THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Cherokee County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate case No. 2012-212107

JONATHAN KYLE BINNEY, #6009,

Petitioner-Respondent,

vs.

THE STATE,

Respondent-Petitioner.

BRIEF OF RESPONDENT BY RESPONDENT-PETITIONER

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Sr. Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT-PETITIONER

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I. Whether the PCR Court erred in finding that trial counsel was not ineffective for failing to adequately investigate and present evidence concerning the possibility that the victim's husband may have had some involvement in her death[?]

II. Whether the PCR Court erred in finding that trial counsel was not ineffective for failing to develop and present all available evidence to support their theory that Petitioner-Respondent [hereafter, "Petitioner"] entered the victim's home with the intent to commit suicide[?]

COUNTERSTATEMENT OF ISSUES PRESENTED

I. Whether this Court must affirm the denial of Post-Conviction Relief because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence of Allan Southern's possible "direct or indirect involvement" in his wife's death?

II. Whether this Court must affirm the denial of Post-Conviction Relief because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under *Strickland* not to present expert testimony concerning Binney's suicidal intent in the guilt phase because counsel was concerned that (1) presenting mental health testimony would open the door for the prosecution to introduce evidence of the CSC conviction concerning his infant daughter, as well as negative mental health diagnoses that were consistent with the prosecution's theory of the case; and (2) counsel wanted to avoid alerting the State as to how the defense intended to utilize evidence of his suicidal intent, when the State was in the dark on that strategy?

STATEMENT OF THE CASE

Petitioner-Respondent, Jonathan Kyle Binney (Binney), is presently confined on death row, at the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC). He was convicted in Cherokee County for murder and first degree burglary and he received a death sentence. Both convictions and his sentence stemmed from the June 8, 2000, shooting of Judy L. Southern, in her Cherokee County home. Respondent-Petitioner (the State) hereby incorporates by reference the Statement of the Case from the Brief of Petitioner by Respondent-Petitioner, which was filed on May 15, 2014.

ARGUMENTS

I. This Court must affirm the PCR judge's denial of relief because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence of Allan Southern's possible "direct or indirect involvement" in his wife's death.

Respondent submits that the Court must affirm the PCR judge's denial of relief on Binney's first allegation because there is evidence of probative value to support the PCR judge's finding that counsel made a reasonable investigation for and presentation of evidence that Allan Southern possibly had some "direct or indirect involvement" in his wife's death and that there was no prejudice from counsel's performance. **App. 5470-76; 5478-83**.

A. Standard of Review on Certiorari.

This Court must deny certiorari if there is any evidence of probative value to support the PCR judge's findings, *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989), and it will only reverse the decision of the PCR judge when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Binney cannot

meet his burden of proof.

B. Evidence presented at trial and at PCR hearing.

1. Trial Evidence.

Contrary to the claim in Binney's first Question Presented, counsel elicited a great deal of evidence suggesting Allan Southern's possible "direct or indirect" involvement in his wife's death:

- Roy Lee Chapman, Mr. Southern's employee and friend, received a phone call from Judy Southern at approximately 4:00 p.m. on June 7, 2000, which was about ten minutes after Mr. Southern had left the bowling alley. **App. 2332.**

- In the first call, Chapman thought she said "Roy, I need help, I have been stabbed." He did not recognize her voice and asked who was calling.

- Although Judy identified herself, Chapman did not immediately call 911 when the call was disconnected. **App. 2332-34**. Instead, he called the Southern residence and left a message on the answering machine. **App. 2334**.

- Judy Southern called a second time and told him both that she had been stabbed and that she was in the pasture, but Chapman still did not call 911 after that call was disconnected. Rather, he told her that he was on his way and he left the bowling alley to go there. **App. 2334-36**.

- Counsel established the route Chapman took to the Southern's residence "on the other side of the county" and that this drive takes about fifteen minutes to drive. **App. 2334-36**. Along his way there, Chapman called Mr. Southern and he told Mr. Southern that Judy was in the pasture, but he still did not call 911. **App. 2317-38**.

- Mr. Southern was able to hear the conversation Chapman had with him. **App. 2338**.

- Fifteen or twenty minutes had elapsed between the time of the first call and the time that Chapman reached the residence.

- Although Mary Black and Gaffney hospitals are roughly an equal distance from the residence, it takes about fifteen minutes to drive to Mary Black. However, it is possible to drive faster if there is an emergency. **App. 2240-43**.

- The fastest way to Mary Black would be to get on Hwy. 29, but Chapman has never taken that route in an emergency situation. **App. 2340-42**.

- Despite Chapman's claim that he had "fully cooperated in the investigation," he admitted that he had refused to meet with an officer. **App. 2342-43**.

- Mr. Southern's truck was not pulled all the way up to the pasture when Chapman arrived, and counsel used a rough sketch to demonstrate the distance that Chapman said the truck was from the pasture. **App. 2343-45**.

- When Judy had called Allan Southern, around 3:15 or 3:30p.m., he told her that he "would be at home around four o'clock." He did not know whether she was at the Post Office or in her vehicle at the time of that conversation. **App. 2370-71**.

- It was "unusual" for Mr. Southern to meet Judy at home was because she would normally come pick him up at his business between 3:30 and 4:30 p.m. However, they had an appointment with a marriage counselor around 5:00 p.m. the day that she was shot. **App. 2372-73**.

- The Southerns had four or five prior meetings with the counselor because they were having "marital problems." **App. 2373-74**.

- Mr. Southern did not know two of the numbers that his wife frequently called on her cell phone at the time of her death, including one she had called at 3:41 p.m. **App. 2371-72**.

- The Southerns had three phones in their home: one on a desk near the back door; one under a cabinet in the kitchen and one by the bed in the master bedroom. However, Mr. Southern did not remember having an answering machine on any phone in the home in June 2000. **App. 2375-76**.

- Mr. Southern denied having any other type of recording devices on the phone at the time Judy was shot but he admitted that he had secretly recorded her conversations with other persons in the past, in order "[t]o see if she was talking to somebody else." **App. 2376-77**.

- Mr. Southern "felt sure" that she was seeing someone else because he had heard taped conversations between her and an individual named Roy Glass, as well as conversations that she had with her sister, Trudy Smith. **App. 2377-78**. Also, he was aware that Judy "was at least ... contemplating ... leaving" him. **App. 2378-79**.

- Mr. Southern denied that anything had prompted the counseling, but admitted

that he had attempted suicide about a month before June 7th. **App. 2379.**

- Mr. Southern admitted that he had a 9 mm. handgun, and he admitted that he used to own a smaller caliber handgun, such as a .22 or .25 caliber weapon. He also remembered telling police that he had a small caliber handgun. Yet, he testified that "don't even know where it's at, if I even still got it or not." (Sic). **App. 2379-80.**

- The police came to the bowling alley to look for evidence after the killing. **App. 2380.**

- At the time of the trial, Mr. Southern owned a new truck that he had not owned at the time of Judy's death. **App. 2381.**

- As Mr. Southern was driving to his home on June 7th, he received a call on his cell phone from Roy Chapman informing him that Judy had been stabbed. Even though he was four or five miles from his residence at the time, he did not call 911. **App. 2381-82.**

- Chapman had told Mr. Southern that Judy was in the pasture, and Chapman had never said she was in the house. Also, Mr. Southern had parked near the pasture when he got home. However, he first ran back into his house. **App. 2382-83.**

- Judy's cell phone records reflect that she telephoned the residence at 4:13 p.m. on June 7th. **App. 2389-90.**

- Judy's cell phone rang while Mr. Southern was in the pasture with her and she was "drunk-like" but still conscious. He thought that the caller was Tonya Brown, but Judy did not ask to speak to her. **App. 2385.**

- By the time he found Judy and had carried her back to the truck, Chapman had arrived. **App. 2381.**

- Mr. Southern was contacted by 911 as he was leaving the house and driving Judy to the hospital. **App. 2384.**

- He had also received a phone call on Judy's cell phone after Judy lost consciousness, and he again thought that the caller was Tonya Brown. **App. 2384.**

- He was aware that there is an EMS substation along the route he followed on Hwy 29, but he drove past it because he did not think of stopping to get immediate aid. **App. 2385-86.**

- When Mr. Southern subsequently spoke to Chapman about the 4:00 p.m. phone call Chapman received from Judy on June 7th "Roy had said that he had got two phone calls. The first one, he thought it was some kid making a joke, because he couldn't understand what they were saying and they hung up. So Roy hung up." **App. 2386**.

