raises multiple issue of ineffective assistance of trial and appellate counsel. Each ground is discussed below.

A. Ineffective Assistance of Trial Counsel.

1. The testimony of Anthony Sellers was impermissible hearsay that violated the confrontation clauses of the United States and South Carolina Constitutions.

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

Sellers direct testimony was devastating to Horton's defense. On January 2, 2007, Sellers noticed he "had a couple of missed calls from Erika." The missed calls were between 8:00 and 8:30 p.m., and Sellers returned the calls "around 9:00 or 9:15-ish." According to Sellers, Erika's "voice was a little distraught."² Erika asked, "Tony, I was calling you to ask you if I could possibly get my job back with you." She added, "I need to get a job. I need to make some money so that I can get out and get me a place." Sellers asked, "Erika, is everything all right with you." Sellers claimed Erika responded, "Well, *my husband just beat my ass and threw me out of the house*" (emphasis added). Erika purportedly told Sellers "she was going to stay with a friend." "And she said that she wanted to get her kids but she couldn't, he wouldn't, her husband wouldn't let her get her kids."³ Sellers claimed Erika said she was going back to her house "to

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

³ The testimony from Brenda Horton, the mother of the applicant, was that on the night of the incident Erica asked her to pick up the children. Tr. 217, lines 8-9

get some things." The "next morning" Sellers heard "Erika Horton was murdered." He called the police and "told them what had transpired the night before." Tr. 143-47. Trial counsel did not object to any of this testimony.

Trial counsel's cross-examination of Sellers emphasized the inadmissible evidence:

I asked her was everything okay because, well, I got -- she -- things just didn't sound right with her. I mean, you know, this is someone you worked with for a couple of years. And I said, "Is everything okay?" And she just sounded. She didn't sound herself. And, again, you know, *stated to me that her husband had beat her ass and kicked her out of the house.*

And at that time I'm saying, oh, God, you know. We conversated a little bit more, and she started telling me that she needed to make some money or whatever so that she can get out of the house and just what I just told you earlier.

Tr. 155, line 16 -- 156, line 2 (emphasis added).

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

Erika Horton went back to her house on January the 2nd of 2007 after her husband has already hit her.

She was not planning to stay there that night. The only reason she went back is because she wanted to get a few things for the night.

She'd already arranged to get her old job back. She'd already arranged to stay with a friend. She was getting out of a bad situation.

Tr. 367, lines 3-11.

Later on, the prosecutor argued:

And what was on Erika's mind at the time this happened? Mr. Vieth told you in his opening that she went back to her house. But we don't know why she went back there. Yes, we do; yes, we do.

No. Erika Horton didn't come in this courtroom and she didn't get on the stand and testify. But we do know some things

about what was going on and what was in her mind at the time based on the actions, based on what she did that night.

She tells us through her actions. And we know what was on her mind because she told Tony Sellers on the telephone. *I left the house. He just beat my ass. I left the house. He just beat my ass.*

She wanted her old job back. She was going to go stay with a friend. What she's telling us is she's making plans to leave. She's making plans to support herself.

She does not have any intention of staying in that home that night. . . .

We do know she went back to the house. She told Tony Sellers why she went back to the house. Listen, I'm just going to get a few things for the night, I'm going to go back. . . .

Tr. 371-72 (emphasis added).

The prosecution clearly offered Erika's purported statements to Sellers "to prove the truth of the matter asserted." Rule 801, SCRE. Sellers' entire testimony was inadmissible hearsay. Rule 802, SCRE. *State v. Garcia*, 334 S.C. 71, 512 S.E.2d 507 (1999) (held that admission of evidence concerning victim's fear of defendant under "present state of mind" exception to hearsay rule was reversible error).

Sellers' testimony recounting Erika's purported statements also violated the confrontation clauses of the Sixth Amendment of the United States Constitution and Article I, Section 14 of the South Carolina Constitution. *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

The Court should order a new trial.

- 2. During the charge conference, trial counsel failed to argue facts and existing case law that would have required the trial judge to instruct the jurors about voluntary manslaughter.**

During the charge conference, trial counsel argued that Investigator William Robert

Gary's⁴ testimony was Brent told him he and Erika "had been fighting." This statement provided the sufficient legal provocation for voluntary manslaughter. Tr. 338-29.

The Solicitor down played the fighting by arguing, "Fighting is a synonym for fussing, which is the word [Horton] used when he testified." The Solicitor further contended, "The only episode of physical contact between the two of them was when he got her cell phone and she tried to get it back, which, as the Court knows, is the exercise of a legal right." And, Horton "testified he was sitting there in his pajamas and the next thing he knows he as lunging at her." The Solicitor contended, "[T]here is no sufficient legal provocation" and "no evidence of sudden heat of passion that would overcome someone's will." Tr. 339-40.

The trial court judge asked trial counsel:

Well, Mr. Vieth, even assuming from the evidence in the case that you could reasonably infer heat of passion, I think the record in this case is lacking in any evidence that would support that heat of passion based upon sufficient legal provocation.

Maybe you can help me with that difficulty. I don't recall any evidence in the case, direct or circumstantial, for which you could reasonably find that there was a sufficient legal provocation.

Tr. 340, lines 10-18.

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

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

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

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

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

Tr. 129, lines 19-23 (emphasis added). Nor did trial counsel remind the judge that Horton said, “[I]t all happened so fast.” Tr. 129, line 24 – 130, line 9.

Trial counsel never pointed out to the judge that Horton testified, “She was going through a drawer and turned around and like she threw something at me.” Tr. 257, lines 6-7; 267, lines 17-21.⁵

The trial court judged erred by focusing on sufficient legal provocation rather than “reasonable provocation.” One-hundred-eighty years ago, the South Carolina Supreme Court held:

The distinction between murder and manslaughter, as put in the books, and as generally understood by the profession, is not merely an arbitrary rule, but is founded on a thorough knowledge of the human heart, and framed in compassion to the passions and frailties which belong to and are inseparable from our natures. We look in vain through all classes of society, for even one individual who has so much command of himself as to remain passive and unmoved when suffering under personal injuries. Passion arising

⁵ The Solicitor mischaracterized this testimony during cross-examination, suggesting it was a sock, which Horton immediately disputed. Tr. 260, lines 5-8.

out of even imaginary wrongs, frequently gets the ascendancy of distempered minds, and even those that are better regulated are sometimes carried away by the ordinary "ills which flesh is heir to." These may, however, be subdued and overcome by a proper course of reflection and discipline, and it is our duty to keep them within proper bounds; but he who has suffered great bodily harm, the parent who sees his child, or the child who sees the parent, suffering under the hand of ruffian violence, or the husband who finds his wife in the embrace of an adulterer, does not stop to reason about the extent to which he will carry his resentment, and in proportion to the degree of provocation will be the almost certain excess of resentment; and if, under the influence of such an excitement, one man takes the life of another in whose wrong it originated, it is manslaughter and not murder. There must, however, be a provocation—*a reasonable provocation*, and what will or will not constitute a *reasonable provocation*, is perhaps the only difficulty in applying the otherwise well defined distinction between the crimes of murder and manslaughter. *The line which distinguishes between those provocations which will and will not extenuate the offence, is not, nor can it be, certainly defined.* Those provocations which are in themselves calculated to provoke a high degree of resentment, and which ordinarily superinduce a great degree of violence, when compared with those that are slight and trivial, and from which a great degree of violence does not usually follow, may serve as a general outline to mark the distinction, and when applied with judgement and discretion, will usually lead to correct results. Decided cases furnish practical applications of the principle, and are of infinite use in carrying it out. According to those, it is now well established that no provocation, however grievous, will operate to excuse the slayer of the crime of murder, when, from the weapon used, or from the manner of the assault, an intention to kill or to do some great bodily harm was manifest, unless it was accompanied by some act of unlawful violence, or denoting an intention to do bodily harm; nor will even a trivial provocation extenuate the offence, although, in point of law, it may amount to an assault, if the punishment inflicted is outrageous in its nature, either in the manner or circumstance of it, and beyond all proportion to the provocation; because it manifests rather a diabolical depravity than the frailty of nature; and, as more directly applicable to the case in hand, it is laid down by all the criminal law writers, that if one interpose in a fray to separate the combatants, and give notice of his pacific intent, and is slain by one of the affrayers, it is murder. East's Cr. Law, 233, 234, 304.

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

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

In addition, the prosecution argued in closing Horton's motive for killing Erika was because she was going to take the kids. Tr. 369, lines 22-25; 371, lines 17-19; 376, line 14 – 3777, line 6; 378, lines 12-18. Under *Ferguson*, *Hammond*, and *Martin*, threatening to take someone's kids is reasonable provocation entitling Horton to a charge on voluntary manslaughter.

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

The Court should order a new trial.

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

Over a century ago, the South Carolina Supreme Court held that when "one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation *without premeditation or malice*, it would be manslaughter." *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 3-4 (2003); *State v. Graham*,

260 S.C. 449, 451, 196 S.E.2d 495, 496 (1973); and *State v. Andrews*, 73 S.C. 257, 53 S.E. 423, 424 (1906).

Today, many trial courts charge the distinction between murder and manslaughter is the absence of malice. Such a definition is not correct and serves only to confuse a jury. A simple example will illustrate this fact. A classic example of manslaughter is when a man comes home and finds his wife in bed with another man. He pulls out his gun and kills the man. While there was no physical threat to the upset husband, courts traditionally would charge voluntary manslaughter as this crime was done in sudden heat and passion. The husband exclaiming shortly before firing his weapon, "I am going to kill you, you SOB," would not change the requirement that voluntary manslaughter should be charged. But, when that statement is made, there is expressed malice and an intent to kill. This simple example should cause this Court to question the definition of manslaughter often given to juries.

In *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), our Supreme Court began to rethink the law as to murder and eliminated, in most cases, an inference of malice from the use of a deadly weapon. In deciding the case, the court said, "[I]t becomes clear that inferring malice from the use of a deadly weapon is indeed only a 'half-truth.'" *Id.* at 610, 685 S.E.2d at 808. This discussion of "half truths" in the concept of murder came from *Glenn v. Maryland*, 68 Md.App. 379, 511 A.2d (1985).⁶ The case also discusses in detail another "half truth" of murder cases – "MALICE IS THAT WHICH SEPARATES MURDER FROM MANSLAUGHTER." *Id.* at 379, 398, 511 A.2d at 1121 (all caps in original). As discussed above, an intent to kill is not what distinguishes murder from manslaughter and neither is the lack of malice. In the opinion Judge Daniel Moylan of the Court of Special Appeals of Maryland gives an historical

⁶ On cross-examination, trial counsel produced a copy of the *Glenn* case from his trial notebook. The *Glenn* case is a very scholarly opinion in this area of the law.

lesson on the use of the words "malice" and "aforethought" as they relate to the charges of murder, manslaughter, and attempted murder.

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

The Court should order a new trial.

4. Trial counsel failed to object to the trial court's erroneous instruction about the definition of "malice aforethought."

Section V(A)(3), *supra*, is incorporated by reference as if set forth here fully and verbatim.

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

[T]he law does not require that malice must exist for any appreciable length of time before the commission of an act or acts proximately causing a fatal result. Indeed, it may be conceived at the very moment that the fatal act or acts are committed.

It is sufficient in the law so long as the state has proven beyond a reasonable doubt both the existence of malice and the commission of an act or acts by the defendant which proximately caused the fatal result.

Tr. 393, line 23 – 394, line 5.

Trial counsel neither objected to this instruction nor pointed to existing, contrary South

Carolina case law, which was cited in Section V(A)(3), *supra*. Additionally, Judge Moylan discusses how, over time, “malice” was overemphasized in the definition of murder while “aforethought” was deemphasized. “‘Aforethought,’ in its pristine state, connoted that the intention to kill had existed some appreciable time before the actual execution of the deed. . . . The word ‘aforethought’ today is devoid not simply of an ordinary, layman’s meaning, but of any meaning at all, even as a term of art.” *Glenn*, 68 Md. App. at 402, 511 A.2d at 1122.

The Court should order a new trial.

5. Trial counsel undermined his own credibility and the credibility of Horton’s testimony when he told the jurors during closing argument that they should question the credibility of Horton and other defense witnesses.

During his testimony, Horton testified that he did not have a memory of most of what happened when he killed his wife. *E.g.* Tr. 247, lines 13-16; 257, lines 3-10. On cross-examination, the prosecution questioned Horton extensively about his lack of memory. Tr. 261-72.

The defense called Dr. Margaret Milikian, a forensic psychiatrist and professor at the Medical University of South Carolina, to testify about Horton’s amnesia. Dr. Milikian diagnosed Horton with dissociative amnesia, “which occurs when something is so traumatic and has so much emotion reckoned with it that the person can’t remember it.”⁷ She did not find any evidence that Horton was malingering amnesia. Tr. 311-19.

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

I told you in my opening statement that the issue of

⁷ This expert testimony buttressed the other evidence of voluntary manslaughter and supported Judge Cole’s finding that evidence of “heat of passion” exists in the record.

amnesia hurts me more than it helps me.⁸ And I realize Mr. Gowdy jumped all over Dr. Melikian about amnesia. And I think after hearing Mr. Gowdy give his argument about it, that there is no such thing as amnesia, because it would be contrive and always would be malingering.

So probably all of these textbooks ought to be erased of amnesia. Under that theory of cross-examination, it's just a joke.

Tr. 349, lines 13-21. Trial counsel again emphasized how Horton's amnesia hurt his defense.

Tr. 361, lines 21-23. And then he argued:

A lot of things in this case are unique. I haven't seen amnesia in a long time. And, again, it doesn't make someone not guilty of a crime. We never contended that. I just felt I had to cover that base with a doctor to see why he can't help me.

And if you don't want to believe it, then you don't have to. Everything goes to credibility that sits on that side of the jury post.

Tr. 366, lines 9-15.

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

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

Tr. 358, lines 8-12.

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

Our Supreme Court has long recognized the significance of trial counsel maintaining credibility with the jurors. *E.g. State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001)

⁸ See Tr. 92-94.

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

The Court should order a new trial.

6. Cumulative error.

If this Court concludes these deficiencies, standing alone, are insufficient to order a new trial, then this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Horton a fair trial. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (considered "the entire post-conviction record...as a whole"); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); and *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

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

instruction. Tony Sellers' testimony undermined the voluntary manslaughter defense. Likewise, the closing argument undermined the credibility of the defense. Cumulatively, these errors deprived Larry Brent Horton, Jr. of a fair trial.

The Court should order a new trial.

B. Ineffective Assistance of appellate counsel.

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

1. Appellate counsel failed to argue facts and existing case law that would have required the trial judge to instruct the jurors about voluntary manslaughter.

Assuming *arguendo* that trial counsel adequately developed the trial record regarding the request for a voluntary manslaughter instruction, appellate counsel failed to adequately brief the issue. Although the Final Brief of Appellant, at p. 5, argued the reviewing court should view the evidence "in a light most favorable to the defendant,"⁹ appellate counsel did not brief all the evidence favorable to Horton. Appellate counsel, unlike trial counsel, pointed out that Horton told Investigator Gary "they did get physical and they did hit each other" and that Horton testified that Erika threw something at him. Final Brief of Appellant, p. 5. The brief, however,

⁹ See e.g. *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008) ("We therefore review the evidence in the light most favorable to appellant, mindful that the charge request is properly rejected only where 'there is no evidence whatsoever' of the lesser offense."). The South Carolina Court of Appeals recognized this principle in affirming the conviction of the applicant. Obviously, had appellate counsel pointed out all the evidence existing in the record, relief would have been obtained.

does not correct the Solicitor's mischaracterization of the object as a sock. Nor does it point to Horton's testimony that said, "[I]t all happened so fast." Or even mention the fact that Judge Cole found during the charge conference that evidence of "heat of passion" exists in the record.

