

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Petition for Certiorari from Richland County
Deadra L. Jefferson, Circuit Court Judge

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S.C. SUPREME COURT

Hank E. Hawes, Petitioner,

v.

State of South Carolina, Respondent

Appellate Case No. 2023-001759

APPENDIX

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primary appellate brief explained, the jury heard questions and answers regarding Mr. Hawes' prior statement that were inseparable from the bad acts giving rise to them, and the jury undoubtedly "read between the lines" to deduce the violent context in which the statement was made.⁶ This violated Rule 404(b), which prohibits testimony that even *implies* the defendant engaged in prior bad acts. (See Brief of Appellant at 16–18 (citing *State v. Traylor*, 360 S.C. 74, 84 n. 12, 600 S.E.2d 523, 528 n.12 (2004); *State v. Nelson*, 331 S.C. 1, 13, 501 S.E.2d 716, 722 (1998); *State v. Tate*, 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986); *United States v. Scott*, 677 F.3d 72 (2nd Cir. 2012).)

In short, the State's response argument on appeal fails to acknowledge, much less rebut, the Rule 404(b) implications and errors in the admission of the testimony of Mr. Hawes prior bad acts. Testimony from which a jury can infer a defendant's prior wrongs is prohibited and may not be smuggled into a case under the guise of impeachment or some other façade. See *State v. Fonseca*, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009) (holding the trial court erred by allowing testimony of a prior bad act, noting that the purported basis for doing so was but a "thin disguise for impermissible character evidence and would undermine the protections of Rule 404"); *State v. Nelson*, 331 S.C. 1, 12, 501 S.E.2d 716, 722 (1998) ("We find the State's argument this evidence was relevant to show motive or intent is merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual

⁶ There is no dispute that the underlying incidents giving rise to Mr. Hawes statement to Ms. Newsom that he would turn the tables on her involved domestic violence. See R. 930–931 (noting during the proffer of Ms. Newsom's testimony that Mr. Hawes' statement was uttered in the course of "intense fights" involving threats of physical violence including throwing Ms. Newsom to the ground); *id.* at 933 (noting during the proffer of Ms. Newsom's testimony that Mr. Hawes' statement "is connected to these physical episodes").

offenses.”). Accordingly, the Trial Court’s admission of this testimony was error and warrants reversal and remand for a new trial.

III. The Trial Court erred and abused its discretion by permitting Ms. Wilson’s neighbor to testify of Mr. Hawes’ purported prior bad acts.

As explained in Mr. Hawes’ primary brief, the Trial Court erred by permitting Ms. Wilson’s neighbor to testify about a prior argument he had overheard between Mr. Hawes and Ms. Wilson in which he “heard her screaming like he was hurting her and Jen saying ‘no.’” (*See* Brief of Appellant at 18–21.) Such testimony of prior bad acts is forbidden by Rule 404(b), and Mr. Hawes did not “open the door” to the otherwise forbidden evidence. (*See id.*)

The State argues Mr. Hawes opened the door to this testimony when his counsel cross-examined the neighbor and asked questions about details in his courtroom testimony that were absent from the written statement he provided to police immediately after the incident. (*See* Brief of Respondent at 34–36.) Specifically, counsel asked him about his testimony that the sounds of the struggle emanated from specific rooms in Ms. Wilson’s home since those details were omitted from his written statement. *See* R. 102:11 to 103:7. Counsel also asked the neighbor to confirm he had previously heard an argument between Mr. Hawes and Ms. Wilson on only one occasion. R. 104:19-25. Counsel did not challenge the neighbor’s memory of that prior argument, dispute the veracity of his testimony regarding that prior argument, or question him regarding the description or intensity of that argument. Counsel also asked the neighbor, who had testified he though Mr. Hawes and Ms. Wilson were no longer dating, if he was aware they had been in regular contact with each other in the weeks leading up to her demise. *See* R. 105–106.

According to the State, these questions opened the door to the otherwise impermissible testimony of Mr. Hawes’ past alleged violence. The State’s argument goes too far. If these unremarkable questions, which never disputed anything regarding the neighbor’s recollection of

a past argument, are sufficient to open the door to evidence otherwise barred by Rule 404(b), it is difficult to conceive what questions defense counsel *could* ask a witness on cross-examination that would not open the door to otherwise impermissible testimony. The Trial Court's ruling, if upheld, would hamstring criminal defendants' attorneys so utterly as to essentially deprive defendants of either the protection afforded by the Rules or of the right to cross-examine witnesses. This result cannot be correct, and the Trial Court's ruling should be reversed.

IV. The Trial Court erred by permitting a Solicitor's office to prosecute a case in which two fact witnesses were an assistant solicitor and her husband.

As explained in Mr. Hawes' primary brief, although South Carolina's courts have not previously confronted the question, other jurisdictions have held an entire solicitor's office should be recused from prosecuting a case in which a member of that office and/or his spouse were a witness to the alleged crime. (*See* Brief of Appellant at 21–27.) The State asserts two arguments in response: (1) the standard for recusal of an entire office should be actual prejudice, not merely the avoidance of the appearance of bias or prejudice, and (2) the wealth of cases from other jurisdictions holding otherwise are in slight ways distinguishable from the case at bar. (*See* Brief of Respondent at 37–45.)