- When Mr. Southern finally went back to his residence after 12:00 a.m. on June 8th, he called the Sheriff's Department and received permission to re-enter the residence even though it still was marked off by crime scene tape. **App. 2386-87**.

- Judy was a part owner or helped run the bowling alley. **App. 2383-84**.

- The first 911 call was placed by Chapman and was received at 4:27 p.m. (State's Ex. 72). **App. 2415-16**.

- Crime Scene Investigator Jimmy Henson testified that the Southerns' computer was taken into evidence, but he did not know whether anyone had examined the contents of it. SLED would be responsible for examining it. Also, he did not know why the Southerns' computer was not sent to SLED, although he, Capt. Fowlkes or Agent McCraw would have made the decision of whether or not to send it. **App. 2604**.

- Inv. Henson did not look for knives in the kitchen and he did not notice if there was a knife block, despite Binney's statement that he had hidden knives in the house. Also, the focus of the crime scene investigation was "[t]he living room and the hall bathroom and the master bedroom." **App. 2606-08**. While no identifiable fingerprints were recovered at the scene, Binney's were the only latent prints taken. **App. 2611-12**. Also, only Binney's blood was drawn for testing. **App. 2618**.

- The bullets found at the scene were not processed for either blood or fingerprints. (Both were sent to SLED ballistics and toxicology). However, a presumptive test for blood could have been done by SLED. **App.2613-15; 2620**.

- The crime scene was "released" when Inv. Henson had finished on the morning of June 8th but the second bullet was not recovered until six days later, on the 13th. **App. 2617-18**.

- Of the items that were submitted to SLED for processing, the only one with Binney's fingerprint on it was the suicide note (State's Ex. 34; Defense Ex. 2). **App. 2647-48**.

- Of the knives that were hidden by Binney and taken from the scene by the Sheriff's Department, there was a sufficiently developed latent print that could possibly have been identified, which did not belong to Binney or Inv. Henson, but SLED was unable to identify it. **App. 2651-52**.

- Dr. John Tate, the surgeon who treated Judy at Mary Black hospital testified that "[t]here was no neurologic activity at that point. She had been in severe shock for some time, and I don't . . . think that getting an ambulance there and getting her back would have made a great deal of difference." He was also asked on direct whether he would have been able to save her "if she had been shot in the waiting room of Mary Black Hospital." He testified that "It's not a sure thing that you would be able to save somebody even at that point. I mean, there [was] a lot of injury, a lot of bleeding, and a lot to go through to try to be saved, even at that point." **App. 2764-65**.

- On cross-examination, however, he conceded that Judy bled to death; that he "would hope" that "there is always a point at which someone can be saved or resuscitated" whenever someone bleeds to death; and he did not know what time she was wounded. **App. 2765-66**.

- Dr. Janice Ross, the pathologist who performed the autopsy, acknowledged on direct examination that her report listed the cause of death as "fatal perforated smaller caliber gunshot wound to the abdomen, and perforation of the pancreas, duodenum, [and] left kidney causing hemoperitoneum" or bleeding to death. (Emphasis added). She explained that .22 and .25 caliber weapons were small caliber handguns, and medium caliber weapons "were more like a [9 mm.] or a .357 or [a] .38" caliber handgun. She further explained that "the hole itself only measured .22, which is the size of a .22."

- Contrary to her report, she then opined that the victim's injuries were caused by "a distant gunshot wound . . . consistent a medium caliber weapon," such as a .357 caliber bullet, a .38 caliber bullet or a 9 mm bullet. **App. 2880-83**.

- However, Mr. Slade forced her to admit on cross-examination by that (1) she had spoken to Mr. Slade about her findings about a month before the trial; (2) she had told him that Judy may have survived if Judy "had gotten treatment or gotten to an EMS truck within twenty, twenty-five minutes of this wound being incurred;" (3) although the pathologist testified that she had changed her findings after viewing the emergency room records concerning Judy's blood loss and that she had not known the distance between the Southerns' residence and the hospital, she admittedly told counsel something different only "[a] couple weeks ago;" (4) she had changed her original finding as to the distance of the gunshot; (5) she had reassessed her "position on whether or not it was a small caliber wound versus a medium caliber wound," as well as whether it was

> a close contact or distant wound, at the same time; (6) she claimed that she had changed her findings "in reviewing ... the case, because it didn't make sense the first time;" but she admitted that she told Mr. Slade that she would call him back about the distance of the wound; (7) at the time that she changed her opinion "on a couple of these issues, she did not issue a written report; (8) she had contact with the Solicitor's Office "right around the same time" that she had made her reassessment;" (9) she had received additional information from the Solicitor's Office about "the caliber of weapon that they suspected had been used in this case;" and (10) the Solicitor's Office suspected that a 9 mm. weapon had been used. **App. 2884-88**.

2. PCR proceedings.

Binney called two witnesses in support of this allegation at the PCR hearing: Dr. Leroy Riddick and Ms. Tonya Brown. Without objection, Dr. Riddick was qualified as an expert in forensic pathology. **App. 4026-29**. In connection with this case, Dr. Riddick had reviewed Dr. Ross' autopsy report on Judy Southern; the emergency room and the surgical records from Mary Black Hospital; the trial testimony of Dr. Tate, Dr. Ross, Allan Southern, Roy Chapman and Inv. Henson; "some" of the crime scene photographs; and one autopsy photograph. He took issue with Dr. Ross' testimony that Judy's gunshot wound was more consistent with a medium caliber weapon. He noted that the autopsy report listed "the cause of death as a perforating small caliber gunshot wound of the abdomen." Also, Dr. Ross initially thought that a small caliber weapon had been used. **App. 4029-31**.

The difference in size between a small caliber and medium caliber wound is only about one tenth of an inch. Also, Judy was "still of childbearing age and the abdominal wall in most childbearing women is distendable, it is elastic." As a result, either a .22 caliber or a .38 caliber bullet would only leave a very small hole. While the bullet had passed through several vital organs, "none of the organs were solid muscle so that you could get a better idea maybe of the diameter of the bullet." **App. 4031-32**.

He also described the exit wound as "essentially normal," which he opined made it difficult to determine the exact size of the bullet.[1] In his opinion, the wound could have been caused by a 9 mm. bullet, a .22 caliber bullet, or a .38 caliber bullet. **App. 4032; 4036-37**. Additionally, Dr. Riddick noted that the death certificate listed the cause of death as "[hypovolemic] shock due to perforation of the pancreas, duodenum in the left kidney due to the gunshot wound to the abdomen."[2] However, neither Dr. Ross nor Dr. Tate reported that the bullet had hit any major arteries. Based upon these findings, Dr. Riddick opined that Judy could have survived "with very rapid medical intervention." **App. 4032-33**.

He found that two things in the medical records supported his conclusion. First, "there was no description on any major artery." The second thing that stood out was the delay between the time that she arrived at the hospital and the time that she went into surgery:

> [F]rom what I read, the indication was that the wound occurred around 4:00 in the afternoon. She got to the hospital at 4:34 in the afternoon. And for some reason, and this I can't explain, it was not until 5:25 that she got definitive care and surgery.
>
> And it's that latter hour almost that . . . the trauma surgeons talk about the golden hour, that if they can get somebody primarily from a bleeding wound (within an hour) that they have a chance of survival. But **it was not only the time frame from where her husband picked her up in the pasture until she got to the hospital, but also it was almost an hour's delay in the emergency room, which I cannot explain and was struck with**.

App. 4033-34. (Emphasis added). He felt that "[w]hat [Judy] needed was to have the bleeding stopped as soon as possible," and that the only way to have accomplished that would have been to

[1] He could eliminate a .45 caliber bullet but he could not determine whether it was a small caliber or medium caliber bullet that caused the wound.

[2] The duodenum and portions of the pancreas and stomach were removed during surgery. **App. 4037**.

"[t]ake her to . . . surgery immediately." **App. 4035-36**.[3]

The State established on cross-examination that Judy would have had between ten and fourteen units of blood in her system before she was shot, and that Dr. Ross had calculated that Judy had lost nearly seven units. Also, Dr. Riddick conceded that only the surgeon could answer whether it was necessary to stop the bleeding before surgery could have been performed and he clarified that Judy only would have "had a better chance of surviving" if there had been "a rapid response time," not that she could have survived. Finally, he claimed that doctors "could have had a real chance of saving her" if she had been taken into surgery within thirty minutes of being shot, but he could not assign any value to a "real chance." **App. 4035-41**.