The case law cited in Sections V(A)(3) and (4) was available to both trial and appellate counsel. If appellate counsel had cited this case law in the brief to the Court of Appeals, then the outcome would have been different, and the Court would have reversed the conviction and remanded with instructions to charge the jurors the law of voluntary manslaughter. *See Patrick, supra.*

The Court should order a new trial.

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

The case law cited in Sections V(A)(3) and (4) was available to both trial and appellate counsel. If appellate counsel had cited this case law in the brief to the Court of Appeals, then the outcome would have been different, and the Court would have reversed the conviction and remanded with instructions to charge the jurors the law of voluntary manslaughter. *See Patrick, supra.*

The Court should order a new trial.

3. Cumulative error.

If this Court concludes these deficiencies, standing alone, are insufficient to order a new trial, then this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Horton a fair trial. *See Section V(6), supra.*

C. Cumulative error.

If this Court concludes the deficiencies of trial and appellate counsel combined to deny Horton a fair trial and appeal, then this Court must apply a cumulative error analysis because the

deficiencies taken together also combined to deny Horton a fair trial. *See* Section V(6), *supra*.

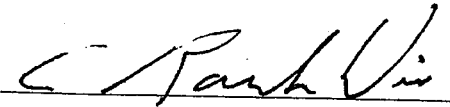
VI. Conclusion.

For the foregoing reasons, the Court should order a new trial.

IT IS SO MOVED.

Respectfully submitted,

By



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Counsel for the Applicant

April 29, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	Case Number: ~~2011~~ ²⁰¹³ -CP-42-0007
Larry Brent Horton, SCDC# 329065,	)	
Applicant,	)	Applicant's Memorandum in Support of
vs.	)	Application for Post Conviction Relief
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

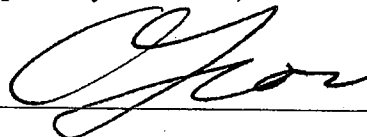
I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

Suzanne H. White
Assistant Deputy Attorney General
PCR Division
PO Box 11549
Columbia, SC 29211

Attorney for Respondent

Respectfully Submitted,

By



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April 30, 2015
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	Case Number: ²⁰¹⁵ ~~2011~~ -CP-42-0007
Larry Brent Horton, SCD# 329065,	)	
Applicant,	)	
vs.	)	Index of Case Law
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

For the Court's review, the applicant, Larry Brent Horton, Jr., submits the following case law:

Reasonable Provocation

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

Absence of Premeditation

- 4) *State v. Andrews*, 73 S.C. 257, 53 S.E. 423 (1906).
- 5) *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973)
- 6) *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003).
- 7) *Glenn v. Maryland*, 68 Md.App. 379, 511 A.2d (1985).

Counsel Undermining Defense

- 8) *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).
- 9) *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (comments defense counsel made during closing arguments created ineffective assistance of counsel on kidnapping charge)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2013-CP-42-0007
Larry Brent Horton, #329065,	)	
	)	
Applicant,	)	
	)	
v.	)	MEMORANDUM OF
	)	LAW
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the February 2008 term of the Spartanburg County Grand Jury for murder (2008-GS-42-0950). The Applicant was represented by Richard W. Vieth, Esquire. On June 16-18, 2008, the Applicant proceeded to trial, where he was convicted by a jury. The Honorable J. Derham Cole sentenced Applicant to life without the possibility of parole.

A timely notice of appeal and brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Horton, Op. No. 2010-UP-406 (filed September 16, 2010). The South Carolina Court of Appeals also denied the Applicant's Petition for Rehearing on October 29, 2010. Applicant then filed Petition for Writ of Certiorari which was denied on January 11, 2012. The Remittitur was returned on January 13, 2012.

The Applicant filed his application for post-conviction relief (PCR) on January 2, 2013. The Respondent filed its Return on March 18, 2014. A hearing was held in the Spartanburg County Courthouse on March 25, 2015. The Applicant was present and represented by C. Rauch

Wise, Esquire, and E. Charles Grose, Jr., Esquire. The Respondent was represented by Suzanne H. White, Esquire. Applicant presented no testimony in support of his application. Respondent called Richard Vieth, Esquire, to testify.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- a. Ineffective assistance of counsel, in that;
 - i. Counsel failed to object to testimony of Anthony Sellers when this witness' entire testimony was inadmissible and prejudicial hearsay,
 - ii. Counsel failed to cross-examine the State's witnesses to reveal evidence which would mitigate the offense from murder to voluntary manslaughter,
 - iii. Counsel failed to present available evidence of the victim's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
 - iv. Counsel failed to present available evidence of Applicant's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
 - v. Counsel undermined the credibility of the defense when he told jurors during his closing argument that they should question the credibility of the Applicant and his witnesses,
 - vi. Counsel failed to effectively argue the facts and existing law so that the trial court would instruct the jurors about the law of voluntary manslaughter,
 - vii. Counsel failed to object to the trial court's erroneous jury instruction on malice aforethought,
 - viii. Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice,
 - ix. Counsel failed to object to the trial court's refusal to consider any evidence

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or circumstances that would mitigate the punishment,

b. Ineffective assistance of appellate counsel, in that;

- i. Appellate Counsel failed to argue that the trial court erred by not admitting evidence of the victim's state of mind that was relevant to mitigate the offense from murder to voluntary manslaughter,
- ii. Appellate Counsel failed to effectively argue the facts and existing law to show that the trial court erroneously failed to instruct the jurors about the law of voluntary manslaughter,
- iii. Appellate Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice.

At the hearing, Applicant indicated that he would proceed on allegations (a)1, 5, 6, 7, 8, and abandon allegations (a)2, 3, 4, and 9. Applicant orally amended allegation 1 to include the issue of confrontation clause. Applicant also abandoned allegation (b)1.

RESPONDENT'S STATEMENT OF FACTS

On January 2, 2007, Applicant severely beat his wife Erika Bell Horton ("Erika") until she was unconscious or helpless. (Tr. p. 180, lines 18-22; p. 261, lines 16-19). The beating was so severe one of Erika's eye balls collapsed into her sinus. (Tr. p. 180, 261). Additionally, Erika's nose was broken, and she had bruises and contusions to her lips, about her eye, her forehead, and to her scalp. (Tr. pp. 179-181, 261). Her frenulum, the piece of supporting tissue inside the upper lip, was also torn. (Tr. p. 180). She also had extreme congestion of the thinnest layer covering the brain, which can come from trauma. (Tr. p. 181). Prior to the attack on her by Applicant on January 2, 2007, Erika had been diagnosed with multiple sclerosis. (Tr. pp. 240).

After beating his wife until she was unconscious or helpless, Applicant then walked the length of his home dripping Erika's blood from the bedroom, where the beating took place, to the

kitchen. (Tr. pp. 165-178, 260-261). Once there, Applicant opened a kitchen drawer, took out a kitchen knife, and returned to the other end of the home to the bedroom where Erika lay. (Tr. pp. 130, 165-178, 179-186). Applicant then stabbed the victim at least five (5) times in the neck with the kitchen knife. (Tr. p. 185).

Several of the stab wounds penetrated to the victim's spine. (Tr. pp. 179, 185). The victim's jugular veins, both common carotid arteries in the neck, as well as her esophagus, trachea, and all of the muscles of the front of her neck were severed. (Tr. pp. 184-185). There were also hesitation stab wounds to the victim's shoulders. (Tr. pp. 179, 181-182, 261). After the stab wounds to her neck were inflicted, the only thing holding Erika's head onto her body was the skin and musculature of the back of the neck and her vertebral column. (Tr. p. 185). There were *no defensive stab wounds* to Erika's hands or forearms indicating that at the time she was stabbed she was either unconscious or could not get her hands up to defend herself. (Tr. p. 182, 260). Erika died from blood loss as a result of the stab wounds. (Tr. pp. 184-185, 106-107, 179-182).¹

Applicant called 911 to report that he thought he killed his wife. (Tr. p. 100; p. 131-2). When police arrived at the crime scene, Applicant was sitting in the carport of the home. In addition to finding the trail of blood from the bedroom to the kitchen drawer where the knife was selected, police found the murder weapon lying on the bedroom floor. There was blood everywhere in the bedroom where Erika's body was found, on Applicant's clothing, and on Applicant's hands and forearms. (Tr. pp. 165-177). The pathologist and an investigator testified that at the autopsy there was very little blood left in Erika's body. (Tr. pp. 184-185, 106-107).

¹While the pathologist did not specify the cause of death, the fact the victim died from blood loss from the stab wounds is the only reasonable inference from the record, including the exhibits offered at trial, the testimony of the pathologist, the testimony of the officers who worked the crime scene, the testimony of the officer who attended the autopsy, and the cross-examination of Applicant and is readily apparent from the record. (Tr. pp. 178-186, 106-107, 107-111, 118, 120-121, 123-124, 136, 140, 157-160, 259-273).

Applicant told the investigator that he could not remember what happened as far as the murder. Applicant stated he and his wife had separated but had gotten back together several weeks before her death. Applicant stated they were living together in the home where Erika's body was found. Applicant told the investigator that earlier in the evening there was an altercation between he and his wife and she left. Applicant stated his mother then came and picked up the couple's children. Applicant stated that later he was sitting on the couch in the dark when Erika returned to the home. Applicant stated Erika was getting some of her things together, and they were fussing. (Tr. p. 127-8). At that point in the interrogation, Applicant stated the next thing he remembered was being in the carport on the phone with 911. (Tr. p. 128). When the investigator played the 911 tape for Applicant, Applicant just kept saying "he wouldn't do that, he wouldn't do that," i.e. kill his wife. However, Applicant admitted that he and his wife were alone in the house at the time of her death. (Tr. p. 129).

Applicant continued to assert that he could not remember anything that happened between the fussing and being out in the carport talking to the 911 operator. (Tr. p. 129). Applicant was then asked if he saw the victim on the floor in the bedroom. Applicant admitted he saw the victim on the floor but said he didn't know how that happened to her. (Tr. p. 129). When the investigator told Applicant "the way it looked in the house, whether they got into a fight, he got a knife [sic], he hurt her." Applicant stated "they did get physical and they did hit each other." (Tr. p. 129). Applicant did not state who the aggressor was, who hit who first, or why they got physical. (Tr. pp. 129-130). The investigator testified there were no injuries to Applicant that he could see other than a bite mark to his hand, which Applicant admitted was from an altercation much earlier in the evening. (Tr. p. 136).

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Applicant never told the investigator his wife hit him first. In fact, Applicant admitted he grabbed the victim by the hair. (Tr. p. 129-130). Applicant also admitted to the investigator four times in a row, "I kept hitting her." (Tr. p. 130). Applicant then stated he got the knife. (Tr. p. 130). Applicant initially denied knowing where the knife came from, but eventually admitted to the investigator the knife was a kitchen knife, and he had retrieved the knife and used it. (Tr. p. 130).

At trial, Applicant testified in his own defense. Applicant testified that he could not remember anything about beating his wife or walking the entire length of the home, obtaining a knife from the kitchen drawer, and walking all the way back to the bedroom and stabbing his wife at least five (5) times in the neck with the kitchen knife. Applicant claimed amnesia about the events of the murder itself and claimed amnesia about what he had told the police and the 911 operator. Applicant also called a psychiatric expert who testified that in her opinion Applicant suffered from amnesia. However, in his trial testimony, Applicant testified he clearly remembered all the events that led up to his beating and eventual stabbing of his wife to death. Applicant testified the couple was having marital difficulties and his wife was leaving him. Applicant testified that earlier in the evening when his wife was leaving the home *the first time*, he took his wife's phone away from her and she bit his hand in an attempt, that proved successful, to retrieve her telephone. Applicant testified that after retrieving her phone, the victim left the home in her car.

Applicant testified that after the children were gone, he was sitting on the couch in the dark, when his wife returned to retrieve some things from their home. (Tr. p. 268). Applicant testified he followed his wife to the bedroom and was asking her "what was going on." (Tr. p. 257). Applicant testified he continued to ask her what was going on, and she would not answer

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him. (Tr. p. 257). Applicant testified: "[s]he [Erika] was going through a drawer and turned around and like she threw something at me." (Tr. p. 257). Applicant testified he lunged for her, "everything went gray," and he heard his wife call out his name. (Tr. p. 257). Applicant testified he remembered everything up until the point that he lunged into his wife. (Tr. p. 257-258, 262, 267-268). On direct examination, Applicant was asked the following question and gave the following answer regarding what occurred before he lunged at his wife:

Q: Okay. Was there any arguing or fighting or anything of that nature?

A: I was just trying to find out what was going on. I mean, like I said, I remember she turned around and I remember lunging for her.

Everything went gray. She yelled my name, and that was it. I don't know what happened. It was like she just didn't want to talk to me when I got home. And we'd been talking the whole day.

(Tr. p. 257, line 23 - p. 258, line 6). After discussing problems with the victim's multiple sclerosis diagnosis, Applicant testified as follows:

Nothing that happened - - the argument, the discussions of her leaving - - wasn't something that hadn't happened a million times before. I mean, it was no different.

(Tr. p. 258, lines 12-14).

On cross-examination, Applicant testified as follows:

Q: You just don't remember - - you remember everything in vivid high-definition detail up until when?

A: She came back. She turned *like* she was going to throw something and lunged at her. Things went gray. She yelled my name, and that was that.

(Tr. p. 267)(emphasis added). On cross-examination Applicant also testified as follows:

Q: You don't deny calling 911?

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A: No, sir.

Q: You don't deny that that's your voice?

A: No, sir.

Q: You don't deny telling 9-1-1 that you beat her because you thought she was going to take the children?

A: Correct.

Q: You don't deny telling William Gary that you beat her, and repeated it four times for emphasise [sic]?

A: Correct.

Q: And you don't deny telling William Gary that you went to get a knife?

A: Correct.

(Tr. p. 272, ll. 12-24). On cross-examination Applicant was asked several times if the victim fought back, and he stated he did not remember. (Tr. p. 260, lines 3-10). Upon further questioning, based on the physical evidence, Applicant agreed with the Solicitor the victim did not put up a fight. (Tr. p. 260, lines 11-19). However, Applicant continued to assert, he did not recall anything after he lunged into his wife. (Tr. pp. 261-272).

DISCUSSION

Ineffective Assistance of Counsel

Applicant argues that Counsel failed to effectively present and argue the facts contained in the record and existing case law to the trial court in his request for a voluntary manslaughter jury instruction. However, Applicant offers nothing more than mere speculative statements to meet his required burden of proof and offered no testimony to support his claims.

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When an ineffectiveness claim is presented the defendant must FIRST show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). In addition, the Applicant must THEN show prejudice by establishing that the outcome would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694.

Respondent submits that the Applicant failed to meet his burden of proof of establishing that any alleged deficient conduct of Counsel affected the outcome of his trial. Respondent also submits that Applicant was not prejudiced by any alleged deficient performance because of the overwhelming evidence against him.