Tonya Brown worked with Judy at the Postal Service. Even though Ms. Brown only knew Judy briefly, she considered Judy to be a "close friend." **App. 4321-22**. Over the State's objections that any conversations were inadmissible hearsay and that the conversation did not satisfy the requirements of *Holmes v. South Carolina*, 574 U.S. 319 (2006). **App. 4321-30; 4341-46**, the Court permitted Binney to elicit testimony about events and a conversation that Ms. Brown had with Judy on the day that Judy was murdered. Brown testified that Judy was standing in the office with a bundle of mail when Brown arrived. Judy looked "like she was lost" in her work. **App. 4330**.

When Ms. Brown said something to her, Judy turned around and looked at her. "[S]he was just real pale, almost white as a ghost. When Ms. Brown asked if something was wrong, "she said, today's the day. And I said, today's the day what? And she said, today's the day I'm going to die." **App. 4330**.

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[3]Judy had gone into heart arrest four times while she was in the hospital and medical personnel were only able to "bring her back" the first three times.

In their subsequent conversation, Judy indicated she was upset as the result of a conversation that she had with Mr. Southern about a list that he had made of things about her that he did not like. Judy accepted Brown's offer to contact a woman employed at Safe Homes, and Brown unsuccessfully attempted to contact the woman while Judy called the daycare to check on the Southern's son. Ms. Brown gave the Safe Homes telephone number to Judy. When Ms. Brown inquired later that morning, however, Judy said that she had not called the number. **App. 4330-32.**

In this later conversation, Judy told Brown about "a book that Allan had been reading **or somebody had been reading**" that discussed how a person who had killed someone that he or she loved could be forgiven by doing certain other acts. (Emphasis added). Ms. Brown admitted that Judy "was **real vague** about it." (Emphasis added). In response to questioning by Ms. Brown still later that morning, Judy said that she would talk to her supervisor after other employees had left and that she would call Safe Homes. **App. 4332-33.**

Brown called Judy sometime after lunch to see whether Judy wanted some hay, and Judy did. Brown did not receive an answer when she, again, called later that afternoon to see if the hay could be delivered that day. So, she "left a message." Still later that afternoon, Brown called one of Judy's two cell phones and Mr. Southern answered it. Brown thought that this was unusual. Mr. Southern repeatedly asked who was calling; and the phone went dead shortly after *someone* said "give me the phone." **App. 4333-35; 4337.**

Despite the conversation with Judy on the day of the murder and her offer to get help for Judy from Safe Homes, Brown refused to admit that she disliked Allan Southern. **App. 4335-36.** She likewise admitted that she had gone horseback riding with Judy and Roy Glass, Judy's paramour. Although Brown initially thought the two were just friends, Judy had discussed him

with her and she was aware of the adulterous relationship. Moreover, Brown clarified on cross-examination that she had several conversations with Judy throughout the morning of the shooting because Brown was training a new employee that day and she admitted that she did not know what Mr. Southern was doing when he had answered Judy's cell phone later that day. **App. 4337-40**.

Because Judy had talked about her marital problems at work, Brown thought that Judy and Allan were going to counseling. **App. 4337**. Also, she claimed on cross-examination that "I try not to listen to gossip." Yet, all of the conversations to which she testified were either speculative or hearsay and, showing her character as a gossip and an interloper, she testified that she had told other co-workers about her conversations with Judy. **App. 4340-41**.

Mr. Pruett, lead counsel, testified that "there had been some suggestion, even before we got the file, that there was a potential murder for hire theory that had been investigated. And so when we received the [State's] file [in discovery,] the Solicitor's Office put a page 1 on top of the file the FBI investigation report." Counsel read the report and it suggested the possibility of a murder for hire. Counsel's "job was to see whether or not there was any merit to that theory," which the State had apparently discounted. **App. 4577**.

Binney did not provide counsel with much assistance on this issue. Instead, he gave a number of different accounts that he would later admit were untrue, and he ultimately denied any prior knowledge or involvement with either Mr. Southern or Ms. Southern. **App. 4569-70**. Counsel first met with Binney at the end of December 2001. Mr. Pruett outlined the prosecution's case against Binney, based upon the State's discovery responses. Also, counsel asked him whether or not he had any connection with Allan Southern. **App. 4560-63**.

Binney asked the significance of that relationship to his case and counsel explained that it was important because of the statutory aggravating circumstance of "murder for hire." Counsel then asked what he knew about Judy's death. Binney's response was to the effect that "I'll get back in touch with you." **App. 4560-63**.

Binney later sent Mr. Pruett a letter providing "a rather involved story" about what had occurred. He claimed that he and Judy were having an affair, and that he had gone to her house on the day of her death in order to meet her. They got into an argument. Binney had a gun and he was threatening to commit suicide. Judy was shot as they struggled over the gun. However, Mr. Pruett learned on March 25, 2002, that Binney had written his parents and told them that this story was not true. **App. 4563-64**.

Mr. Pruett also discussed with Binney the statement that Binney had given to Mr. Thompson, his original attorney. In that statement, he claimed that he had met Mr. Southern at a restaurant in Greenville, and that Mr. Southern had offered to pay him $3,000.00 to kill Judy. **App. 4565**. However, Mr. Thompson was familiar with the restaurant that Binney had named. He knew that the restaurant had been closed for some time before the killing and that Binney's statement had to be false. When Mr. Thompson confronted Binney, Binney admitted that he had fabricated the story. Binney also told Mr. Pruett that he had made up that account. **App. 4565-66**.

Binney subsequently gave counsel varying accounts about the killing, but when counsel asked him "point blank, is this a murder for hire scheme? Are you in any way involved? Did you know these people prior to the incident date? . . . [H]is answer was, no. There was no murder for hire. No[,] there was no prior knowledge or involvement with either Mr. Southern or Ms. Southern." **App. 4569-70**. *See Strickland*, 466 U.S. at 691 ("the reasonableness of counsel's

actions may be determined or substantially influenced by the defendant's own statements or actions").

In spite of Binney's lack of cooperation with counsel, counsel investigated both the question of third party guilt and whether Mr. Southern had some possible involvement in Judy's death, independent of whether he and Binney had a relationship.

As the PCR court correctly found, by the time of Binney's trial,

> trial counsel: (1) obtained and reviewed the prosecutor's file; (2) interviewed Tonya Brown and at least one other friend of the victim; (3) interviewed the Southerns' marriage counselor; (4) obtained and reviewed the counseling records; (5) obtained the Southerns' cell phone records; (6) obtained, listened to, and had transcriptions of Mr. Southern's recordings of Mrs. Southern's calls on her home phone; (7) listened to the tape of the 911 call; (8) learned of employee Chapman's financial dependence on Mr. Southern; (9) determined the length of time it would take to drive from the bowling alley [which Mr. Southern owned and where he worked] to the Southern residence, as well as the time it would take to drive from the residence to Mary Black Hospital, and ascertained that these times were consistent with Mr. Southern's subsequent trial testimony; (10) ascertained that Upstate Carolina Medical Hospital was further away from the Southern residence than Mary Black Hospital; (11) visited and walked through the Southern residence and the surrounding area; (12) obtained the relevant medical records related to the victim's treatment; (13) were aware that Mr. Southern's truck was not processed by law enforcement and that the home computer had not been seized; (14) spoke to the pathologist about her findings; (15) were aware of the delay by Roy Chapman in calling 911 and that Mr. Southern did not call 911; (16) were aware that Mr. Southern failed to stop at an EMS substation on the highway; (17) were aware that only [Binney's] blood was drawn for testing against evidence found at the crime scene and around the Southern property; (18) were aware that Mr. Southern owned a small caliber weapon; and, (19) were aware both that [Binney's] fingerprints were the only prints found on the suicide note and that an identifiable print, inconsistent with [Binney's], had been lifted from one of the knives recovered from the house, but that there was no known standard with which to compare the print.