Counsel failed to object to testimony of Anthony Sellers when this witness' entire testimony was inadmissible that violated the confrontation clauses of the United States and South Carolina Constitutions

Counsel testified that he made the strategic decision to not object to Anthony Sellers' hearsay testimony during trial. Counsel testified that because he was unable to present the timeline or events of that evening through Applicant's testimony, Counsel believed that he could make the best argument regarding the possibility of voluntary manslaughter by allowing Sellers' testimony in and effectively cross-examining him. Additionally, Counsel testified that he used Sellers' testimony to call into question the victim's reasons for returning to the home if the Applicant had "beat her ass," as Sellers testified and raise the possibility of the victim returning to the home with the intent to do bodily harm to Applicant. Counsel testified that he spent a great deal of time addressing Sellers' testimony during his closing arguments.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of

tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel articulated valid strategic reasons for allowing Sellars' testimony in and addressing potential issues on cross-examination and again during closing argument. The Applicant has not shown that counsel was deficient in that choice of tactics.

Although this Court may find that Counsel was deficient in failing to object to portions of Sellars' testimony as hearsay, because of the overwhelming evidence, Respondent submits that there is no prejudice from any deficiencies. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Smith v. State, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010). "Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009). This allegation should be denied.

During the charge conference, Counsel failed to argue facts and existing case law that would have required the trial judge to instruct the jurors about voluntary manslaughter

&

Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice

&

Counsel failed to object to the trial court's erroneous instruction about the definition of "malice aforethought"

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Cole, 338 S.C. at 101, 525 S.E.2d at 513.

Sudden heat of passion upon sufficient legal provocation that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what,

according to human experience, may be called "an uncontrollable impulse to do violence.

State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). "The law does not reduce from murder to manslaughter every homicide committed in the heat of passion; it must be *passion justly excited by legal provocation*." State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (S.C. 1969). Furthermore, a finding that there is evidence of adequate legal provocation has no bearing on whether a defendant may have acted in a sudden heat of passion. See Cole, 338 S.C. at 102, 525 S.E.2d at 513. Nor does the fact that there is evidence that a defendant acted in a sudden heat of passion necessarily imply that a defendant's actions were the result of adequate legal provocation. See State v. Kornahrens, 290 S.C. 281, 285-6, 350 S.E.2d 180, 184 (1986). To warrant a court's eliminating the offense of [voluntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to [voluntary] manslaughter." Cole, 338 S.C. at 101, 525 S.E.2d at 513.

Counsel requested a charge of voluntary manslaughter, noting that testimony was presented which indicated that the Applicant and victim had been fighting before the victim's death, which Counsel argued was sufficient legal provocation. (Tr. p. 337). Counsel's argument also focused on the timeline of the incident and the fact that if the incident occurred so quickly following phone calls, that the element of heat of passion and provocation were present. (App. p. 338-339). The trial court acknowledged the possibility of an argument for heat of passion, but found that there was no "evidence from which you could reasonably infer that there was sufficient legal provocation for that heat of passion." (Tr. p. 341, lines 5-13).

The South Carolina Court of Appeals affirmed Applicant's conviction based upon State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008), and State v. Smith, 363 S.C. 115, 609 S.E.2d 528, 530 (Ct. App. 2005). Even in reviewing the evidence in the light most favorable

to the Applicant, it is clear that the Court of Appeals found that the charge was properly denied because there was "no evidence whatsoever" of the lesser offense of voluntary manslaughter. State v. Horton, No. 2010-UP-406, 2010 WL 10080219, at *1 (S.C. Ct. App. Sept. 16, 2010). The affirmation of the denial of the voluntary manslaughter charge belies the argument that had Counsel "just" pointed out other minute testimony, the outcome of Applicant's trial would have been different.

Further, the evidence supports the fact that, although Applicant argues absence of premeditation is the correct standard, not the absence of malice, the denial of the voluntary manslaughter charge would have stood regardless. While the law has not defined a bright-line rule for what constitutes a sufficient time for cooling off, the South Carolina Supreme Court has determined that whether the defendant's actions during the intervening time between the provocation and the killing indicates the absence of sudden heat of passion is an appropriate question for the court. See State v. Walker, 324 S.C. 257, 261, 478 S.E.2d 280, 281-82 (1996) (finding that the defendant demonstrated cool reflection through his actions between the alleged provocation and the killing); and State v. Byrd, 323 S.C. 319, 322-23, 474 S.E.2d 430, 432 (1996) (holding that the defendant's actions between the alleged provocation and killing did not support a finding of sudden heat of passion)."

The evidence supports the finding that the Applicant hit the victim, rendering her unconscious, before leaving her to go pick up the kitchen knife, come back and stab the victim to death. Respondent submits that the outcome of the trial would have been the same, even if Counsel had argued that voluntary manslaughter was the absence of premeditation and the absence of malice.

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"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 5 (2003). Moreover, as further noted in Yarborough, "even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Id. at 1, 124 S.Ct. 6. With regard to the Counsel's summation of facts and theory of voluntary manslaughter, Counsel set forth a succinct version of the facts, ultimately focusing in on Applicant's statement to investigators regarding "fighting" with the victim. While Applicant may have preferred a more extensive argument, Counsel's argument was not unreasonable under professional norms. Further, there is no evidence that additional commentary during the charge conference may have influenced the ultimate outcome of the case. Therefore, these claims should be denied.

Counsel undermined his own credibility and the credibility of Horton's testimony when he told the jurors during closing argument that they should question the credibility of Horton and other defense witnesses.

At the PCR hearing, Counsel testified that one would have to be present in the courtroom to see his mannerisms and hear his tone of voice to understand the statements he made to the jury regarding questioning credibility and amnesia. Counsel testified that he spoke in a manner to be down to earth and to be sarcastic regarding the State's questioning of the expert regarding amnesia. Applicant offered no testimony or evidence to support the claim that Counsel was ineffective for his statements during closing argument.

A court's review of closing arguments must be "highly deferential," for "counsel has wide latitude in deciding how best to represent a client" and "deference to counsel's tactical decisions in his [trial counsel's] closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 4

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(2003). There is no evidence that would support a finding of ineffectiveness as to this issue, so it should be denied.

Cumulative Error

Applicant also argued that because there are multiple alleged instances of deficiency on Counsel's behalf, in particular the failing to object to hearsay testimony and failing to properly present facts and case law to support a voluntary manslaughter instruction, the application should be granted based upon the open question of law in South Carolina regarding cumulative error. The State continues to submit that the adoption of a cumulative prejudice standard in the adjudication of PCR actions will result in certain disaster because it would be inherently incapable of consistent application and review.

In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the reviewing appellate declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson, 367 S.C. at 604, 627 S.E.2d at 710 (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis").

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be

said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”).

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related, such as the failure to request a jury charge and the failure to introduce certain testimony. To hold otherwise is to conclude that even non-deficient performance under Strickland might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in Strickland. See Strickland, 466 U.S. at 687 (“Unless a defendant makes both showings [i.e., both deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”).

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998) (emphasis added); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). Therefore, Respondent submits that this allegation should be denied.

Ineffective Assistance of Appellate Counsel.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose

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among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Although Applicant focuses on the length of the argument in Applicant's brief, he fails to note that a Petition for Rehearing was filed, as well as a lengthy Petition for Writ of Certiorari to the Court of Appeals following the denial of Applicant's appeal. The Petition for Writ of Certiorari was also denied. Applicant failed to meet his required burden of proof to establish that Appellate Counsel was ineffective in the representation. Therefore, this allegation should be denied.

Overwhelming Evidence

The South Carolina Supreme Court has held that whether error is harmless depends on the facts of each case, including the importance of challenged testimony in prosecution's case, whether the testimony was cumulative, presence or absence of evidence corroborating or contradicting testimony on material points, extent of cross-examination otherwise permitted, and

overall strength of prosecution's case. State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002). There is no question of the Applicant's guilt in the murder of his wife.

Based upon the overwhelming circumstantial evidence of Applicant's guilt, this Court should find no prejudice suffered as a result of any alleged deficiencies on Counsel's behalf and that it is improbable that any alleged deficiencies affected the outcome of the trial.

CONCLUSION

Based on all the foregoing, Respondent submits that the application for post-conviction relief should be denied and dismissed with prejudice.

Respectfully submitted,

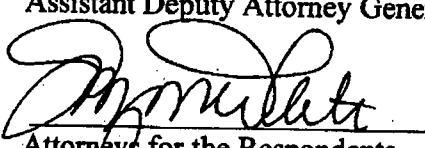
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May 29, 2015

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Larry Brent Horton, #329065,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2013-CP-42-0007

ORDER OF DISMISSAL

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This matter comes before the Court by way of an Application for Post-Conviction Relief ("PCR") filed January 2, 2013. Respondent filed its Return on March 18, 2014. An evidentiary hearing into the matter was held on March 25, 2015, at the Spartanburg County Courthouse. Applicant was present and represented by C. Rauch Wise, Esquire, and E. Charles Grose, Jr., Esquire. Respondent was represented by Suzanne H. White, Esquire. Applicant did not testify and presented no witnesses at the hearing. Respondent called Richard Vieth, Esquire, to testify.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the February 2008 term of the Spartanburg County Grand Jury for murder (2008-GS-42-0950). Applicant was represented by Richard W. Vieth, Esquire ("Counsel"). On June 16-18, 2008, Applicant was tried before the Honorable J. Derham Cole and a jury. The jury found him guilty as indicted, and Judge Cole sentenced him to life without parole.

A timely notice of appeal was filed on Applicant's behalf, and Joseph L. Savitz III, Esquire, ("Appellate Counsel") of the Office of Appellate Defense perfected the appeal. The



South Carolina Court of Appeals dismissed the appeal. State v. Horton, Op. No. 2010-UP-406 (filed September 16, 2010). The South Carolina Court of Appeals also denied the Applicant's Petition for Rehearing on October 29, 2010. Wanda Carter, Esquire, also of the Office of Appellate Defense, filed a Petition for Writ of Certiorari with the Supreme Court of South Carolina, which was denied on January 11, 2012. The Remittitur was returned on January 13, 2012.

At the PCR hearing, Applicant alleged that he is being held in custody unlawfully for the following reasons:

a. Ineffective assistance of counsel, in that;

1. Counsel failed to object to testimony of Anthony Sellers when this witness' entire testimony was inadmissible and prejudicial hearsay,
2. Counsel failed to cross-examine the State's witnesses to reveal evidence which would mitigate the offense from murder to voluntary manslaughter,
3. Counsel failed to present available evidence of the victim's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
4. Counsel failed to present available evidence of Applicant's conduct and state of mind that would mitigate the offense from murder to voluntary manslaughter,
5. Counsel undermined the credibility of the defense when he told jurors during his closing argument that they should question the credibility of the Applicant and his witnesses,
6. Counsel failed to effectively argue the facts and existing law so that the trial court would instruct the jurors about the law of voluntary manslaughter,
7. Counsel failed to object to the trial court's erroneous jury instruction on malice aforethought,

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8. Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice,
9. Counsel failed to object to the trial court's refusal to consider any evidence or circumstances that would mitigate the punishment,

b. Ineffective assistance of appellate counsel, in that;

1. Appellate Counsel failed to argue that the trial court erred by not admitting evidence of the victim's state of mind that was relevant to mitigate the offense from murder to voluntary manslaughter,
2. Appellate Counsel failed to effectively argue the facts and existing law to show that the trial court erroneously failed to instruct the jurors about the law of voluntary manslaughter,
3. Appellate Counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice.

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At the hearing, Applicant indicated that he would proceed on allegations (a)1, 5, 6, 7, 8, and abandon allegations (a) 2, 3, 4, and 9. Applicant orally amended allegation 1 to include the issue of confrontation clause. Applicant also abandoned allegation (b)1. Before this Court are the records from the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the pleadings.

II. TRIAL TESTIMONY

On January 2, 2007, Applicant severely beat his wife Erika Bell Horton ("Erika") until she was unconscious or helpless. (Tr. p. 180, lines 18-22; p. 261, lines 16-19). The beating was so severe one of her eyeballs collapsed into her sinus. (Tr. p. 180, 261). Additionally, Erika's nose was broken, and she had bruises and contusions to her lips, her scalp, and about her eye and

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under the carport of the home. (Tr. p. 63). In addition to finding the trail of blood from the bedroom to the kitchen drawer where the knife was taken, police found the murder weapon lying on the bedroom floor. There was blood everywhere in the bedroom where Erika's body was found, on Applicant's clothing, and on Applicant's hands and forearms. (Tr. pp. 165-177). The pathologist and an investigator testified that at the autopsy there was very little blood left in Erika's body. (Tr. pp. 184-185, 106-107).

Applicant told the investigator that he could not remember what happened regarding the killing of his wife. (Tr. p. 129). Applicant stated he and his wife had separated but had gotten back together several weeks before her death and that they were living together in the home where the victim's body was found. (Tr. p. 134). Applicant told the investigator that earlier in the evening there was an altercation between he and his wife and she left. (Tr. p. 128). Applicant stated his mother then came and picked up the couple's children. (Tr. p. 128). Applicant stated that later he was sitting on the couch in the dark when Erika returned to the home. (Tr. p. 127-28). Applicant stated Erika was getting some of her things together, and they were fussing. (Tr. p. 127-28). At that point in the interrogation, Applicant stated the next thing he remembered was being in the carport on the phone with 911. (Tr. p. 128). The investigator testified that when he played the 911 tape for Applicant, Applicant said over and over that "he wouldn't do that, he wouldn't do that." (Tr. p. 129). However, Applicant admitted that he and his wife were alone in the house at the time of her death. (Tr. p. 129).

Applicant continued to assert that he could not remember anything that happened between the fussing and being out in the carport talking to the 911 operator. (Tr. p. 129). Applicant was then asked if he saw the victim on the floor in the bedroom. (Tr. p. 129). Applicant admitted he saw the victim on the floor but said he didn't know how that happened to her. (Tr. p. 129). When

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the investigator told Applicant "the way it looked in the house, whether they got into a fight, he got a knife [sic], he hurt her." (Tr. p. 129). Applicant stated "they did get physical and they did hit each other." (Tr. p. 129). But Applicant never stated who initiated the physical altercation or who hit whom first, nor did he explain why the confrontation became physical. (Tr. pp. 129-30). The investigator testified there were no injuries to Applicant that he could see other than a bite mark to his hand, which Applicant admitted was from an altercation much earlier in the evening. (Tr. p. 136).

Applicant never told the investigator his wife hit him first. In fact, Applicant admitted he grabbed the victim by the hair. (Tr. p. 129-130). Applicant also admitted to the investigator four times in a row, "I kept hitting her." (Tr. p. 130). Applicant then stated he got the knife. (Tr. p. 130). Applicant initially denied knowing where the knife came from, but eventually admitted to the investigator the knife was a kitchen knife, and he had retrieved the knife and used it. (Tr. p. 130).