App. 5471-72. These findings are supported by the record. *See* **App. 4445-49; 4453-70; 4494-99; 4570-81; 4623-24; 4628-29; 4637-49; App. 5226-31, Respondent's Exhibit 4 (victim's medical**

records for treatment of gunshot wound).[4]

Moreover, Mr. Slade had discussed Dr. Ross' autopsy findings with her roughly a month or so before the trial. At that time, she stated that her opinion was that Judy had a contact wound caused by a small caliber weapon. This was important because it was inconsistent with the State's theory that Binney had shot her with a 9 mm. weapon and because counsel had information that Mr. Southern owned a .22 caliber handgun. Also, Mr. Southern had said in the 911 call that the wound looked like it was from a small caliber weapon. *See* **App. 4470-72; 4500; 4510-12.**

Likewise, because Mr. Southern owned a .22, it was plausible for counsel to argue that the killing was a spur of the moment decision by Binney, who was surprised when Judy came home, as opposed to a scenario where he laid in waiting for her to get home. However, Dr. Ross changed her opinion sometime after her conversation with Mr. Slade and between the time that she met with the prosecution and the time of her trial testimony. She testified at trial that Judy's wound was caused by a "distant contact wound" that was consistent with a 9 mm. bullet or a .357 or .38 caliber bullet. (**App. 2171-76**). *See* **App. 4470-72; 4500; 4510-12.**

Mr. Slade haltingly agreed with Binney's characterization of Dr. Ross' change in findings as beneficial to the prosecution, but he explained that "the reason for my hesitation was that ultimately, I think, to a certain extent it fit in with the idea that . . . not only were they having to fit other testimony to their needs to fit their theories, but they were having to actually change some evidence." Mr. Slade thought the change in testimony was "clear" and "worked fairly well with ... one of the themes we already had." **App. 4513-14.**

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[4] Both spouses were having extramarital affairs and they were attending marriage counseling. **App. 4572.** Counsel was also aware that Judy had discussed filing for a divorce with her sister, and that she had previously "requested a divorce, years earlier, because Mr. Southern had an affair. **App. 4629.**

Ultimately, counsel based their theory of defense on what Binney told them and his inconsistent stories "as to how he knew the Southerns or what involvement he might have." While Binney's changing accounts tended to make him less credible, he ultimately said that "he had no connection with them and there was no "murder for hire." Counsel "essentially walked through" Binney's statement to law enforcement and they discussed it with him. While he disputed minor points, "for the most part he [admitted] that his statement was consistent with the acts that actually occurred." **App. 4577-79**.

In light of what Binney had told counsel, Mr. Pruett thought that there were two ways that he could make use of the evidence of Mr. Southern's suspicious behavior. First, it was relevant as part of the *res gestae* or the setting of the crime. Second, counsel "wanted to keep that door open if ... during the trial for whatever reason [Binney] were to tell me" that there was a connection between him and Mr. Southern. So, counsel developed this evidence both directly and indirectly at trial. **App. 4579-80**.

When asked whether he considered calling Ms. Brown or a similar witness, Mr. Pruett testified that, despite his theory, the only evidence from his client was that there was neither a murder for hire nor a conspiracy to kill Judy. In his estimation, an attorney must "draw a line between what is [a] credible defense [and] what is a fraud upon the court." If Binney had provided counsel with a different account and had implicated Mr. Southern, counsel might have presented such a witness. However, Mr. Pruett felt that it is "misleading, it's unethical to call somebody that you know is not laying a factual foundation that [can] be supported or [is not] the truth as you know it to be." **App. 4580-81; 4638-39**.

Mr. Pruett felt that one of the biggest problems in the case was the evidence involving

Binney's CSC offense against his infant daughter, and both attorneys strategically decided that they did not want jurors to hear any information about that charge in the guilt phase of the trial. **App. 4566-67; 4586**. The primary theory of the defense, beyond that, was to convince jurors that there was no burglary because Mr. Pruett was "hoping that if we could convince the jury there was no burglary, then there would be no death penalty." **App. 4585-86**. Based upon Binney's statements and the State's other evidence, "we felt [confident] that the prosecution could prove the murder case, but the burglary was still an issue." So, they decided to present the defense that Binney had entered the house without the intent to commit a crime and that, therefore, there was no burglary. **App. 4585-86**.

Binney's PCR counsel questioned Mr. Pruett about several possible scenarios as to how Judy could have been killed. In addition to the positions advanced by the State and the defense at trial, counsel expressly considered the possibility that Mr. Southern had deliberately delayed getting his wife to a hospital for medical attention, as both counsel's PCR testimony and Mr. Pruett's cross-examination of Mr. Southern clearly reflect. Counsel had investigated the amount of time that it would have taken Mr. Southern to drive from the bowling alley to his residence and then to either of the two closest hospitals, and counsel found that the times "were within the same range" to which Mr. Southern subsequently testified at trial. The only variable was "how fast you wanted to drive down Highway 29." **App. pp. 4575-76; 4632**.

Mr. Pruett explained that "my thought on that was it wasn't an independent causation issue as to that drive. Either it was linked to this idea there was a conspiracy there between Binney and Mr. Southern or there wasn't." In the absence of such a link, Mr. Pruett did not believe that he could establish an independent causation. **App. 4640-43**.

Mr. Pruett also rejected as implausible Binney's hypothesis that Alan Southern had been the person who shot Judy and Binney had missed her when he closed his eyes before shooting because of "the telephone calls and the timing that she would have left from work to get home and then the calls she made to Mr. Chapman. You can obviously look at the credibility of Mr. Chapman and say that he's not credible on that issue, that that's the evidence I would look at." **App. 4643-48**.

Mr. Slade testified that there were three primary defense strategies in the guilt phase of Binney's trial. The first, as discussed, was to prevent the jury from hearing about the CSC involving his daughter. The second strategy was "to get out from under the burglary" of the Southern's residence. This strategy was based upon counsel's belief that eliminating burglary as an aggravating circumstance would result in Binney not being eligible for the death penalty. **App. 4445-49; 4453-64; 4494-96**.

The third part of the defense's strategy was to raise questions about Mr. Southern's possible involvement with Judy's death, and to "leave the door open in case Jonathan said that Mr. Southern was involved." Because Mr. Pruett was aware of speculation in the community about Mr. Southern's possible involvement,[5] the defense investigated whether or not Mr. Southern had some part in his wife's death. **App. 4445-46; 4453-54**.

Counsel therefore presented evidence of what they had uncovered during their investigation, through the cross-examination discussed above. Mr. Slade stressed that "[w]e wanted to cross-examine him about as much of it as we could [but], I mean, there's a limit to how hard you can cross examine the victim's husband . . . if you don't have some smoking gun to show

[5] Mr. Slade explained that Mr. Pruett worked in Gaffney and knew a lot of people in the area.

definitely he's involved in it." **App. 4468-71; 4496-99**. Mr. Slade's remaining testimony on the current issue corroborated that of Mr. Pruett. **App. 4468-72; 4496-99; 4500-01; 4510-12**.

After the conclusion of the guilt phase, the State indicated that it was dropping the murder for hire aggravating circumstance and only proceeding with the statutory aggravators of burglary and larceny while armed with a deadly weapon. Also, the trial judge granted defense counsel's directed verdict motion on the statutory aggravator of larceny while armed with a deadly weapon, and he dismissed that aggravating circumstance at the end of the State's case. **App. 3101-02; 3109-11; 3314-16; 3323-26**.

Following that ruling, Mr. Pruett had a conversation with Binney about any connection between Binney and the Southerns. Because Mr. Pruett felt that their conversation was "a pivotal point" in counsel's representation of Binney, he decided that it should be recorded and thereby foreclose any future dispute about what had been said or done during the conversation. Therefore, he placed a tape recorder in front of Binney and asked if Binney objected to him recording the conversation. Binney did not object and Mr. Pruett recorded the conversation. **App. 4581-83; Respondent's Ex. 11**.

Over Binney's objection, the PCR court allowed the State to introduce the tape recording as **Respondent's Ex. 11** and play it for the court. In their conversation, Mr. Pruett explained that the State had abandoned the statutory aggravating circumstance of murder for hire, and that the only "real" aggravating circumstance remaining was murder while on the commission of burglary. Mr. Pruett also told Binney that, "from a strategic point of view," if Binney took the stand and testified that it was a murder for hire, there was the possibility that the jury would not impose the death penalty because he would have been let into the home and there would not be a burglary.

App. 4581-85; Respondent's Ex. 11.