Applicant testified in his own defense at trial. He testified that he could not remember anything about beating his wife or walking the entire length of the home, obtaining a knife from the kitchen drawer, and then walking all the way back to the bedroom and stabbing his wife at least five times in the neck with the kitchen knife. (Tr. pp. 260-62). Applicant testified that "[he] and Erika had an argument, and she told [him] to leave. . . I told her I wasn't going anywhere, that she could go." (Tr. p. 253). Applicant claimed amnesia about the events of the murder itself and claimed amnesia about what he had told the police and the 911 operator. (Tr. p. 262). Applicant also called a psychiatric expert, Dr. Margaret Milikian, who testified that in her opinion Applicant suffered from amnesia. (Tr. pp. 311-19). However, in his trial testimony, Applicant testified he clearly remembered all the events that led up to his beating and eventual stabbing of his wife to

death. (Tr. pp. 262-69). Applicant testified the couple was having marital difficulties and his wife decided to leave. (Tr. p. 252-53). Applicant testified "the argument, the discussions of her leaving—wasn't something that hadn't happened a million times before." (Tr. p. 258). Applicant testified that earlier in the evening when his wife was leaving the home the first time, he took his wife's phone away from her and she bit his hand when she was trying to get the phone back. Applicant testified that after that she left in her car. (Tr. p. 265).

Applicant testified that after his mother came to pick up the children from the house, he was sitting on the couch in the dark when his wife came back to get more of her things from the home. (Tr. p. 268). Applicant testified he followed his wife to the bedroom and was asking her repeatedly "what was going on." (Tr. p. 257). But she would not answer him. (Tr. p. 257). Applicant testified: "[s]he was going through a drawer and turned around and like she threw something at me." (Tr. p. 257). Then he lunged for her, "everything went gray," and he heard her call out his name. (Tr. p. 257). Applicant testified he remembered everything up until the point that he lunged at his wife. (Tr. p. 257-58, 262, 267-268). On direct examination, Applicant was asked the following question and gave the following answer regarding what occurred before he lunged at his wife:

Q: Okay. Was there any arguing or fighting or anything of that nature?

A: I was just trying to find out what was going on. I mean, like I said, I remember she turned around and I remember lunging for her.

Everything went gray. She yelled my name, and that was it. I don't know what happened. It was like she just didn't want to talk to me when I got home. And we'd been talking the whole day.

(Tr. p. 257, line 23 - p. 258, line 6).

On cross-examination, Applicant testified as follows:

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Q: You just don't remember - - you remember everything in vivid high-definition detail up until when?

A: She came back. She turned *like* she was going to throw something. I lunged at her. Things went gray. She yelled my name, and that was that.

(Tr. p. 267) (emphasis added). On cross-examination Applicant also testified as follows:

Q: You don't deny calling 911?

A: No, sir.

Q: You don't deny that that's your voice?

A: No, sir.

Q: You don't deny telling 9-1-1 that you beat her because you thought she was going to take the children?

A: Correct.

Q: You don't deny telling William Gary that you beat her, and repeated it four times for emphasise [sic]?

A: Correct.

Q: And you don't deny telling William Gary that you went to get a knife?

A: Correct.

(Tr. p. 272, lines 12-24). On cross-examination Applicant was asked several times if the victim fought back, and he stated he did not remember. (Tr. p. 260, lines 3-10). Upon further questioning, based on the physical evidence, Applicant agreed with the Solicitor the victim did not put up a fight. (Tr. p. 260, lines 11-19). However, Applicant continued to assert, he did not recall anything after he lunged into his wife. (Tr. pp. 261-72).

Counsel requested a jury charge on voluntary manslaughter. In his argument to the trial court requesting the charge, Counsel conceded he had no pinpoint evidence of what occurred when the victim returned to the house, because the victim was deceased and he, Applicant, purportedly could not remember. (Tr. p. 341, lines 1-10). The trial judge considered the request and declined to charge voluntary manslaughter on the grounds there was no evidence that would support a charge that Ericka's murder was in the heat of passion upon adequate legal provocation. (Tr. pp. 340-41). Specifically, the trial court found that while there *might* be some evidence from which one could infer heat of passion, he saw no evidence of sufficient legal provocation for that heat of passion. (Tr. p. 340-41).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland,

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466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 688). After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proving ineffective assistance of counsel in this action.

Failure to Object to Testimony of Anthony Sellers

Applicant asserts Counsel was ineffective for failing to object to Anthony Sellers' testimony at trial. This Court finds Counsel's performance was not deficient because he articulated a valid strategic reason for not objecting to Sellers' testimony. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)).

Sellers testified that on the night she was killed, he had a couple of missed calls from the victim. (Tr. p. 143). He testified she called for the first time probably sometime between 8:00 PM

and 8:30 PM and that he called her back around 9:00 PM. (Tr. p. 143-44). Sellers testified that the victim told him she wanted her job back so that she could "make some money so that [she] can get out and get . . . a place." (Tr. p. 145). Sellers testified she said "my husband just beat my ass and threw me out of the house." (Tr. p. 145). Sellers also testified the victim said she was going back to the house to get some things. (Tr. p. 146).

Counsel testified that he chose not to object to Sellers' hearsay testimony at trial because he reasoned that through effective cross-examination he could introduce evidence supporting a voluntary manslaughter charge. According to Counsel's testimony and the record, Counsel's trial strategy was to show that Applicant was entitled to a voluntary manslaughter charge. At trial, Counsel requested and argued for a jury charge on the lesser included offense of voluntary manslaughter. Additionally, according to Counsel's testimony and the record, he spent a great deal of time addressing Sellers' testimony during his closing arguments. Counsel noted and the trial transcript reflects that Applicant remembered nothing that happened between lunging at his wife and then calling 911.

This Court finds that because Counsel articulated valid strategic reasons for not objecting to Sellers' testimony, his decision not to object is entitled to deference and does not constitute ineffective assistance of counsel. Accordingly, this Court finds Applicant has failed to satisfy his burden of showing Counsel's performance was deficient.

This Court also finds Applicant has failed to satisfy his burden of proving that any alleged deficient performance prejudiced him. This Court finds that there is no reasonable probability that had the testimony been excluded the outcome of trial would have been different. There was no dispute at the trial that Applicant beat his wife until she was unconscious and then stabbed her so

severely that he almost decapitated her. Accordingly, this Court finds that Applicant has also failed to satisfy his burden of proving prejudice with respect to this allegation.

Counsel's Comments in Closing Argument Concerning Credibility of Witnesses

Applicant alleged Counsel was ineffective for arguing to the jury that it should question the credibility of Applicant and his witnesses because such argument undermined the credibility of the defense. "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, (2003). In light of this range, this Court's review of an attorney's closing arguments must be "highly deferential." Id. at 6.

In this case, Counsel addressed the jury in closing argument in a manner intended to be accessible. Counsel testified that he spoke in a manner to be down to earth and to be sarcastic about the State's questioning of the expert on amnesia. Applicant offered no evidence to support his contention that Counsel's manner and tone during closing arguments were damaging to his defense, nor did he offer any evidence to support his claim that Counsel's performance in giving his closing argument was deficient. Accordingly, this Court finds Applicant has failed to present any competent evidence to support a finding that Counsel's performance was deficient in this regard.

This Court also finds that Applicant has failed to present any competent evidence that any alleged deficiency in Counsel's performance during his closing argument prejudiced him. A court may find that ineffective assistance of counsel occurred when "there is a reasonable probability that, but for counsel's improper closing comments, the result of the trial would have been different." Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008). "An error by counsel,

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even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Smith v. State, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010). "Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

Here, there was overwhelming evidence of Applicant's guilt. The record is undisputed that Applicant killed his wife. Applicant testified at trial and the investigator testified that Applicant did not remember anything that happened after lunging at his wife up until the time he called 911. Applicant did not testify at the PCR hearing. As Counsel testified, the predominant issue at trial was whether the elements of voluntary manslaughter were present. This Court finds Applicant has produced no evidence to show that there is a reasonable probability that the outcome of Applicant's trial would have been different but for Counsel's alleged errors. Therefore, this Court finds Applicant has also failed to satisfy his burden of proving prejudice with respect to this allegation.

**Failure to Effectively Argue the Facts and Law in Support of His Request for
a Jury Instruction on Voluntary Manslaughter**

Applicant alleges Counsel failed to effectively argue the facts and existing law to convince the trial judge to instruct the jury on the law of voluntary manslaughter. Applicant argues that the facts Counsel should have highlighted as entitling him to an instruction on voluntary manslaughter were that: (1) Applicant made statements to Investigator Gary that he and the victim had been "fighting" and that "they did get physical and they did hit each other," and (2) that the victim had threatened that she was going to take the kids. At the appropriate time, Counsel requested a voluntary manslaughter charge. At the charge conference, the judge asked Counsel: "what evidence is there, do you believe, that would support a jury instruction on voluntary

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manslaughter?" (Tr. p. 337). Counsel argued that there was evidence, based on Investigator Gary's testimony, that Applicant and the victim had been in a physical altercation that night, and that, therefore, there was evidence of sufficient legal provocation. (Tr. p. 338, lines 1-5). Counsel also cited to case law in support of his argument. (Tr. p. 338, lines 6-12). Counsel also argued that based on the timeline and Sellers' testimony, there was evidence of both heat of passion and sufficient legal provocation. (Tr. pp. 338-39). There was no other testimony at trial that Counsel could have argued in support of his request for a voluntary manslaughter charge.

At trial, Applicant testified in his own defense. Applicant testified that he could not remember anything about beating his wife or walking the entire length of the home, taking a knife from the kitchen drawer, and walking all the way back to the bedroom and stabbing his wife five times in the neck. Applicant claimed he had amnesia about the events of the murder itself and his statements to police and the 911 operator. Applicant also called a psychiatric expert at trial who testified that in her opinion Applicant suffered from amnesia. However, Applicant testified he clearly remembered all the events that led up to his beating and eventual stabbing of his wife to death. Applicant testified the couple was having marital difficulties and his wife was leaving him. Applicant testified that earlier in the evening when his wife was leaving their home the first time, he took her cell phone away from her and she bit his hand to get it back. Applicant testified that after taking her phone back, she left.

Applicant testified that later that night he was sitting on the couch in the dark when his wife returned home to retrieve some of her things. He testified that he followed her to the bedroom asking her repeatedly "what was going on" but that she would not answer. Applicant testified: "[s]he was going through a drawer and turned around and like she threw something at me." Applicant testified he lunged for her, "everything went gray," and he heard his wife call out

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his name. Applicant testified he remembered everything up until the point that he lunged into his wife. On direct examination, Counsel asked Applicant if there was "any arguing or fighting or anything of that nature" and Applicant stated: "I was just trying to find out what was going on. I mean, like I said, I remember she turned around and I remember lunging for her. Everything went gray. She yelled my name, and that was it. I don't know what happened. It was like she just didn't want to talk to me when I got home. And we'd been talking the whole day." On cross-examination Applicant was asked several times if the victim fought back, but he said he did not remember. After further questioning, Applicant agreed with the Solicitor that, based on the physical evidence, the victim did not put up a fight. However, Applicant continued to assert he did not recall anything after he lunged into his wife.

To mitigate a charge of murder to the offense of voluntary manslaughter, a defendant must show that the killing occurred "in sudden heat of passion upon sufficient legal provocation," 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000), which "must be such as would render the mind of an ordinary person incapable of cool reflection, and produce . . . 'an uncontrollable impulse to do violence.'" State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). "Heat of passion alone will not suffice to reduce murder to voluntary manslaughter." State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996) (holding no error where evidence showed a witness heard a 'scuffle'; victim and defendant had a bad relationship, and victim was angry at defendant and charged at defendant). Rather, both "must be present at the time of the killing." Id. (citing State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984)). "The killing of a human being, even in the heat of passion[,] is murder if the slayer ha[s] no just cause for his anger." State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) (quoting Smith v. State, 49 Ga. 482 (1873)). Even if sufficient legal provocation has aroused a defendant's passion, "if at the time of the killing those passions

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had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Furthermore, "mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996). The court need not charge voluntary manslaughter if "there is no evidence whatsoever tending to reduce the crime . . . to manslaughter." State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 168 (2007) (quoting State v. Burris, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999)).

Applicant alleges Counsel failed to point to Investigator Gary's testimony about the occurrence of a physical altercation in support of his request for the voluntary manslaughter instruction. However, Counsel did refer to Gary's testimony in recounting the evidence supporting legal provocation. Gary testified that Applicant told him that he and the victim had been "fussing" that day and "said they did get physical and they did hit each other." He also testified that Applicant "never . . . [told him] exactly how any of the injuries [to the victim] were caused, which ones were caused first, . . . he never would go into any details with that." Gary testified that Applicant "just kept saying 'we were just fussing, we were just fussing, I love her, I would never hurt her.'" But Gary testified "I asked him what happened once the fussing stopped. He told me he doesn't remember." Gary also testified that he "saw no injuries on [Applicant] other than the bite mark that [he] could see on [Applicant's] hand." Additionally, at trial, Applicant admitted on cross-examination that the victim did not defend herself.

Brenda Horton ("Brenda"), Applicant's mother, testified at trial that around 7:30 p.m., Applicant had called her to ask if he could bring the children to her house in the morning. (Tr. pp. 215-16). She testified she did not think anything of it because the children had been at her house

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for the most part of the year before. (Tr. p. 216). She also testified that the victim had come by her house and asked her to take care of the children around 8:00 or 8:30 p.m. on the night in question. (Tr. p. 215). In addition, She also testified she did not see any evidence that Erika had been struck. (Tr. p. 217). Brenda testified that she then called Applicant and asked if she could come by and pick up the children that night rather than him having to bring them very early the next morning. (Tr. pp. 217-18). Applicant corroborated that testimony when he testified he called his parents and told them he would bring the children to them in the morning, and then they called back and said they would come get the girls that night. (Tr. p. 253, lines 20-24). Brenda testified that when she and her other son went to pick the children up from Applicant's house, Applicant seemed fine. (Tr. p. 228, lines 10-11). Finally, Applicant testified "I was not afraid of my wife taking the kids. She'd already told me she couldn't take care of them." (Tr. p. 26, lines 22-23).

This Court finds that Applicant has failed to show that Counsel's performance fell below an objective standard of reasonableness with respect to this allegation. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 1 (2003). Counsel properly apprised the trial judge of the relevant facts and governing case law. The judge nevertheless refused to charge the jury on voluntary manslaughter, finding that, though there may have been evidence presented from which the factfinder might infer "anger or heat of passion[.]" there was no "evidence from which [the jury] could reasonably infer . . . sufficient legal provocation for heat of passion. The South Carolina Court of Appeals affirmed Applicant's conviction finding that the charge was properly denied because there was no evidence whatsoever of the lesser offense of voluntary manslaughter. State v. Horton, No. 2010-UP-406, 2010 WL 10080219, at *1 (S.C. Ct. App. Sept.

16, 2010). The Court had before it the trial transcript. In its opinion the court of appeals made no suggestion that the argument was not preserved because of a failure of Counsel to highlight specific testimony. Therefore, this Court finds Applicant has failed to establish that Counsel's performance fell below an objective standard of reasonableness with respect to this allegation.

Applicant has also failed to show prejudice with regard to this allegation. Counsel requested a jury instruction on voluntary manslaughter. The judge considered counsel's request and argument for a jury instruction on voluntary manslaughter but found that there was no evidence of legal provocation. Applicant offers nothing more than mere speculative statements to meet his required burden of proof and offered no testimony to support his claims. There is no dispute in this case as to whether Applicant killed his wife. No evidence was presented at trial that would reduce, mitigate, or excuse that killing. By Applicant's own admission at trial, he was not afraid that the victim was going to take his children. Additionally, Applicant could never identify who started the physical altercation between him and his wife or who threw the first blow. Applicant simply testified the victim "turned like she was going to throw something." (Tr. 267, lines 19-21). But he never gave any details about what it was she was going to throw or how or why this upset him. Applicant has failed to point to any additional competent evidence that Counsel could have presented to the court to convince it to give that charge. Additionally, this Court notes that the trial judge was present throughout the entire trial and heard all of the same testimony that Counsel heard. In arguing legal provocation to the judge, Counsel stated the evidence would have to come "from the officer talking to [Applicant] when he said [he and his wife] had been fighting." There is no dispute that the judge heard that testimony.

Therefore, based on the record and the testimony presented at the PCR hearing, this Court is not convinced that Counsel could have said anything further that would have persuaded the trial

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judge to give the charge. The request to charge was made, a discussion of legal provocation and heat of passion ensued, and the Court denied the request. Therefore, this Court finds there is no reasonable probability that any alleged deficiencies of counsel affected the outcome of the trial, nor is there a reasonable probability, in light of the facts shown at trial, that the jury would not have convicted Applicant of murder even if a voluntary manslaughter charge had been given. Accordingly, this Court finds Applicant has failed to satisfy his burden of proving he was prejudiced by any alleged deficiency of counsel.

Failure to Object to the Trial Judge's Instruction on Malice Aforethought

Applicant contends that Counsel was ineffective for failing to object to the trial judge's "erroneous" instruction on malice aforethought. However, the Court finds Applicant has not only failed to demonstrate any deficiency in Counsel's performance, but has also failed to show that the trial court's instruction on malice aforethought was erroneous. In support of his assertion that the trial judge gave an erroneous instruction, Applicant points to the case of State v. Belcher, in which the court held that a jury instruction permitting the jury to infer malice from the use of a deadly weapon is no longer valid law in cases "where evidence is presented that would reduce, mitigate, excuse, or justify the homicide." 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009) (emphasis added). Belcher is inapplicable in this case for two reasons. First, it was decided after Applicant's trial, State v. Belcher, 385 S.C. 597, 613, 685 S.E.2d 802, 810 (2009) ("Our ruling, however, will not apply to convictions challenged on post-conviction relief.") (citations omitted). See also State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("[the courts] have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial."). Second, Applicant has failed to point to any evidence that was presented at trial that would reduce, mitigate, excuse, or justify the homicide.

Here, the trial judge charged the jury that it was "permitted to infer the existence of malice from proof of the intentional use of a deadly weapon." Applicant did not testify at the PCR hearing. The record clearly shows that Counsel requested a voluntary manslaughter charge. However, the court refused to charge voluntary manslaughter because it specifically found there was no evidence from which the jury could infer sufficient legal provocation. The Court of Appeals affirmed his conviction. Accordingly, this Court finds Applicant has failed to show Counsel was deficient in failing to object the trial court's instruction regarding malice because Applicant failed to point to any evidence produced at trial that would reduce, mitigate, excuse, or justify the killing.

Furthermore, this Court finds Applicant failed to establish his burden of proving he was prejudiced because the court had already found that a voluntary manslaughter charge was improper because there was no evidence presented from which the jury could infer sufficient legal provocation. The court of appeals had the full trial record before it and affirmed Applicant's conviction. Where there is no evidence presented to reduce, mitigate, excuse, or justify a killing, an instruction on the inference of malice through the use of a deadly weapon is not improper under Belcher. Accordingly, this Court finds Applicant has failed to show that there is a reasonable probability that the outcome of the proceedings would have been different had counsel objected to the malice instruction.

Failure to Argue That Voluntary Manslaughter Is the Absence of Premeditation and Not the Absence of Malice

Likewise, in light of this Court's findings above regarding Counsel's request to charge voluntary manslaughter, Applicant's assertion that Counsel was ineffective for failing to argue that "voluntary manslaughter is the absence of premeditation and not the absence of malice" is entirely without merit. Murder is defined as "the killing of any person with malice aforethought,

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either express or implied." S.C. Code Ann. § 16-3-10 (2003). Premeditation is not an element of murder in this state. Furthermore, voluntary "[m]anslaughter is defined as "the unlawful killing of another without malice." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (citing S.C. Code Ann. § 16-3-50 (2003)); Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990)). Applicant has failed to set forth any evidence that Counsel's performance fell below an objective standard of reasonableness with respect to this allegation. Therefore, this Court finds Applicant has failed to satisfy his burden of proving that counsel's performance was deficient. This Court also finds that Applicant has failed to satisfy his burden of proving that any alleged deficiency in this regard affected the outcome at trial.

B. Ineffective Assistance of Appellate Counsel

Applicant alleged his appellate counsel, Joseph L. Savitz, III ("Appellate Counsel") was ineffective for (1) failing to argue that the trial court erred in refusing to admit evidence of the victim's state of mind where it would have been relevant to mitigate the offense from murder to manslaughter; (2) failing to effectively argue the facts and existing law to show the trial court erroneously failed to instruct the jurors about the law of voluntary manslaughter; and (3) failing to argue voluntary manslaughter is the absence of premeditation and not the absence of malice. This Court finds Applicant has failed to meet his burden of proving ineffective assistance of appellate counsel. Applicant failed to show that appellate counsel's performance was deficient or that any such deficiency prejudiced Applicant.

"A defendant is constitutionally entitled to effective assistance of appellate counsel." Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)).

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Appellate counsel has a "professional duty to choose among potential issues" according to their merit. Barnes, 463 U.S. 745. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

This Court must analyze claims of ineffective assistance of appellate counsel according to the same standard set forth in Strickland v. Washington. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)). In other words, Applicant has the burden of proving appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005) (citing Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003)). Where an Applicant contends appellate counsel rendered ineffective assistance by failing to argue an issue, Applicant must show the failure to raise the issue was objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed. See Southerland v. State, 337 S.C. 610, 617, 524 S.E.2d 833, 836 (1999) (citing People v. Griffin, 687 N.E.2d 820 (Ill. 1997)). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Applicant argues Appellate Counsel's performance was deficient, in part, because of the length and content of his brief filed in the court of appeals. In support of that argument, Applicant refers to the South Carolina Supreme Court's ruling in Patrick v. State, 349 S.C. 203, 562 S.E.2d

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609 (2002). In that case, however, counsel "devoted [only] three short paragraphs to [the] issue [on appeal], did not give any useful analysis, . . . only cited one case. . . ." in his brief and failed to "make any note of [the pertinent] issue in his petition for rehearing." Id. at 208, 562 S.E.2d at 611. Additionally, counsel raised the issue "in a conclusory fashion in [his] final brief" and failed to state it with particularity in [the] petition for rehearing." Id. at 208-09, 562 S.E.2d at 612. Based on the court of appeals statements and counsel's briefs, the supreme court found appellate counsel was ineffective for failing to adequately raise or address the merits of prosecutorial retaliation. Id. Here, Appellate Counsel not only presented an argument on the controlling legal issue of voluntary manslaughter in his brief to the South Carolina Court of Appeals, but also cited the relevant case law addressing the requirements of "heat of passion" and "sufficient legal provocation." Therefore, this Court finds Patrick is not applicable in this case.

Applicant also argues that State v. Belcher, 385 S.C. 597, 685 S.E.2d 802, was a seminal case on the issue of voluntary manslaughter. In Belcher the court held it was improper for the trial court to charge the jury that it could infer malice from the use of a deadly weapon where evidence is presented that would reduce, mitigate, or excuse the homicide. Here, the trial judge found that a jury instruction on voluntary manslaughter was inappropriate because there was no evidence from which the jury could infer that there was a sufficient legal provocation in Applicant's case. Because there was no evidence to support a voluntary manslaughter charge and the jury was not charged on voluntary manslaughter, the judge's charge to the jury that it could infer malice from the use of a deadly weapon was not an erroneous instruction under the rule established in Belcher. Therefore, this Court finds Belcher was inapplicable both at Applicant's trial and on appeal. Therefore, Applicant has failed to demonstrate that Appellate Counsel's performance in failing to raise Belcher was deficient. Furthermore, this Court finds Applicant has failed to demonstrate that

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the alleged deficiency in failing to raise Belcher prejudiced him because there is no reasonable probability that had Appellate Counsel raised Belcher as an issue the result of the appeal would have been different.

This Court finds that Appellate Counsel effectively argued the controlling legal issue of voluntary manslaughter and cited to relevant case law in support of his arguments. Following the denial of the appeal, Wanda Carter, also with the Office of Appellate Defense, filed a well-argued petition for rehearing in the court of appeals and an extensive Petition for Writ of Certiorari to the supreme court. Although the court ultimately denied certiorari, Appellate Counsel provided effective assistance in both selecting and raising the issues that he deemed meritorious on appeal. Applicant has failed to show that Appellate Counsel's "failure to raise the issue was objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed." See Southerland v. State, 337 S.C. at 617, 524 S.E.2d at 836. Applicant has therefore failed to produce evidence sufficient to overcome the presumption of effective assistance. Accordingly, this Court finds Applicant has failed to show that Appellate Counsel's performance was deficient.

This Court also finds Applicant has failed to demonstrate that he was prejudiced by any alleged deficiency of Appellate Counsel. As this Court found above, Belcher was inapplicable to Applicant's case because this Court agrees with the trial Court's finding that there was no evidence presented at the trial from which a juror could reasonably infer that there was sufficient legal provocation. Applicant could not even remember what occurred between 10:00 and 10:30 PM and could not testify whether he or the victim made the first blow. There was simply nothing in the testimony at trial that indicated Applicant acted under sufficient legal provocation. Therefore, there is no reasonable probability that the outcome of Applicant's appeal would have been different but for the alleged deficiency of Appellate Counsel. Applicant has failed to point to

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any other arguments he feels Appellate Counsel should have made. Accordingly, this Court finds Applicant has failed to demonstrate that he was prejudiced by any alleged deficient performance by Appellate Counsel.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

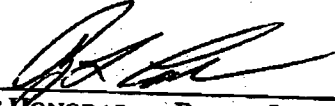
IT IS THEREFORE ORDERED THAT:

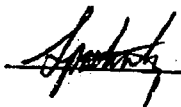
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

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2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 22nd day of February, 2016.


THE HONORABLE ROGER L. COUCH
Presiding Judge

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Larry Brent Horton, SCDC# 329065,)
Applicant,)
)
vs.)
)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case Number: 2011-CP-42-0007

Rule 59(e), SCRCP Motion to Alter or
Amend the Order of Dismissal

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Larry Brent Horton, the Applicant herein, moves the Court to Alter or Amend the Order of this Court in the following particulars.

I. Erroneous Factual Framework.

An erroneous factual framework permeates all aspects of the order of dismissal. The Court repeated findings of fact like this one: "Here, there was overwhelming evidence of Applicant's guilt. The record is undisputed that Applicant killed his wife." Order, p. 13. Mr. Horton has never disputed that he killed his wife. Mr. Horton, however, has always disputed that he committed murder and contends that under a proper charge, the jury would have convicted him of manslaughter. While the Court's order acknowledges that Mr. Horton's defenses was voluntary manslaughter, the Court's order often confuses proof that Mr. Horton committed the acts with proof of the elements of murder. This was error.

The Court further erred in finding, "There was no dispute at trial that Applicant beat his wife until she was unconscious and then stabbed her so severely that he almost decapitated her." Order, pp. 11-12. This finding by the Court was a theory urged by the State based upon the circumstantial evidence. The State's theory was not undisputed. Section II(A) below will discuss the facts disputing the State's theory and justifying a voluntary manslaughter instruction.

The Court also erred in stating, “Applicant could never identify who started the physical altercation between him and his wife or who threw the first blow.” Order, p. 18; and see p. 24. The statement fails to recognize that the State had the burden of proving at trial who threw the first blow or who started the physical altercation. The statement implies the Applicant has a burden of proof at the trial, which is contrary to the law.

Throughout the order of dismissal, this erroneous factual framework is used to justify conclusions that Mr. Horton failed to establish prejudice. Significantly, the Attorney General supplied the erroneous factual framework when drafting the order of dismissal. “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). The Court provided guidance about drafting the order of dismissal in a post-hearing memorandum dated September 11, 2015, a copy of which is attached.

The Court’s order, furthermore, seems to confuse proof that Mr. Horton committed the acts with proof of the elements of murder. Voluntary manslaughter best explains the tragic events in this case.

This Court should reconsider the order of dismissal and correct the erroneous factual framework.

II. Findings of Fact and Conclusions of Law.

A. Ineffective Assistance of Trial Counsel.

1. Failure to Object to Testimony of Anthony Sellers.

The Court’s post-hearing memorandum stated:

Mr. Vieth's failure to object to testimony of Anthony Sellers did not violate Applicant's rights under the Confrontation Clause of the

United States and South Carolina Constitutions. Mr. Vieth made the strategic decision to not object to Sellers's hearsay testimony during trial. If trial counsel can articulate valid reasons for adopting a certain strategy at trial, his choices with regard to those tactics will not be deemed ineffective assistance. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 530, 531 (1992). ***Although the testimony at issue may have had the result of damaging the defense***, Mr. Vieth withheld his objection during trial, concluding that the testimony paired with an effective cross-examination of Sellers would support the possibility of voluntary manslaughter. Because Mr. Vieth has articulated valid reasons for allowing the otherwise inadmissible hearsay testimony, the decision to not object is entitled to deference and does not constitute ineffective assistance of trial counsel.

(emphasis added). This Court, thus, recognized the devastating nature of Mr. Seller's testimony. See also Applicant's Post-hearing Memorandum of Law in Support of Application for Post Conviction Relief (hereinafter "Applicant's Post-hearing Memorandum"), Section V(A)(1).

Despite the Court's direction "to prepare an Order consistent with the below findings," the order drafted by the Attorney General did not (1) contain a legal conclusion that trial counsel's failure to object to testimony of Anthony Sellers did not violate Applicant's rights under the Confrontation Clause of the United States and South Carolina Constitutions" or (2) include the Court's finding that Mr. Sellers' testimony was "damaging" to the defense.

There can be no doubt that Mr. Sellers' testimony about Erica Horton's supposed statements was hearsay and implicated the Confrontation Clause. The order drafted by the Attorney General, indeed, acknowledged Mr. Seller's testimony to be "hearsay testimony," without identifying any applicable hearsay exception. No hearsay exception applies. The analysis of deficient performance under *Strickland*,¹ therefore, must begin from the premise that Mr. Seller's testimony was objectionable and inadmissible. The question then becomes whether trial counsel had a legitimate strategic reason for allowing the introduction of inadmissible

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

evidence. “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (“Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness.” (emphasis supplied by court)). The Court’s post-hearing memorandum and the order of dismissal, at p. 11, state trial counsel “withheld his objection during trial, concluding the testimony paired with an effective cross-examination of Sellers would support the possibility of a manslaughter instruction.” Mr. Seller’s testimony did nothing to establish the elements of voluntary manslaughter, but rather helped the prosecution advance its narrative of Mr. Horton’s supposed motive for murder. Additionally, trial counsel never articulated a theory of the case to persuade the trial judge to charge voluntary manslaughter. Trial counsel also did not conduct the legal research regarding voluntary manslaughter necessary to be able to articulate a theory of the case to persuade the trial judge to charge voluntary manslaughter. Thus, the decision not to object to the statement could not have been a strategic decision based upon his plan to argue manslaughter.