However, Binney denied that there was any factual basis to a murder for hire; he denied knowing the Southerns before June 6-7, 2001; he admitted that the contrary statement he had given to Mr. Thompson was untruthful; he admitted that there was no truth to his earlier claim that he and Judy were having an affair, and that the only evidence that he could think of that he could present that he knew either of the Southerns was if Judy had been a customer for work he did on satellite "subscription manipulation." To his knowledge, however, he did not know her. **App. 481-85; Respondent's Ex. 11.** Finally, the State published the 911 tape and played it for the PCR court.

C. Discussion.

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id. See also Harrington v. Richter*, 562 U.S. 86, __, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable

competence, not perfect advocacy judged with the benefit of hindsight").

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness. *Strickland*, 466 U.S. at 691 ("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"). In other words, he must prove "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." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.

Rather, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 562 U.S. at __, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

The Court in *Richter* also explained that:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v.*

> *Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

131 S.Ct. at 788.

As the PCR judge correctly recognized,

> *Strickland* explains that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690-691. *See also Wiggins*, 539 U.S. at 521-22. Further, "the reasonableness of counsel's actions may he determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691.

App. 5470. See also *Mobley v. Head*, 267 F.3d 1312, 1318-19 (11th Cir. 2001) (when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless, counsel's failure to pursue those investigations may not later be challenged as unreasonable) (citing *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066).

1. Third party guilt.

The PCR judge properly concluded that counsel made a reasonable investigation for and presentation of admissible evidence that Allan Southern may have been an intervening cause in the victim's death. The PCR judge's factual findings as to counsel's extensive efforts to investigate Mr. Southern's possible involvement and their inability to develop "credible evidence supporting a third-party guilt theory that Allan Southern had killed his wife, or to develop any link between their client and Mr. Southern" (**App. 5471-72**) are supported by the record, *see Cherry*, 300 S.C. at

119, 386 S.E.2d at 626, as the above detailed discussion makes abundantly clear. Without establishing a link between Mr. Southern and Binney, counsel the men, they could not establish the existence of a conspiracy, a murder for hire scenario, or that Southern or Chapman's actions after Binney shot Judy were a superseding, intervening cause of her death. **App. 5472.**

However, counsel made a strategic decision that was objectively reasonable under *Strickland* to present much of the evidence that they had discovered as part of the surrounding circumstances of the crime. Although the evidence that counsel admitted was not admitted to suggest that Mr. Southern was responsible for his wife's death, it nevertheless allowed "counsel to argue that the State had 'to improve the evidence a little bit to get it to fit their theory' of the case" and it permitted "counsel to leave the door open to more fully develop Mr. Southern's culpability. **[App. 2332-45; 2370-87; 2389-90; 2415-16; 2604-08; 2611-18; 2647-48; 2651-52; 2766-67; 2777-81]." App. Order, 5473.**

This way, if Binney provided counsel with credible information that there was a connection between him and Mr. Southern during the trial, counsel had left the door open to pursue this as a defense or in mitigation. However, that did not occur. After the State had dropped the statutory aggravating circumstance of murder for hire and the trial judge had granted the defense's directed verdict motion on the statutory aggravating circumstance of larceny while armed with a deadly weapon - so that the only remaining aggravating circumstance was that the murder was committed while in commission of burglary in any degree under §16-3-20(C)(a)(i)(c) - counsel explained to Binney that there could be no intent to commit burglary if he had a connection to the Mr. Southern or the victim and counsel asked if there was a connection. Binney steadfastly denied that there was any connection between him and either the victim or her husband. *See* **App.**

4581-85; Respondent's Ex. 11.

Further, the PCR judge correctly found that counsel made an objectively reasonable decision not to pursue a defense of third party guilt

> because they did not have evidence that satisfied the requirements of *State v. Gregory*, 198 S.C. 98,104-05, 16 S.E.2d 532, 534-35 (1941) ... [and t]he evidence of Mr. Southern's behavior in the months leading up to the shooting, as well as his actions on that day or in the days that followed, simply did not "raise a reasonable inference or presumption as to [Applicant's] own innocence" and did not constitute "such a train of facts or circumstances, as tends clearly to point out [Mr. Southern] as the guilty party," *see Gregory*, [198 S.C. 98,104-05,]16 S.E.2d at 534-35[... and] *Holmes v. South Carolina*, 547 U.S. 331 (2006). This is because, to present date there is no direct, admissible evidence that Mr. Southern, in fact, played a role in his wife's death, or that he and Applicant were somehow connected. The only evidence of a connection between Applicant and Mr. Southern was in a statement that Applicant had given to his first attorney, Donald Thompson; however, he later admitted to both trial counsel and Mr. Thompson that this statement was fabricated. Counsel clearly were not deficient in failing to present evidence that their client and his previous attorney had both confirmed was untrue.FN10
>
> > FN10/ The Court notes that the State did no object to the evidence that was presented, even though it contemplated and was concerned that the defense would present evidence of third party guilt. **PCR Tr. pp. 471-74; 482-83.** [**App. 4417-20; 4428-29**].

App. 5472-73.

With respect to a defense of third party guilt, counsel went as far as they could without "a smoking gun" connecting Mr. Southern to his wife's murder. As the PCR judge correctly noted, counsel were aware that Binney's jury would hear evidence that was inconsistent with the suggestion that the victim's husband had any involvement in her death. This evidence included the 911 call, in which the dispatcher and Southern speak for some time. **App. 5473-74.**

The PCR judge found that:

> This Court listened to the 911 tape and the conversation between the dispatcher and Mr. Southern when it was published by the State at the PCR hearing. Mr. Southern's emotional demeanor and the information that he provided in the call do

> not appear to be consistent with the theory that he was involved in the shooting of his wife. His voice and actions reflect a genuine concern for his wife. Also, he explained the circumstances surrounding the calls he received from employee Chapman, where he was when he spoke to Chapman, as well as how and why he first looked for his wife in their house. He further explained his delay in getting her to his truck after finding her in the pasture some 300 yards from the house, that his wife told him that her assailant was waiting on her in the bathroom, and that the assailant left a note that was in the yard. More importantly, he provided information that the Court concludes is inconsistent with his own culpability and tends to refute any connection between him and Applicant. Specifically, even though Mr. Southern owned a small caliber handgun, he told dispatch that there appeared to be two wounds that were caused by a small caliber weapon. Further, he said that although his wife was not very coherent, she told him that the assailant's name was Berry and that he lived near the Southerns.

App. 5474.

This Court should defer to the PCR's finding on this because he was in the best position to assess the demeanor of Mr. Southern. *See Goins v. State*, 397 S.C. 568, 573-74, 726 S.E.2d 1, 3-4 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court"); *see also Gavin v. State*, 473 So.2d 952, 955 (1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire") (cited with approval in *Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmon, J., concurring in part and dissenting in part).[6]

Nor were counsel deficient in failing to present the victim's friend, Brown, on the issue of third party guilt both because her testimony was inadmissible hearsay. Moreover, her testimony

[6] The PCR judge also did not err by finding that counsel correctly viewed the factual scenario later hypothesized "by PCR counsel as implausible-that Applicant had not actually shot Judy Southern and that Mr. Southern had shot her." This bizarre theory is not supported by anything in the record, "other than PCR counsel's conjecture. This type of conjecture simply "does not satisfy the strict requirements of *Gregory* and *Holmes*." **App. 5474**.

was inadmissible under *Gregory* and *Holmes*, because it did not "raise a reasonable inference or presumption as to [Binney's] own innocence" and it did not constitute "such a train of facts or circumstances, as tends clearly to point out [Mr. Southern] as the guilty party," as required by *Gregory*, 198 S.C. at 104-05, 16 S.E.2d at 534-35.[7]

She was also easily impeached as a meddlesome busybody and "town gossip." Again, in making their decision not to present her, counsel were aware that Binney's statements and their extensive investigation did not establish either a link between Mr. Southern and Binney or evidence that Mr. Southern was either directly or indirectly involved in causing Judy's death because neither his actions nor those of the hospital were such that they were an independent intervening cause of Judy's death. Further, calling Brown "may have opened the door on admissibility of [Binney]'s conflicting statements about a link between Mr. Southern and [Binney], depicting him as a non-credible individual." **App. 5475.**

The fact Binney's collateral attorneys claimed that they would have tried the case differently, with the luxury of knowing in hindsight that trial counsel's chosen course failed to achieve the desired result, does not establish deficient performance because "[i]t is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' " *Richter*, 131 S.Ct. at 788 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Further, in assessing the constitutional adequacy of counsel's performance, it must be remembered that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

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[7] In the conversation with Judy about a book discussing how a person who had killed someone that he or she loved could be forgiven by doing certain other acts, she was uncertain as to whether it was "a book that Allan had been reading or **somebody [else] had been reading**" that. She also admitted that Judy "was real vague about it." **App. 4332-33**. (Emphasis added).

"Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach. *Richter*, 562 U.S. at __, 131 S.Ct. at 789 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

The relevant inquiry under *Strickland* is not what defense counsel could have pursued. Rather, the question for a reviewing court to decide is whether counsel made objectively reasonable strategic choices after a constitutionally adequate investigation. *Wiggins v. Smith*, 539 U.S. at 521-22; *Strickland*, 466 U.S. at 690-691, 104 S.Ct. 2052.[8] Given the present record Respondent submits that Binney cannot meet his burden of proof. Specifically, he cannot establish that counsel's errors were "so serious as to deprive [Binney] of a fair trial, a trial whose result is reliable." *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Richter*, 562 U.S. at __, 131 S.Ct. at 789.

Finally, Binney has woefully failed to show any plausible prejudice from counsel's handing of the defense of third part guilt. As noted by the PCR judge, there was overwhelming evidence of guilt pointing squarely at Binney - and Binney alone - as the murderer and proving that he was guilty of burglary, *see Strickland*, 466 U.S. at 694; he admitted his guilt in closing; and a murder for hire involving Southern would be a statutory aggravating circumstance, *see* § 16-3-20(C)(a)(4). **App. 5476**. Any suggestion that Binney was prejudiced under *Strickland* must, of necessity, ignore that in **Respondent's Exhibit 11**, given to counsel during the trial, Binney denied any connection to the Southerns when he could have avoided a death sentence by admitting it.

2. Intervening cause.

The PCR judge further found that counsel were not deficient and that Binney was not

[8] Thus, Binney misstates the appropriate inquiry when he says that "[c]ounsel's failure to raise an available defense falls below the objective standard of reasonableness and prejudices the defendant if such a defense is reasonably supported by available evidence. **Brief of Petitioner-Respondent, p. 4**.

prejudiced by the failure to employ an independent pathologist. Binney contends that an independent pathologist could have supported a defense that Mr. Southern's actions were an superseding intervening cause of death. First, there was no deficiency in counsel's performance.

As discussed, counsel reviewed Dr. Ross' findings with her roughly one month to six weeks before trial. At that time, she stated that her opinion was that Judy had a contact wound caused by a small caliber weapon. Because these findings were consistent with the planned defense and inconsistent with the State's theory of what had occurred, and because she did not alert defense counsel to this change in her findings and did not issue an amended report, counsel's failure to hire an independent pathologist and, instead, to rely upon cross-examination of Dr. Ross was reasonable under *Strickland*. *See Smith v. Angelone*, 111 F.3d 1126, 1132-33 (4th Cir. 1997) (counsel reasonably chose to rely upon cross-examination of the State's own witnesses to establish his case, rather than hire independent expert); *Strickland*, 466 U.S. at 690. *See also State v. Harrison*, 129 N.M. 328, 7 P.3d 478 (2000) (concluding that "[d]efense counsel made a tactical decision before trial not to hire a polygraph expert and to rely on his own cross-examination of [the State's expert]"); *People v. Bradley*, 25 P.3d 1271, 1276 (Colo.App. 2001). The reasonableness of counsel's performance is buttressed by the fact Binney had "admitted to counsel he had shot the victim, that there was no connection between him and Mr. Southern, and that Mr. Southern was not involved. **App. 5478**. *Strickland*, 466 U.S. at 691.

Further, the record supports the PCR judge's finding that Binney did not establish prejudice from counsel's failure to employ an independent pathologist to support a defense based upon a superseding intervening cause of death. Dr. Riddick's testimony simply does not support a conclusion of Mr. Southern's potential involvement or a break in causation by the medical

treatment provided.

In South Carolina, "one who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the cause of the death of the other." *State v. Jenkins*, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981). *See also State v. Patterson*, 367 S.C. 219, 232, 625 S.E.2d 239, 246 (Ct. App. 2006); *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986).

> [Under the doctrine of intervening cause, a homicide defendant may be relieved of legal liability for the death of the victim if the chain of causation is broken and death is caused by an independent intervening act. To qualify as an intervening cause, an event must not be reasonably foreseeable and one in which the defendant does not participate, must appear, with the benefit of hindsight, to be abnormal or extraordinary, and must be the sole proximate cause of death. An intervening cause must be so extraordinary that it would be unfair to hold the defendant responsible for the death. An intervening event, even if it is a cause of the victim's death, does not exempt the defendant from liability for death if that event was put into operation by the defendant's initial criminal acts.

40 CJS *Homicide*, § 10 (footnotes omitted). *See also People v. Saavedra-Rodriguez*, 971 P.2d 223 (Colo. 1998), as modified, (Feb. 11, 1999) (defendant is not relieved of liability, even in face of grossly negligent medical treatment, if original wound would likely have been fatal without treatment); *People v Griffin*, 80 NY2d 723, 594 NYS2d 694, 610 NE2d 367 (1993) (the test for relief from criminal liability is whether the death can be attributed solely to the negligent medical treatment).[9]

Here, counsel impeached Dr. Ross, through cross-examination with her initial report, and Binney's jury learned that she did not change it until after she had met with the State. The report

[9] The Court in *Griffin* affirmed the defendant's conviction despite testimony that a necessary procedure was not timely performed by treating physicians because the Court found that the alleged medical negligence was only a contributing cause and not the sole cause of the victim's death. Therefore, the defendant remained criminally responsible for stabbing the victim.

stated that the wound could have been caused by a small or medium caliber bullet. **App. pp. 2773-81**. Further, a review of counsel's cross-examination of Dr. Ross shows that he jury presented with

> similar information about the type of bullet used as that presented in PCR through Dr. Riddick. Dr. Riddick disputed the trial testimony of Dr. Ross that the victim's injuries were caused by "a distant gunshot wound . . . consistent with a medium caliber weapon," such as a .357 caliber bullet, a 38 caliber bullet, or a 9 mm bullet. He opined that the wound could have been caused by a small or medium caliber bullet: a 9 mm bullet, a .22 caliber, or a .38 caliber bullet. **PCR Tr. pp. 87-88; 91-92**. Although trial counsel did not create a battle between two competing experts, counsel effectively exploited Dr. Ross' amended findings as part of the defense's theme that the State was forced to "change" the evidence to fit its theory of the case.

App. 5479.

Despite counsel's inability to establish, after a reasonable investigation, either that Mr. Southern's actions upon finding his wife after the shooting or that the subsequent treatment by the hospital staff was a superseding, intervening cause of death, "counsel elicited on cross-examination of the emergency room surgeon that the victim bled to death; that he 'would hope' that 'there is always a point at which someone can be saved or resuscitated, whenever someone bleeds to death,' and that he did not know what time she was wounded. [**App. 2766-67**]." **App. 5479-80**.

Also, Dr. Riddick's chief concern was not the time it took for Mr. Southern to get Judy to the hospital. Instead, it was the delay of almost an hour between her arrival and the time that she went into surgery. **App. 4033-35**. However, counsel's failure to present expert testimony to this effect was neither deficient performance nor prejudicial to Binney because Riddick's testimony did not support Binney's "allegation that counsel were ineffective for not presenting evidence of Mr. Southern's potential involvement and it did satisfy the requirements of *Gregory*. **App. 5480**.

Moreover and as discussed,

> the State's cross-examination established that the victim had lost seven of the ten to fourteen units of blood that were in her system before she was shot, and that *only the surgeon* could answer whether it was necessary to stop the bleeding before surgery could have been performed. Also, Dr. Riddick's opinion was only that the victim would have had a better chance of surviving if there had been a rapid response time, but he could not assign any figure to a real chance of saving the victim if she had been taken into surgery within thirty minutes of being shot. [**App. 4035-41**] Similarly, the surgeon opined at trial that it was uncertain he would have been able to save her 'if she had been shot in the waiting room of Mary Black Hospital' because 'there is a lot of injury, a lot of bleeding, and a lot to go through to try to be saved, even at that point." [**App. 2764-65**].

App. 5480 (emphasis in Order).