Despite the Court’s memorandum finding Mr. Sellers’ testimony “damaging,” the order drafted by the Attorney General concluded, “This Court finds Applicant has failed to satisfy his burden of proving any alleged deficient performance prejudiced him.” Order, p. 11. The order then emphasizes that Mr. Horton committed the underlying acts but never addresses the impact of Mr. Sellers testimony concerning the defense and possible jury instruction on voluntary manslaughter. As seen, Mr. Seller’s testimony did nothing to establish the elements of voluntary manslaughter, but rather helped the prosecution advance its narrative of Mr. Horton’s supposed motive. The “damaging,” therefore, prejudiced Mr. Horton.

Mr. Horton has established both deficient performance and prejudice. This Court should reconsider the order of dismissal and order a new trial.

2. Counsel's Comments in Closing Argument Concerning Credibility of Witnesses.

The Court's post-hearing memorandum and the order drafted by the Attorney General, at p. 12, both state trial counsel

addressed the jury in closing argument in a manner intended to be accessible. Counsel testified that he spoke in a manner to be down to earth and to be sarcastic about the State's questioning of the expert on amnesia. Applicant offered no evidence to support his contention that Counsel's manner and tone during closing arguments were damaging to his defense, nor did he offer any evidence to support his claim that Counsel's performance in giving his closing argument was deficient.

In making this statement, the Court overlooked or misapprehended three important points. First, Mr. Horton's ground for relief was based on substance of the argument, which is contained in the trial transcript, and not trial counsel's "manner and tone." Second, Mr. Horton's grounds for relief included not only the expert witness testifying about Mr. Horton's amnesia, but also trial counsel's statements during his closing argument about Brenda Horton's testimony. Third, the Court failed to consider how the substance of trial counsel's comments about these witnesses undermined the credibility of the defense. Applicant's Post-hearing Memorandum Section V(A)(5).

When analyzing prejudice, the order once again focuses on the evidence that Mr. Horton committed the underlying acts but not how trial counsel's deficient performance related to the voluntary manslaughter defense and the defense that the acts were committed without malice aforethought. Trial counsel's undermining the credibility of the defense prejudiced Mr. Horton by eliminating any chance the jurors would find him not guilty based on the absence of malice aforethought.

Mr. Horton, therefore, has established both deficient performance and prejudice. This Court should reconsider the order of dismissal and order a new trial.

3. Failure to Effectively Argue the Facts and Law in Support of His Request for a Jury Instruction on Voluntary Manslaughter

As discussed in Applicant's Post-hearing Memorandum Section V(A)(2), the trial court judge called for trial counsel's assistance in identifying "any evidence in the case" that established provocation to support a voluntary manslaughter instruction. Tr. 340, lines 10-18. The Court's post-hearing memorandum and order focused on witnesses identified by trial counsel rather than trial counsel's failure to point to the specific facts and evidence testified to by those witnesses that supported charging voluntary manslaughter. Trial counsel was deficient for not arguing the evidence that supported the instruction. Mr. Horton was prejudiced because, but for trial counsel's deficient performance, the trial judge would have instructed voluntary manslaughter.

Section V(A)(2) of Applicant's Post-hearing Memorandum identified existing South Carolina precedent regarding what constitutes a "reasonable provocation" to mitigate murder to voluntary manslaughter. *State v. Ferguson*, 20 S.C.L. 619, 621-23 (S.C. App. L. & Eq. 1835) (emphasis added) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). *See also State v. Hammond*, 36 S.C.L. 91 (S.C. App. L. 1850) and *State v. Martin*, 216 S.C. 129, 57 S.E.2d 55 (1949) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). These cases are valid law in our State. Neither the Court's post-hearing memorandum nor the order of dismissal discussed these cases. Trial counsel was deficient for not arguing existing law that supported the instruction. Mr. Horton was prejudiced because, but for trial counsel's deficient performance, the trial judge would have instructed voluntary manslaughter.

Mr. Horton, therefore, has established both deficient performance and prejudice. This Court should reconsider the order of dismissal and order a new trial.

4. Failure to Object to the Trial Judge's Instruction on Malice Aforethought.

The Court's post-hearing memorandum and order of dismissal, at pp.19-20, focused on *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) invalidating a jury instruction that malice can be inferred from the use of a deadly weapon. The Court concluded *Belcher* was not applicable because the trial judge did not instruct voluntary manslaughter and the *Belcher* case was decided after Mr. Horton's trial. The Court, however, overlooked the reason Mr. Horton cited to *Belcher*. Our Supreme Court's discussed *Glenn v. Maryland*, 68 Md.App. 379, 511 A.2d (1985) in *Belcher*. Applicant's Post-hearing Memorandum Section V(A)(3) and (4). The legal concepts discussed in *Glenn* are much broader than the "inference of malice" jury instruction, and these legal concepts are consistent with South Carolina precedent available to trial counsel at the time of Mr. Horton's trial and cited in Applicant's Post-Hearing Memorandum. Trial counsel produced a copy of *Glenn* from his file during the PCR hearing.

Trial counsel was deficient for not arguing existing law that supported the instruction. Mr. Horton was prejudiced because but for trial counsel's deficient performance, the trial judge would have instructed voluntary manslaughter.

Mr. Horton, therefore, has established both deficient performance and prejudice. This Court should reconsider the order of dismissal and order a new trial.

5. Failure to Argue That Voluntary Manslaughter is the Absence of Premeditation and not the Absence of Malice.

The Court erred in finding, "Premeditation is not an element of murder in this state." Order at 21. This Court overlooked Mr. Horton citing South Carolina Supreme Court precedent existing at the time of Mr. Horton's trial holding that when "one kills another, and at

the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation *without premeditation or malice*, it would be manslaughter.” *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 3-4 (2003); *State v. Graham*, 260 S.C. 449, 451, 196 S.E.2d 495, 496 (1973); and *State v. Andrews*, 73 S.C. 257, 53 S.E. 423, 424 (1906). The Court did not discuss any of these cases. Applicant’s Post-hearing Memorandum Section V(A)(3) and (4). *See also* Section II(A)(4), *supra*. Trial counsel was deficient for not arguing existing law that supported the instruction. Mr. Horton was prejudiced because but for trial counsel’s deficient performance, the trial judge would have instructed voluntary manslaughter.

Mr. Horton, therefore, has established both deficient performance and prejudice. This Court should reconsider the order of dismissal and order a new trial.

6. Cumulative Error.

The Court completely overlooked applying a cumulative error analysis. Applicant’s Post-hearing Memorandum Section V(A)(6). This Court should reconsider the order of dismissal and order a new trial.

B. Ineffective Assistance of Appellate Counsel.

Applicant’s Post-hearing Memorandum Section V(B) argued:

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

Mr. Horton then raised three grounds for relief:

1. Appellate counsel failed to argue facts and existing case law that would have required the trial judge to instruct the jurors about voluntary manslaughter;
2. Appellate counsel failed to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice; and
3. Cumulative error.

The Court's post-hearing memorandum and order of dismissal, at p. 21-25, focused on the brevity of the appellate brief. Although the overly brief nature of the appellate brief is troubling, the failure of appellate counsel to cite existing precedent is even more troubling. All of the arguments presented in Applicant's Post-hearing Memorandum Section V(B) incorporated the legal discussion of Applicant's Post-hearing Memorandum Sections V(A)(3) and (4), including existing case law that was available to appellate counsel when he drafted Mr. Horton's appellate brief. This Court never addressed these cases. Trial counsel was deficient for not arguing existing law that supported the voluntary manslaughter instruction. Mr. Horton was prejudiced because, but for trial counsel's deficient performance, the Court of Appeals would have reversed.

Mr. Horton, therefore, has established both deficient performance and prejudice. This Court should reconsider the order of dismissal and order a new trial.

C. Cumulative Error.

Applicant's Post-hearing Memorandum Section V(C) argued:

If this Court concludes the deficiencies of trial and appellate counsel combined to deny Horton a fair trial and appeal, then this Court must apply a cumulative error analysis because the deficiencies taken together also combined to deny Horton a fair trial. See Section V(6), *supra*.

Neither the Court's post-hearing memorandum nor the order of dismissal addressed this argument. Mr. Horton has established both deficient performance and prejudice. This Court should reconsider the order of dismissal and order a new trial.

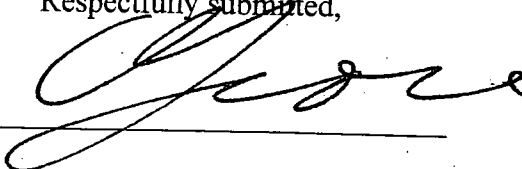
III. Conclusion.

For the foregoing reasons, the Court should reconsider the order of dismissal and order a new trial.

IT IS SO MOVED.

Respectfully submitted,

By



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Counsel for the Applicant

March 2, 2016.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Larry Brent Horton, #329065,

Case No.: 2013-CP-42-0007

Applicant,

**RETURN TO RULE 59(e), SCRC
MOTION TO ALTER OR AMEND
THE ORDER OF DISMISSAL**

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of Applicant's Motion pursuant to Rule 59(e), SCRC, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR).

Respondent submits that the Order of Dismissal of the Honorable Roger L. Couch, dated February 22, 2016, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003) and Rule 52(a) SCRC. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent contends that the Order is an accurate reflection of the findings and amendment is not necessary to support the ruling. Respondent submits the following in response to each of Applicant's arguments:

I. Erroneous factual framework¹

Applicant argues that "an erroneous factual framework permeates all aspects of the order of dismissal" and that "this erroneous factual framework is used to justify conclusions that [Applicant] failed to establish prejudice." Applicant points to only three specific statements in the order and, based on Respondent's reading of the motion, all statements support the Court's

¹ For ease of reference, Respondent adopts Applicant's outline format in this Return.

findings that Applicant failed to show prejudice. Respondent submits that the facts as stated in the Order of Dismissal are consistent with the testimony presented at Applicant's trial, Applicant's direct appeal records, and the testimony and evidence presented at the PCR hearing. Respondent would note that, in accordance with the Court's instructions, Respondent provided Applicant's counsel with an electronic copy of the proposed order of dismissal on February 9, 2016, and the order of dismissal was not signed and filed until February 22, 2016. During this twelve-day period, Applicant made no objection and did not bring any concerns regarding the accuracy of the factual statements to the attention of Respondent or the Court. Respondent submits this argument is without merit and the Order of Dismissal contains no error of fact.

II. Findings of Fact and Conclusions of Law

A. Ineffective Assistance of Trial Counsel

1. Failure to Object to Testimony of Anthony Sellers

Applicant asserts the Order of Dismissal with respect to this claim was inconsistent with the Court's instructions provided in the post-hearing memorandum. Specifically, Applicant states the Order "did not (1) contain a legal conclusion that trial counsel's failure to object to testimony of Anthony Sellers did not violate Applicant's rights under the Confrontation Clause of the United States and South Carolina Constitutions or (2) include the Court's finding that Mr. Seller's testimony was 'damaging' to the defense." Respondent submits that the Order accurately reflects the Court's ruling that Applicant failed to show deficient performance or prejudice with regard to this claim. Respondent took care to craft a proposed order consistent with the Court's findings. To the extent the Court determines the Order of Dismissal misrepresented its findings, Respondent assures the Court that any such error in preparing the proposed order was inadvertent and would have been the result of the drafting attorney's limited familiarity with the case. Should

the Court determine that the Order of Dismissal failed to include certain of its findings with respect to this claim, Respondent will submit an amended proposed order at the Court's direction.

2. Counsel's Comments in Closing Argument Concerning Credibility of Witnesses

Applicant also argues the Court should reconsider its order as to this issue. However, the Court has already considered the applicable law and facts pertaining to this issue, but found that Applicant failed to carry his burden of showing deficiency or prejudice. Therefore, Respondent submits that the Order of Dismissal adequately addresses this issue.

3. Failure to Effectively Argue the Facts and Law in Support of His Request for A Jury Instruction on Voluntary Manslaughter

Applicant also argues the Court should reconsider its order as to this issue. However, the Court has already considered the applicable law and facts pertaining to this issue, but found that Applicant failed to carry his burden of showing deficiency or prejudice. Therefore, Respondent submits that the Order of Dismissal adequately addresses this issue.

4. Failure to Object to the Trial Judge's Instruction on Malice Aforethought

Applicant also argues the Court should reconsider its order as to this issue. However, the Court has already considered the applicable law and facts pertaining to this issue, but found that Applicant failed to carry his burden of showing deficiency or prejudice. Therefore, Respondent submits that the Order of Dismissal adequately addresses this issue

5. Failure to Argue that Voluntary Manslaughter is the Absence of Premeditation and not the Absence of Malice

Applicant also argues the Court should reconsider its order as to this issue. However, the Court has already considered the applicable law and facts pertaining to this issue, but found that Applicant failed to carry his burden of showing deficiency or prejudice. Therefore, Respondent submits that the Order of Dismissal adequately addresses this issue.

6. Cumulative Error

Respondent submits that the Court did not overlook this issue. The Order of Dismissal provides that "as to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned such allegations." The Order of Dismissal adequately addressed all issues. Further, the Court need not conduct a cumulative error analysis for the two reasons provided below.

First, South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See, e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess"). In addition, a number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Second, because the Court found Applicant failed to satisfy his burden of proving ineffective assistance of counsel on any issue, the record contains no error for the Court to cumulatively assess. Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, error. See, e.g., Green v. State, 351 S.C. at 197, 569 S.E.2d at 325 ("While it is unsettled law whether individual

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errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors."'). Only then can the cumulative prejudice arising from the alleged errors be considered. See id. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Respondent submits that the Court did not overlook this issue. Rather, the Court adequately addressed all issues before it, and found that Applicant failed to satisfy his burden of proving ineffective assistance on any issue. Therefore, the Order of Dismissal need not address the issue of cumulative error.

B. Ineffective Assistance of Appellate Counsel

Applicant also argues the Court failed to address all of Applicant's claims regarding ineffective assistance of appellate counsel. However, Respondent submits that the Order of Dismissal adequately addresses this issue.

C. Cumulative Error

Applicant argues the Court failed to address his argument that the deficiencies of trial and appellate counsel combined to deny him a fair trial. However, Respondent submits that, for the same reasons as above, this Court need not engage in cumulative error analysis. South Carolina courts have routinely declined to apply cumulative error in PCR cases and where the Court finds no error, there is nothing for the court to cumulatively assess. Therefore, the Order of Dismissal need not address the issue of cumulative error.

III. Conclusion

Respondent further submits that oral argument would not aid in the reconsideration of the original judgment as the previous order fully comports with the requirements of Rule 52(a), SCRPC.

WHEREFORE, having made its Return to Applicant's Rule 59(e) Motion to Alter or Amend a Judgment, the Respondent requests that the motion be denied and dismissed.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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By: 
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May 20, 2016.

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG SEVENTH JUDICIAL
CIRCUIT
2011-CP-42-0007

LARRY BRENT HORTON,) TRANSCRIPT OF
APPLICANT,) RECORD
VS.)
THE STATE OF SOUTH) JULY 11, 2017
CAROLINA,) CHARLESTON, SC
RESPONDENT.)

B E F O R E:

HONORABLE ROGER COUCH

A P P E A R A N C E S:

VALERIE GARCIA GIOVANOLI, ESQUIRE
Attorney for the State

C. RAUCH WISE, ESQUIRE
E. CHARLES GROSE, JR. ESQUIRE,
Attorneys for the Applicant

* * * * *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

I N D E X

Page

POST-CONVICTION RELIEF HEARING

3

NO EXHIBITS INTRODUCED

1 (The following proceedings were held
2 July 11, 2017, Charleston County, South Carolina, @
3 8:57 a.m.)

4 THE COURT: This is the case of Horton
5 versus State of South Carolina, case number
6 2011-CP-42-0007. Before me today I believe on a
7 Rule 59(e) motion by the applicant; is that
8 correct?

9 MR. GROSE: Yes, sir, Your Honor.

10 THE COURT: And present is the
11 applicant and his counsel and the attorney general
12 is present.

13 MS. GIOVANOLI: Yes, Your Honor.

14 THE COURT: Good to see you again.
15 Happy to hear from you.

16 MR. GROSE: Thank you. If it pleases
17 the Court, Mr. Wise and I are going to divide the
18 argument.

19 THE COURT: That will be fine with me.

20 MR. GROSE: Thank you, Your Honor. And
21 I believe you have our 59(e) motion.

22 THE COURT: I do. I have just pulled
23 it up.

24 MR. GROSE: One of the first things
25 that we talk about in that motion which I think is

1 important to viewing really all the issues that we
2 have before the Court today is the what we refer to
3 as an erroneous factual framework that's in the
4 order that was drafted for Your Honor by the
5 attorney general's office.

6 The problem essentially boils down to
7 conflating the concept of committing the act with
8 equating that to malice. Of course that's not the
9 law and we believe it has to be analyzed, you know,
10 in that framework.

11 THE COURT: In what framework?

12 MR. GROSE: Well, yes, that's a good
13 point. If you go back and look at Mr. Veith's
14 closing argument as well as what he testified to at
15 the PCR hearing, he always viewed this as a case of
16 manslaughter. And so -- and he acknowledged over
17 and over again in the trial that Brent had
18 committed the acts, that he was responsible for his
19 wife's death. So he had acknowledged that Brent
20 had committed the acts. And so the framework --

21 THE COURT: In viewing the transcript
22 there was overwhelming evidence that he, in fact,
23 was involved in the act.

24 MR. GROSE: Right. And Mr. Vieth never
25 disputed that. So the framework essentially became

1 it was Mr. Veith's view he thought it was going to
2 be a distinction between murder and involuntary
3 manslaughter. As Judge Cole framed the issue for
4 the jury, it was between guilty of murder or not
5 guilty and Mr. Vieth was left in a position to
6 argue the absence of malice as a reason why the
7 jury shouldn't convict of murder. And if you go
8 back --

9 THE COURT: He urged Judge Cole to make
10 the charge manslaughter.

11 MR. GROSE: He did.

12 THE COURT: There was a discussion. I
13 read the entire transcript a couple of times.

14 MR. GROSE: Right.

15 THE COURT: There was discussion about
16 that and questions asked. It was fully hashed out.
17 He made an effort to get it charged. I don't know
18 that Judge Cole really made a decision on whether
19 to charge it or not at the close of the trial. It
20 went to the jury as charged.

21 MR. GROSE: Well, I would disagree with
22 one thing. I agree that there was a charge
23 discussion. And I agree that it occurred close in
24 time to closing argument.

25 THE COURT: Yes.

1 MR. GROSE: But we will disagree that
2 it was fully fleshed out. And we say that for a
3 couple of reasons. From a factual standpoint Mr.
4 Vieth did not cite or point Judge Cole to the right
5 parts of the transcript. Well, he wouldn't have
6 had the transcript, but the testimony that would
7 have supported the voluntary manslaughter
8 instruction. Mr. Wise is going to talk more about
9 this in his part unless you want to get ahead to
10 that now.

11 THE COURT: I will mention I'm in the
12 middle of another trial so we have got about
13 30 minutes or so. But I will take as much time as
14 we need to argue it.

15 MR. GROSE: Well, we don't want to hold
16 that up. But the --

17 THE COURT: I want this to be heard
18 today. It's been a long time on the schedule,
19 mostly my fault. I appreciate it.

20 MR. GROSE: We appreciate you working
21 us in. But the case law that was available to Mr.
22 Vieth at the time that also supported a voluntary
23 manslaughter instruction under these facts was not
24 given to Judge Cole. I think that had it been
25 given to Judge Cole that would have supported

1 charging.

2 THE COURT: Specifically what facts do
3 you say fail? Or I will hear that later?

4 MR. GROSE: Well, we can get into it
5 now if you want to keep moving. We have got the
6 facts that, you know, there was testimony from the
7 investigating officer, I believe it was Mr. Gary,
8 that talked about the confrontation between Brent
9 and his wife and that was evidence before the jury.
10 And while the officer was referenced in general,
11 the judge was not pointed to that specific
12 testimony. Brent also had some testimony with
13 regards --

14 THE COURT: There was no doubt the
15 testimony was in the record and had been elicited.

16 MR. GROSE: That's our position, yes,
17 sir. And, in fact, we have two cases that we would
18 like to hand up. Mr. Wise was going to talk about
19 State v. Martin which I think we already cited and
20 State v. Gardner which is probably not in our
21 brief, but it has some consistent legal framework
22 that we had cited and seems to be factually very
23 similar to Brent's situation.

24 But in addition to the charge
25 conference and everything, we also are here on that

1 issue that involves the testimony of Mr. Sellers.
2 That is, while he was involved in setting up a time
3 frame --

4 THE COURT: Let me interrupt you one
5 more time. I will be studying this. I want to be
6 sure I have got it right. The question of whether
7 or not manslaughter should have been charged or not
8 was an appealable issue.

9 MR. GROSE: That brief was pretty poor.
10 You know, it wasn't -- it was an appealable issue.

11 THE COURT: I think it was appealed.

12 MR. GROSE: It was. And we have also
13 raised ineffective assistance of appellate counsel
14 in our brief and, you know, the lawyer who handled
15 the appeal I have known for a long time. But he
16 was kind of at the twilight of his career when that
17 brief was filed. And he took the brief to its
18 ultimate extreme.

19 And once again the case law that was
20 available to Mr. Vieth that we have cited including
21 the Gardner case that we have handed up today was
22 also available to appellate counsel when he wrote
23 the brief. And so if you look at the --

24 THE COURT: My experience with
25 appellate courts is they study these cases, they

1 study law themselves too. They are not bound by
2 what's in somebody's brief.

3 MR. GROSE: Well, that is true, but
4 then you also have a case like Wayne and Patrick
5 versus the State of South Carolina which is out of
6 Abbeville County where the South Carolina Supreme
7 Court reviewed that case in post conviction and
8 they actually looked at the issue, the issue -- the
9 appellate issue they granted relief on had been
10 argued in that case. The court of appeals had as
11 you said studied it, actually asked for more
12 briefing on it. And it still in the Supreme
13 Court's eyes was not adequately briefed.

14 And then on post conviction the Supreme
15 Court granted relief and said that but for counsel
16 failing to brief it adequately with the law that
17 was existing at the time the court of appeals would
18 have reversed earlier. So --

19 THE COURT: I'm sure something like
20 that has happened.

21 MR. GROSE: Right. Well, we think and,
22 you know, I agree with the assessment of the
23 appellate courts, but they also handle a lot of
24 cases and it's -- I have also seen cases where, and
25 I have been on the losing side of them, they take

1 one side's brief and kind of that's what's tracked
2 for the opinion.

3 THE COURT: I have had some cases go up
4 there and when they are decided I say was that the
5 case I heard?

6 MR. GROSE: Well, I have had that
7 happen too.

8 THE COURT: But that's okay. That
9 happens..

10 MR. GROSE: Right. That stresses the
11 importance of the lawyers to, you know, at least
12 get these cases in front of the trial court and the
13 appellate courts so then you have obviously studied
14 this a lot because we have presented you with those
15 cases. And we think if appellate counsel had
16 presented those cases that would have made a
17 difference on the appeal.

18 THE COURT: I have held you up. I am
19 sorry.

20 MR. GROSE: I just wanted to address
21 the issue with Mr. Sellers' testimony also. Mr.
22 Vieth did give some reasons for not objecting to
23 the hearsay and the confrontation clause.

24 THE COURT: I looked at my notes of his
25 testimony. And as I recall what he said from my

1 notes was that Mr. Sellers' testimony provided some
2 information that might have helped him in his
3 effort to get the case a voluntary manslaughter
4 charge that his client couldn't provide because of
5 his amnesia, he couldn't remember or didn't have
6 available and he felt like that information might
7 be helpful in that regard.

8 MR. GROSE: Well, and I think that goes
9 to the timeline. Because Mr. Vieth did I think --
10 I don't know if he introduced it, but he did in
11 closing argument talk about the timeline of the
12 phone calls that were in -- and the calls, Mr.
13 Sellers records or the calls to Mr. Sellers.

14 The point that I don't think we can
15 overlook is that that evidence was admissible
16 evidence. That evidence didn't have anything to do
17 with the confrontation clause objection. The
18 confrontation clause problem came when Mr. Sellers
19 was allowed to testify about the substance of those
20 calls and as you pointed out in your memorandum
21 after the hearing, the substance of those calls
22 were damaging. So Mr. Vieth could have
23 established --

24 THE COURT: This is the first time I
25 have had my memo requesting an order argued as

1 precedence of the case. I don't know that those
2 memorandums are precedent. What I do is I ask for
3 orders to be prepared, then I review the prepared
4 order and if I don't like it I don't sign it and I
5 send it back for somebody to review.

6 A memo is a request to have an order
7 prepared, but I don't intend to be bound by those
8 things. In fact, I can change my mind 180 or 360
9 degrees if I choose to before I sign the order.

10 MR. GROSE: That's what we are hoping
11 you are going to do today.

12 THE COURT: I am trying to keep an open
13 mind.

14 MR. GROSE: But the PCR statute does
15 suggest that the order that is ultimately signed is
16 supposed to represent your thought process. And
17 the memo was the best evidence we had of your
18 thought process at the time.

19 THE COURT: I thought a lot about it.

20 MR. GROSE: We could tell. Obviously
21 because we are here today you have still been
22 thinking about it. So I guess our point is there
23 is no doubt that the conversations that Mr. Sellers
24 testified about with Erica Horton, that those
25 conversations were damaging and that was something

1 that the State embraced in their closing argument.

2 Our point is is that Mr. Sellers was a
3 legitimate witness. The phone records were
4 legitimate. Establishing the timeline was
5 legitimate. All of that could have been done
6 without the inadmissible hearsay confrontation
7 clause objectionable evidence. And --

8 THE COURT: What you are objecting to
9 is what she said.

10 MR. GROSE: Yes, sir.

11 THE COURT: Now, what she said though
12 was apparently Mr. Vieth felt like it might have
13 some benefit to him as a provocation to his client.
14 It might have been of some benefit to him in trying
15 to get that voluntary manslaughter charge which he
16 was seeking. That was his trial strategy. That's
17 the way I read my notes of what he said. And then
18 I went back and I looked at what happened in the
19 trial and so when you are a practicing attorney, I
20 didn't make every objection I could have made.
21 Quite often I let things go because I thought it
22 was kind of like a weighing test, do the benefits
23 outweigh the prejudicial effect. You got to decide
24 whether that's the case.

25 And that's a tough call for a

1 practicing attorney. You have got to sometimes
2 make some decisions that you could always let the
3 other side second-guess.

4 MR. GROSE: Well, I agree with that.
5 But adding that, you know, as Mr. Vieth said in his
6 closing argument, this is not trial by ambush. He
7 had the records in advance. He had the statements
8 in advance. So this was not a decision that he was
9 making at the spur of the moment.

10 The provocation as you referred to it
11 came out of those calls would not support the
12 manslaughter instruction as a matter of law because
13 of the timeline Mr. Vieth established with a
14 cooling period that was substantial. She was at a
15 different location when she made those calls and
16 that sort of thing.

17 The two things that Mr. Vieth stressed,
18 one that he really stressed was the timeline which
19 could come in based on the documents and testimony.
20 The second thing it may be saying too much that he
21 stressed, but he certainly intimated to the jurors
22 that Mr. Sellers might have had a romantic
23 relationship with Erica Horton which would be a
24 factor that could go to the provocation. And,
25 again, that is something that come can in based on

1 the circumstances based on the question that he
2 asked Mr. Sellers about that without getting into
3 the substance of the calls.

4 And so I think when you look at the
5 strategy for those other two things, that's okay.
6 And he had this with enough time to be able to say
7 Mr. Sellers is going to testify, but we need to
8 have a hearing outside the presence of the jury and
9 limit the scope of the testimony. So that's our
10 position.

11 THE COURT: I understand that.

12 MR. GROSE: All right.

13 MR. WISE: Your Honor, I will pick up
14 what we were talking about earlier on the voluntary
15 manslaughter charge. We have submitted to the
16 Court the case of State v. Gardner and also State
17 v. Martin. And Gardner is one we learned more
18 recent, it goes back to 1951. The facts in Gardner
19 really do parallel the facts in this case. And to
20 some extent the facts in Gardner are stronger
21 against a voluntary manslaughter charge than the
22 facts of this case because in Gardner the Defendant
23 gave a statement to the police that he went to his
24 wife's house looking for his father-in-law to kill
25 him. And then he and his wife got into an

1 argument. That's about the extent of what they
2 said. And then the Court said the fact that he
3 testified that he got into an argument should be
4 sufficient to bring in manslaughter.

5 Now, the other interesting aspect of
6 Gardner that we think really is applicable to this
7 case is the fact that there was no objection by
8 trial counsel below for failure to give a
9 manslaughter charge. And the Court raised the
10 issue on their own back when we had in favor of
11 life review.

12 So to that extent it is somewhat
13 similar to a post-conviction relief petition
14 because they looked at the whole record to see if
15 there was any misconduct by counsel that would
16 prejudice the Defendant.

17 And in that case they simply said yes,
18 there is, that he should have charged manslaughter
19 even though he went there for the purposes of
20 murdering his father-in-law. They said once the
21 testimony was that he and his wife got into an
22 argument that will justify a manslaughter.

23 We quoted the Martin case also to talk
24 about the slight acts that allow a judge to charge
25 manslaughter and they talk about things as tweaking

1 someone's nose or spitting in someone's face.

2 Those are sufficient.

3 Well, it seems to me that under the
4 facts of this case when and there is testimony that
5 his wife came over for the purpose of taking the
6 children that certainly ought to be up there in the
7 range of spitting in someone's face or tweaking
8 someone's nose that would justify a manslaughter.

9 The other point we raised in our motion
10 on this issue is the fact that our courts over the
11 years we think have gotten away from the
12 aforethought part of a murder charge. If the Court
13 reads --

14 THE COURT: In reading the cases that
15 you have submitted and what you said, I wouldn't
16 disagree with that statement. I think our courts
17 have. But the question is is that intentional or
18 not. Now we are looking into the crystal ball. We
19 are trying to figure out why they have quit talking
20 about that. They don't -- I don't see it anywhere
21 in the recent juris prudence. I see it in a lot of
22 old juris prudence, nothing recent.