Additionally, and even though counsel's reasonable investigation did not uncover a sufficient nexus to allow presentation of a defense of either third party guilt or intervening causation, virtually every salient point concerning Allan Southern's conduct discussed in Binney's Petition was uncovered by counsel's investigation and, to the extent that it was admissible, much of the evidence was presented to the jury, as the above discussion reflects.

However, Respondent would note that Allan Southern did not "fail[] to tend to [the victim's] wounds" or "stop[] to answer a call on her cell phone" as Binney argues. **Brief of Petitioner-Respondent, p. 7**. Rather, he answered a call while attempting to provide aid to her. **App. 2388-89**. Also, there is nothing in the record before this Court to support the representation (**Brief of Petitioner-Respondent, p. 8 n. 4**) that "[h]ad Allan stopped at this substation or previously called for ambulance assistance, Judy would have been transported to Spartanburg Regional Hospital, which is a Class One hospital that - unlike Mary Black Hospital- is fully equipped to deal with severe traumas such as a gunshot wound." The record is silent both as to the

comparative quality available at those two hospitals or where she would have been taken if Mr. Southern had stopped at the sub-station.

Nor did Binney ever plead (**App. 3932, Amended Application dated May 1, 2007; App. 3940, Amended Application dated May 21, 2007**) or argue below that Mr. Southern had a duty to furnish medical assistance to his wife or a duty to furnish assistance because he had voluntarily assumed the care of her. He likewise did not make these claims in his Rule 59, SCRCP, motion. **App. 5529-33**. As a result, these contentions are procedurally barred under well-settled precedent. *See, e.g., Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007) (issue not preserved for review where not ruled upon by PCR court and petitioner did not file Rule 59(e) motion); *Evans v. State*, 363 S.C. 495, 503-04, 611 S.E.2d 510, 515 (2005) (an issue must have been raised to and ruled upon by the PCR judge to be preserved for appellate review); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (petitioner failed to preserve for review on appeal claim that trial counsel was ineffective for failure to object that sentences constituted cruel and unusual punishment where point was not raised in PCR application or at hearing); *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("This issue was not raised below and is not properly before us").

The requirement of presenting such an argument to the PCR judge is particularly important here because, to Respondent's knowledge, there are no South Carolina cases imposing such a duty in homicide cases. Moreover, there is no evidence that any such duty was breached by Mr. Southern, and there was no evidence of gross negligence or intentional conduct by Allan Southern, even assuming that this duty existed. Finally, the weakness of Binney's claim is underscored by

the fact that he relies upon a document that was excluded from evidence to support his claim: Court's Exhibit 3 (**App. pp. 4930-71**). See **Brief of Petitioner-Respondent, p. 9**.

As reflected by the record, the PCR judge excluded **Defendant's Exhibit 11 for I.D.** on the State's objection and had it marked as **Court's Exhibit 3**. Worse, this exhibit was not offered in connection with the present allegation but as evidence of a possible conflict of interest based upon the fact that an attorney who represented a prosecution witness in Binney's case was counsel for the probate of the victim's estate. **App. 3951; 4382; 4683, line 21 - p. 4406, line 1**. Likewise, **Applicant's Exhibits 12 -14** were not introduced in the PCR hearing. Thus, Respondent submits that he may not properly rely upon this exhibit before this Court. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal). *See also State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

Thus, the PCR judge's findings (**App. 5480**) that Dr. Riddick's testimony does not establish either that "Mr. Southern's actions or the subsequent medical treatment was a superseding, intervening cause of death" and that there was no prejudice in failing to retain him is supported by the record and this Court must deny certiorari. *See Cherry, supra.*

II. This Court must affirm the denial of relief on Binney's claim that counsel should have employed a "suicidologist because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under *Strickland* not to present expert testimony concerning Binney's suicidal intent in the guilt phase of the trial because counsel were concerned that (1) presenting mental health testimony would open the door for the prosecution to introduce evidence of the CSC conviction concerning his infant daughter, as well as negative mental health diagnoses that were consistent with the prosecution's theory of the case; and (2) counsel wanted to avoid alerting the State as to how the defense intended to utilize evidence of his suicidal intent, when the State was in the dark on that strategy.

Respondent submits that this Court must affirm the denial of relief on Binney's claim that counsel should have employed a "suicidologist," because there is evidence of probative value to support the PCR judge's findings that trial counsel made an objectively reasonable decision under *Strickland* not to present expert testimony concerning Binney's suicidal intent in the guilt phase because counsel were concerned that (1) presenting mental health testimony would open the door for the prosecution to introduce evidence of the CSC conviction concerning his infant daughter, as well as negative mental health diagnoses that were consistent with the prosecution's theory of the case; and (2) counsel wanted to avoid alerting the State as to how the defense intended to utilize evidence of his suicidal intent, when the State was in the dark on that strategy. **App. pp. 5481-83.**

A. Counsel's strategy.

Binney's attorneys were aware of past suicide attempts by Binney. They had the assistance of two experts and had considered presenting evidence of the past suicide attempts and expert testimony to support their theory that Binney's intent, when he broke into the Southerns' residence, was only to commit suicide and not another crime. However, they ultimately chose not to present this evidence for strategic reasons. **App. 4587-88; 4649-51; 4655.**

Specifically, both attorneys were concerned that "once we opened the door to issues relating to Mr. Binney's mental health or his mental illnesses," the State would have been permitted to present evidence of other mental illnesses that were consistent with the State's theory that Binney had burglarized the home to rape and kill Judy, such as the diagnosis of Binney as a sexual sadist. When Binney's collateral counsel asked why he would not have presented Dr. Morton to testify as to evidence that was "factual in nature," Mr. Pruett explained that "I was just very conscious of not wanting to cross that line." He did not know whether Dr. Morton's

testimony would have opened the door for the State to present negative mental health information or not, but he feared that "anything bearing upon his mental state of mind where we're presenting expert testimony or other like evidence bearing upon his mental state of mind might have opened that door." **App. 4587-88; 4650-51**. *See* also **App. 4457-59; 4463-64**.(Mr. Slade's testimony).

In making this strategic decision, counsel were also aware that the trial judge had allowed the State to obtain an independent evaluation of Binney by Dr. Pamela Crawford, over objection. Mr. Pruett was present for this interview, he had tape recorded it and, because it occurred shortly before trial, it was still fresh in his mind. In the interview, Binney admitted to incidents that would not have otherwise been presented to the jury in the guilt phase and Dr. Crawford would have been able to testify about many of his sexual disorders, including sexual sadism. Counsel did not want the guilt phase jury to hear Dr. Crawford's testimony. **App. 4588-89;** *see also* **App. 4514-16**.

Another reason Mr. Pruett did not want to present expert testimony as to Binney's suicidal intent was to keep the prosecution in the dark as to how the defense planned to use evidence of Binney's suicidal intent because the prosecution was unaware of the precise nature of their proposed defense. "They were completely caught off guard when we ... made that argument ... that suicide is not a crime and that if he went in for that purpose then he didn't go in with the intent to commit a crime. And the more we talked about suicide the more we risked the possibility they would catch on to what direction we were taking" and the State could argue more forcefully that under *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1819), suicide is a crime in South Carolina. **PCR Tr. pp. 4651-54**.

Mr. Pruett was aware that he could have requested an *in limine* ruling as to whether any expert testimony would open the door for the State to be able to present damaging mental health

information. However, this would have alerted the State as to the defense's intended strategy and Mr. Pruett did not want to do that. Also, he has learned from past experiences that a witness will sometimes volunteer information that would open the door to the presentation of otherwise inadmissible evidence and defense counsel has to "live with the consequences" of the witness' testimony. **App. 4654-55**.

B. Discussion.

The PCR judge first found that counsel had made an objectively reasonable decision not to present expert testimony regarding Binney's suicidal intent in the guilt phase. **App. 5481**. The PCR judge then found that Binney had not established any prejudice resulting from counsel's failure to present such expert testimony in the guilt phase. **App. 5482-83**.

Again, in assessing the constitutional adequacy of counsel's performance, this Court must remember that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. "Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach. *Richter*, 562 U.S. at __, 131 S.Ct. at 789 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

Also, the relevant inquiry under *Strickland* is not what defense counsel could have pursued. Rather, the question for a reviewing court to decide is whether counsel made objectively reasonable strategic choices after a constitutionally adequate investigation. *Wiggins v. Smith*, 539 U.S. at 521-22; *Strickland*, 466 U.S. at 690-691, 104 S.Ct. 2052.