23 MR. WISE: I am reminded of the wise
24 words of Alexander who said that the appeal courts
25 are like well behaved children. They don't speak

1 unless spoken to. So if it isn't raised in the
2 brief much as they do their own research, it isn't
3 focused on that issue.

4 In this particular case Mr. Vieth had a
5 copy of the opinion of People v. Glenn which was
6 cited by the South Carolina Supreme Court in the
7 Belcher decision in which they threw out the
8 concept of malice, inferred malice with use of a
9 deadly weapon. If you read People v. Glenn that
10 laid out the groundwork for Mr. Vieth to make the
11 argument that Gardner is still good law. And
12 Gardner has not been overturned. We can talk about
13 the older cases showing a little more leeway on
14 malice aforethought, particularly the aforethought
15 portion, but when we -- those cases --

16 THE COURT: Gardner is almost as old as
17 I am.

18 MR. WISE: Well --

19 THE COURT: That's getting pretty old.

20 MR. WISE: I think we got some that are
21 older than all of us. But the point is Gardner and
22 the older cases have not been overturned. Our
23 courts haven't said we are abandoning this concept
24 of aforethought and we are moving to this. That's
25 exactly similar to what happened in Belcher. If

1 you remember that Belcher said yeah, we have got
2 some recent cases that say you infer malice from
3 use of a deadly weapon, but you go back and look at
4 the old cases they really don't say that and that
5 it was improper to change it.

6 So we would basically be urging that
7 based on Martin and Gardner and some of the older
8 cases we have cited, clearly under the facts of
9 this case where there is testimony, clear
10 testimony, that there was an argument and fight
11 going on that that is good support for the charge
12 of manslaughter; and if the Supreme Court wants to
13 change Gardner that's up to them. It is not up to
14 Judge Cole at the trial or up to this Court in this
15 PCR hearing. This Court is bound by Gardner just
16 like --

17 THE COURT: I will go back and reread
18 it and reread the cases since then. But I haven't
19 seen that lately as you said.

20 MR. WISE: I am not disagreeing with
21 you.

22 THE COURT: I don't know if it's my job
23 to correct error or not. I think their job is to
24 correct my errors.

25 MR. WISE: I agree with you, but your

1 job is to follow their guidance and Gardner is part
2 of their guidance.

3 THE COURT: Let me look at it again.

4 MR. WISE: If you read particularly
5 Glenn which is not an easy case to read. I have
6 told a lot of people to go read Glenn, but don't
7 read Glenn when you got 30 minutes to spare. Read
8 Glenn when you have got a couple hours to spare.
9 Because it does spell out the fact that we have
10 morphed away from aforethought and when we charge a
11 jury that basically the aforethought can be however
12 slight --

13 THE COURT: This existed at the time
14 that it occurred.

15 MR. WISE: That eliminates the concept
16 of aforethought completely and that certainly is
17 not in keeping with the old.

18 THE COURT: That's what's in their
19 suggested charges they say. Go ahead.

20 MR. WISE: I think it's incorrect under
21 Gardner.

22 THE COURT: I will take a look at it.

23 MR. WISE: Thank you.

24 THE COURT: Anything further? Yes,
25 ma'am.

1 MS. GIOVANOLI: Thank you. May it
2 please the Court, Valerie Giovanoli on behalf of
3 the State. First, I will be candid with the Court
4 that I'm not as intimately familiar with this case
5 as these two gentlemen that have represented Mr.
6 Horton since at least 2011.

7 And in preparing for this hearing I
8 looked at the file. I am actually the fourth
9 attorney that has touched the case. As Your Honor
10 will recall, you heard the case back in March of
11 2015. Thereafter some post hearing memorandums
12 were filed by both parties and then Your Honor
13 submitted a memorandum and asked the attorney
14 general's office to draft a proposed order in
15 support of that consistent with that order.

16 And I do want to note that in your
17 memorandum very first paragraph actually requests
18 -- let me read it, Defendant is requested to
19 prepare an order consistent with the below finding
20 and is invited to use such additional authority,
21 additional factual findings and consistent
22 reasoning as may be appropriate to support the
23 Court's findings.

24 In my review of everything, the
25 transcript, I wasn't present during the hearing,

1 but I did read the post hearing memorandum, the
2 order is very consistent with your memorandum and
3 your findings. There was some additional language
4 in there.

5 THE COURT: I wouldn't have signed it
6 if I didn't think so.

7 MS. GIOVANOLI: I understand that, Your
8 Honor. Just in the motion, 59(e) motion as well as
9 the memorandum in support kind of alluded to the
10 fact that we misrepresented facts and we -- I guess
11 the State's theory permeated the entire order. But
12 that State's theory was the theory that was
13 accepted by the finders of fact in this case, the
14 jury. I guess if you would like me to go through
15 and address each issue that they have argued
16 here --

17 THE COURT: Well, it seems to me that
18 the biggest sticking issue is Mr. Vieth's trial
19 strategy in allowing Sellers to testify about the
20 prior conversation.

21 MS. GIOVANOLI: Okay.

22 THE COURT: That's something that
23 caught my attention in reading through all of this
24 and of course the question about this malice
25 aforethought and whether or not the judge properly

1 charged it, whether an objection should have been
2 made to that, that's an important issue, to me it
3 is.

4 MS. GIOVANOLI: Sure. We will start
5 with Sellers testimony. It's kind of funny because
6 they said that hearsay was quite damaging to their
7 client.

8 THE COURT: I don't think I used that
9 language in my memo or in the order.

10 MS. GIOVANOLI: I believe that --

11 THE COURT: I agreed that it was not
12 helpful to the defense. I didn't find that it was
13 devastating or something to that though.

14 MS. GIOVANOLI: And, Your Honor, the
15 State would actually submit that that evidence
16 actually helped the defense. In my reading of his
17 closing argument that was about the best argument
18 he could make given the circumstances. Allowing
19 that testimony in where Sellers had testified that
20 she called him and she said I've just been beaten,
21 I'm leaving my house, I want to get out. But then
22 she went back. That just was inconsistent and
23 helped Mr. Vieth make the argument that why was she
24 going back? Was she going back to start something?
25 Was she going back to provoke the Defendant in this

1 case?

2 So I felt that his closing argument,
3 that was actually his strongest argument. And if
4 you take out the hearsay of Mr. Sellers' testimony,
5 the fact that she went back was going to come in,
6 that she went back to the house. It was that
7 testimony that I have been just beaten, I'm leaving
8 and then she went back that made it really
9 inconsistent and may have helped Mr. Vieth's
10 argument of voluntary manslaughter because it's
11 still in the jury's mind she went back for another
12 reason. If she was beaten why was she going back
13 to the house.

14 THE COURT: As I said, when there was
15 evidence -- trial counsel is faced with evidence
16 such as that you have got to make -- I guess that's
17 why we call it the practice of law. You got to
18 make a decision what you think is the best way to
19 go and you can second-guess those decisions
20 forever.

21 MS. GIOVANOLI: Of course.

22 THE COURT: When they say it was
23 probably not as rational as it needs to be, got to
24 have a good basis. I will review it again.

25 MS. GIOVANOLI: I do believe that

1 hindsight does have a distorting effect on trial
2 counsel's strategy, but you are correct. He did
3 actually testify at the PCR hearing that was a
4 strategic decision.

5 With regard to the older case law that
6 I have had a brief opportunity to review, I don't
7 want to lose sight of the standard in
8 post-conviction relief and that's ineffective
9 assistance of counsel. There has got to be a
10 deficiency and that's based on the reasonableness
11 of trial counsel's performance and then the
12 prejudice flowing therefrom.

13 It was definitely reasonable for the
14 arguments that he made during trial for the
15 manslaughter charge and as far as appellate
16 counsel, his brief -- though the initial brief
17 filed in the court of appeals was brief for lack of
18 a better term, but it addressed the facts, it cited
19 the correct case law. And then there was actually
20 a very extensive petition for writ of certiorari
21 filed by Ms. Wanda Carter of the office of the
22 appellate defense and the Supreme Court denied that
23 petition.

24 THE COURT: I wasn't aware of that.
25 Did that occur?

1 MS. GIOVANOLI: Yes. The petition was
2 denied by the Supreme Court, but it was much more
3 extensive than the initial brief that was filed.
4 And as Your Honor is aware, the court of appeals
5 did affirm Judge Cole's decision not to charge the
6 jury on voluntary manslaughter.

7 THE COURT: I didn't look into the
8 appellate history of the case, perhaps I should
9 have. They denied it?

10 MS. GIOVANOLI: Yes, Your Honor.

11 THE COURT: I figured that's what
12 happened, but I didn't check on it.

13 MS. GIOVANOLI: I actually have a copy
14 of the appellate record if you would like to review
15 them.

16 THE COURT: That's quite all right as
17 long as nobody disagrees with that.

18 MR. GROSE: We don't disagree with
19 that.

20 MS. GIOVANOLI: And so that's what's
21 going back to the standard it was reasonable.
22 Appellate counsel, their performance was in my
23 opinion beyond reasonable and trial counsel as
24 well.

25 So having failed to prove any

1 deficiency we don't even have to address the
2 prejudice or cumulative error test that the
3 applicant has proposed. I would request that the
4 motion be denied.

5 THE COURT: Thank you. Any follow up?

6 MR. GROSE: Just very briefly in follow
7 up. Of course the circumstances in closing was
8 without the voluntary manslaughter instruction and
9 specifically to the comment that she made about the
10 trier of fact having set these -- having accepted
11 the State's theory, I think that gets back to due
12 process considerations that militate in favor of
13 charging the lesser offense because in a case like
14 this where the conduct is acknowledged and that
15 even the way Mr. Vieth presented the case, the
16 criminality of the conduct was acknowledged and it
17 puts the jury in the situation of having to choose
18 between the one option of murder and the other
19 option of not guilty and letting a person they
20 think is guilty of some crime go free.

21 And when you go back and look at the
22 timeline and what happened after Judge Cole charged
23 the jury, the jury was out for about three, three
24 and-a-half hours. And in spite of only having the
25 option of murder and in spite of perhaps the

1 longest and most detailed charge on malice I have
2 ever read, the jury came back and said they wanted
3 to hear Brent's testimony and Officer Gary's
4 testimony again. And so even with the misconduct
5 acknowledged the jury was how struggling. And had
6 they had that other option of manslaughter there is
7 a strong probability that would have been the
8 result and we wouldn't even be here right now. So
9 I think that sums it up.

10 THE COURT: Okay with that, Mr. Wise?

11 MR. WISE: Nothing further.

12 THE COURT: Thank you very much. I
13 will take time to read the cases. I will
14 particularly look at the issues that I mentioned in
15 greater detail. I should be able to issue an order
16 within the next 30 days or so. Thank you very
17 much.

18 (These proceedings were concluded at
19 9:29 a.m., July 17, 2017, Charleston County, South
20 Carolina.)
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate
Reporter for the State of South Carolina at Large,
do hereby certify that the foregoing transcript is
a true, accurate, and complete record.

I further certify that I am neither related
to nor counsel for any party to the cause pending
or interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 20th day of December, 2017 at
Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese

Registered Diplomate

Reporter

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Larry Brent Horton, #329065,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

2013-CP-42-0007

**ORDER DENYING MOTION TO ALTER
OR AMEND JUDGMENT**

2017 OCT 25 PM 4:35

This matter comes before the Court by way of Applicant's Motion to Alter or Amend the Order of Dismissal pursuant to Rule 59(e), SCRPC, filed February 22, 2016. In Applicant's Motion, he requested reconsideration on the following issues:

1. Erroneous factual framework.
2. The order did not contain a legal conclusion that trial counsel's failure to object to testimony of Anthony Sellers did not violate Applicant's rights under the Confrontation Clause of the United States and South Carolina Constitutions
3. The order did not include the Court's finding that Mr. Seller's testimony was damaging to the defense.
4. Counsel's Comments in Closing Argument Concerning Credibility of Witnesses.
5. Failure to Effectively Argue the Facts and Law in Support of His Request for A Jury Instruction on Voluntary Manslaughter.
6. Failure to Object to the Trial Judge's Instruction on Malice Aforethought.
7. Failure to Argue that Voluntary Manslaughter is the Absence of Premeditation and not the Absence of Malice.
8. Cumulative Error.
9. The order failed to address all claims of Ineffective Assistance of Appellate Counsel.
10. Cumulative error with regard to deficiencies of both trial and appellate counsel.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment.

Page 1 of 4

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This Court finds there is no erroneous factual framework within its order of dismissal. The facts as stated in the order of dismissal are consistent with the testimony presented at Applicant's trial, Applicant's direct appeal records, and the testimony and evidence presented at the PCR hearing.

This Court also finds the order of dismissal does contain its rulings on the issue of whether trial counsel was ineffective for failing to object to testimony from Anthony Sellers, in counsel's comments in closing argument regarding witness credibility, for failing to effectively argue the facts and law in support of his request for a jury instruction on voluntary manslaughter, for failing to object to the trial judge's instruction on malice aforethought, and for failing to argue that voluntary manslaughter is the absence of premeditation and not the absence of malice. This Court has already considered the applicable law and facts pertaining to this issue and sees no reason to reconsider the issues.

With regard to Applicant's cumulative error argument, this Court declines to adopt such an analysis. South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See, e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess"). In addition, a number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher



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v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Additionally, because this Court found Applicant failed to satisfy his burden of proving ineffective assistance of counsel on any issue, the record contains no error for the Court to cumulatively assess. Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, error. See, e.g., Green v. State, 351 S.C. at 197, 569 S.E.2d at 325 ("While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors."). Only then can the cumulative prejudice arising from the alleged errors be considered. See id. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

This Court did not overlook this issue. Rather, the Court adequately addressed all issues before it and found Applicant failed to satisfy his burden of proving ineffective assistance on any issue. Therefore, the order of dismissal need not address the issue of cumulative error.

The order of this Court also adequately addressed all issues regarding ineffective assistance of appellate counsel. Once again, this Court declines to adopt a cumulative error analysis by combining alleged deficiencies of both trial counsel and appellate counsel. Therefore, the order of dismissal need not be amended to address such a claim.

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IT IS THEREFORE ORDERED:

1. Applicant's motion is denied and dismissed.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this ____ day of _____, 2017.

Octob 25, 2017

[Signature], South Carolina

[Signature]
HONORABLE ROGER L. COUCH
Presiding Judge
Seventh Judicial Circuit

2017 OCT 25 PM 4:35

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
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M. Hope Blackley
Clerk of Court

October 26, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Harry Brent Horton
Applicant #309005

7TH JUDICIAL CIRCUIT

CASE # 203CP42-17

VS
Jail
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the
In this action dated 10-25 2017 on 10-26-17

Back Copying Motion to Arrest or
Arrest Warrant

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Corbinoli
Hindsey, McCay
Charene Wise
Harry Horton

10-26-17
(Date)

Corrie Saly
(Signature)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case № 2013-CP-42-0007

Larry Brent Horton, # 329065, ... Applicant,

vs.

State of South Carolina, ... Respondent.

NOTICE OF INTENT TO APPEAL

Larry Brent Horton appeals the Order of the Honorable Roger L. Couch dated October 25, 2017 and the Order dated February 22, 2016.

November 20, 2017

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