The PCR judge's ruling must be affirmed because counsel, in fact, considered presenting expert testimony, through either Dr. Morton or Dr. Schwartz-Watts, to support their guilt phase

defense that Binney's intent when he entered the Southerns' house was to commit suicide, and that he therefore lacked the intent to commit a crime for purposes of the burglary charge. However, counsel made a reasonable strategic decision not to introduce such expert testimony for two reasons.

First, and as the PCR judge properly found, counsel were reasonably concerned that the presentation of any expert opinion that his mental state was to commit suicide would open the door for the State to present evidence of the CSC and other negative diagnoses, such as the diagnosis that Binney is a sexual sadist. These negative diagnoses were consistent with the State's theory that Binney broke in the home to rape and kill Judy Southern. Second, the State did not know how the defense planned to utilize evidence of Binney's suicidal intent, and counsel wanted to avoid alerting the State to the defense's intended strategy. As a result, the State would be "unprepared to respond to the defense's position that suicide is no longer a crime, contrary to *Levelle*.

Therefore, the record supports the finding (**App. 5481**) that counsel's strategy was objectively reasonable under *Strickland* and Binney has not proven that counsel's supposed errors were "so serious as to deprive [Binney] of a fair trial, a trial whose result is reliable." *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Richter*, 562 U.S. at __, 131 S.Ct. at 789.

The record also supports the finding that Binney did not prove prejudice. **App. 5482-83**. [10]

"Solicitor Gowdy confirmed that the State was unprepared for the defense that counsel presented. [**App. 4429-30**]. Also, there was extensive evidence presented in the guilt phase that

[10] In footnote 6 (**Brief of Petitioner-Respondent, p. 18 n. 6**), Binney asserts that "had trial counsel conducted a thorough mitigation investigation and retained an expert in Fetal Alcohol Syndrome, they would have discovered that Petitioner had a long history of depression and that he previously made multiple suicide attempts, owing in large part to his struggle with Fetal Alcohol Syndrome." However, his attack on counsel's performance in presenting evidence of Fetal Alcohol Syndrome, which he first raised as an additional sustaining ground in the **Return to State's Petition for Writ of Certiorari**, lacks merit for the reasons argued in the **Reply to Return to State's Petition for Writ of Certiorari**.

supported the defense's theory that [Binney] was suicidal at the time of the murder, even without the benefit of expert testimony." **App. 5482**. This evidence included evidence that the parties referred to the note Binney left at the scene (**State's Ex. 34**) as a "suicide note;" Binney was placed on "suicide watch" at the jail and he was only taken off of suicide watch after he gave his June 16, 2000 statement (**App. 2454; 2458-60; 2462; 2464-65; 2485-87**); his June 16, 2000 statement reflected suicidal intent as a possible motive for the crimes (**App. 2441-42; State's Ex 3, R. pp. 3748-52**), he stated that he intended to commit suicide when he later broke into the Southern residence (**App. 3749**), and he asked to be given the death penalty because "the crime I committed definitely warrants it;" and his letter to Mr. Southern (**State's Ex. 6, App. 3755-56**) expresses his intent to commit suicide. **App. 2483**. *See also* **App. 5482 n. 14**.

Additionally, the defense presented Binney's original lawyer, Don Thompson, Esquire, who testified that Binney seemed "self-destructive" and talked only about his wish to receive the death penalty on the date following Binney's arrest, June 14, 2000 (**App. 2795**); the same was true when Thompson saw Binney on June 14th. Thompson testified that he believed Binney was actually suicidal and self-destructive when Thompson saw Binney and that he relayed his concerns to SLED Agent McCraw. **App. 2795-96**.

Thus, the presentation of evidence concerning Binney's suicidal state of mind without presenting an expert was not "weak" as Binney suggests. Additionally, Binney's contention that "trial counsel could not have made a reasonable determination as to whether testimony from a suicide expert was proper, or would even open the door to the type of prejudicial testimony that counsel feared, without first consulting with such an expert," **Brief of Petitioner-Respondent, p. 20**, is specious and ignores that counsel had the assistance of two experts - Dr. Alexander Morton,

a psycho-pharmacologist, and Dr. Donna Schwartz, a forensic psychiatrist - both of who gave testimony related to Binney's allegedly suicidal state of mind in the penalty phase.

Further, the February 22, 2010 affidavit that Binney introduced from Dr. Janet York (**App. 5260-62**) clearly would have opened the door to the State's introduction of the evidence that counsel adamantly and very wisely sought to keep from Binney's guilt phase jury, as the PCR judge correctly found. **App. 5482**.

Additionally, Dr. York expressly opines in ¶ 6 of her affidavit that Binney "had active violent ideation (rape and murder) and was extremely angry." She also opines that he "had multiple psychiatric diagnoses (comorbidity), including polysubstance abuse, mood disorder, and personality disorder." **App. 5261**. Respondent submits that the State would have been permitted to cross-examine her about the negative diagnoses discussed above, which counsel quite understandably sought to keep out of the guilt phase. The State would have also been justified in cross-examining Dr York about the various methods of suicide that Binney told Agent Prodan that he had contemplated. Obviously, the presentation of any such evidence would have been prejudicial to Binney and, again, this prejudice would greatly outweigh the minimal benefit gained through expert testimony that he was suicidal.

Also,

> The presentation of any such evidence would ultimately have been damaging to [Binney] and such prejudice would greatly outweigh the minimal benefit gained through expert testimony that he was suicidal. The Court rejects [Binney's] current implication that counsel could have presented this evidence in some limited form that would not have opened the testimonial door for damaging reply consistent with the prosecution's theory of the case. This would potentially include the type of information that the State elicited on cross-examination of Dr. Morton about [Binney's] depression at sentencing, [**App 3503-15**], as well as [Binney's] statement to Agent Prodan that he contemplated committing a "mass murder"

before he committed suicide, or raping his brother-in-law's wife and killing his brother-in-law before he committed suicide. [**App. 3280-81**].

App. 5482-83.

Finally, Binney has apparently abandoned his contention, raised below, that counsel could have presented Dr. Morton to give testimony that was "factual in nature." Respondent also notes that he neither called Dr. Morton as a witness at the PCR hearing, nor identified those portions of Dr. Morton's sentencing phase testimony (**App. 3480-3517**) that he claims would not have opened the door for the State to present the jury with evidence that the reason for his allegedly suicidal state was because of the CSC charge involving his daughter and other negative mental health diagnoses that were consistent with the State's theory he entered the home with the intent to rape and murder. Thus, his argument is not preserved for this Court's review. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice"). Alternatively, Respondent notes that this is precisely the type of information that the State elicited on cross-examination of Dr. Morton about Binney's depression at sentencing. **App. 3503-17**.

Other negative information was elicited at sentencing on the State's cross-examination of Dr. Schwartz-Watts and the State referenced it in closing argument. Also, Binney mentioned in his statement to Agent Prodan that he contemplated committing a "mass murder" before he committed suicide or raping his brother-in-law's wife and killing his brother-in-law before he committed suicide. **App. 3280-81**. The prosecution would have been able to, at the very least, establish *the reason for the depression and suicidal intent* was that *he had been arrested for the CSC of his infant daughter*. The PCR judge correctly found that counsel's determination that they did not

want the guilt phase jury to hear such evidence was quite reasonable and it clearly was not prejudicial. **App. 5483**.

Therefore, the PCR judge's findings are supported by the record and the Court must affirm the PCR judge's denial of relief as to this claim.

CONCLUSION

Respondent submits that the Court should affirm the Order and judgment denying relief on the two claims raised by Petitioner-Respondent, for the above-stated reasons.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

September 4, 2014.

By: _____
ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Cherokee County
The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2012-212107

JONATHAN KYLE BINNEY,

Petitioner/Respondent,

vs.

STATE OF SOUTH CAROLINA,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

I, William E. Salter, III, of counsel for the Respondent/Petitioner, certify that I have served two (2) copies of the within Brief of Respondent by Respondent-Petitioner via U.S. mail to his attorneys of record, Emily C. Paavola, Esq., Death Penalty Resource Defense Center, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201; and to John H. Blume, Esq., Blume, Norris & Franklin-Best, LLC, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 4th day of September, 2014.

WILLIAM EDGAR SALTER, III
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305