As to the State's first argument, Mr. Hawes' primary brief has already explained how the South Carolina cases the State relies on are distinguishable and why a different result should obtain under the different facts raised in the case at bar. In essence, the State argues the *only* instance in which a solicitor's office should be recused from prosecuting a case is when a member of that office is found to have engaged in deliberate and significant misconduct in the prosecution of that case. (*See id.* at 40.) According to the State, the fact that a prosecutor's case relies on an "insider," thus giving rise to an appearance of partiality, is insufficiently worrisome

to warrant any corrective action. This argument imperils the public trust and confidence in an unbiased and impartial prosecutorial system.

As to the State's argument that the many out-of-jurisdiction cases upon which Mr. Hawes' relies are distinguishable, the State fails to discuss or distinguish the cases that are very nearly on all fours with the case at bar, namely *People v. Jenan*, 140 Cal. App. 4th 782 (Cal. Ct. App. 2006) (holding the trial court properly ordered the recusal of the entire district attorney's office because a district attorney's investigator would likely be a witness) and *Lewis v. Superior Court*, 53 Cal. App. 4th 1277 (Cal. Ct. App. 1997) (reversing trial court's refusal to recuse district attorney's office where the effect of the defendant's conduct on the district attorney and his staff gave rise to an appearance of impropriety).⁷ As to the State's attempt to distinguish *People v. Conner*, 666 P.2d 5 (Cal. 1983), the State relies on the rather narrow difference between a prosecutor who witnessed the defendant's attempted escape from custody while in the courthouse (which in *Conner* was a sufficient basis to recuse the entire office from prosecuting that matter) as opposed to a prosecutor who observes the defendant's getaway from the scene (which the State argues here should *not* compel recusal of the solicitor's office from prosecuting the matter).⁸

⁷ Our Supreme Court's ruling in *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011) which involved a prosecutor called as a defense witness, relied on California precedent, indicating the Court would likely find the California cases cited above to be persuasive in the different situation where a prosecutor and/or her spouse were fact witnesses called by the *prosecution*.

⁸ Contra the State's argument that *Conner* does not support an "appearance of impropriety" standard, the *Conner* court expressly stated recusal was required "if the conflict either affects *or appears to affect* his ability faithfully to perform the discretionary function of his office," and that this conflict was imputable to the entire DA's office in light of its modest size ("about 25 attorneys") and the media coverage of the "dramatic and gripping nature" of the alleged crime. *Conner*, 666 P.2d at 6–7 and 9 (emphasis added).

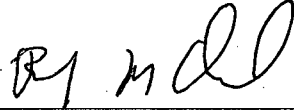
In sum, because prosecutions in which an assistant solicitor and/or her spouse are witnesses are quite rare, the “cost” of recusing the office is minimal. The “benefit,” however, is significant in terms of maintaining the parties’ confidence and the public’s confidence in the judicial process by avoiding even the appearance of partiality or bias. Because a simple preventative measure was available, namely transferring the case to the Attorney General’s office, the trial court erred by failing to recuse the Fifth Circuit Solicitor’s office and transfer the case. This Court should reverse and remand for a new and fair trial.

CONCLUSION

For the foregoing reasons, Appellant requests this Court reverse and remand for new trial.

Respectfully submitted,

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Columbia, South Carolina
August 23, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Hank Eric Hawes, Appellant.

Appellate Case No. 2014-002288

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5543
Heard April 11, 2017 – Filed March 14, 2018

AFFIRMED

Chief Appellate Defender Robert Michael Dudek; and
Allen Mattison Bogan and Nicholas Andrew Charles,
both of Nelson Mullins Riley & Scarborough, LLP; all of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody Jane Brown; and
Solicitor Daniel Edward Johnson, all of Columbia, for
Respondent.

MCDONALD, J.: Hank Eric Hawes appeals his murder conviction, arguing the circuit court erred in (1) admitting unnecessary and prejudicial photographic evidence, (2) allowing the State to recall Hawes to ask a single question intended

to elicit testimony that would permit the State to call impeachment witnesses, (3) admitting testimony regarding a prior argument between Hawes and Jennifer Wilson (Victim), and (4) refusing to disqualify the Fifth Circuit Solicitor's Office from prosecuting the case. We affirm.

Facts and Procedural History

Hawes and Victim met online in February 2011 and began dating shortly thereafter, though neither behaved as though the relationship was exclusive. In June 2011, Hawes moved from Simpsonville to Columbia to be closer to Victim, who was a professor at the University of South Carolina (USC).

On August 27, 2011, Victim texted Hawes and offered to bring him breakfast on her way to yoga. Following her yoga class, Victim invited Hawes to her home for lunch. Hawes accepted and the two spent the afternoon together. Around 5:30 p.m., they departed for their respective evening plans.

Hawes went to dinner with a friend at Cantina 76 on Devine Street. He believed Victim planned to attend a coworker's birthday party and then join him around 8:00 p.m. Over the course of the evening, however, Victim's itinerary kept "getting later and later." Hawes left Cantina 76 at approximately 10:30 p.m.

Meanwhile, Victim and a former boyfriend (Friend) attended a surprise birthday party at Cowboy Steakhouse on Main Street. Shortly after 10:00 p.m., Victim and Friend traveled from the restaurant to another friend's house where the birthday celebration continued. They stopped at Friend's house around 12:30 a.m.; Victim then attended a party at a fellow USC professor's house, where she stayed until approximately 1:30 a.m.

Hawes last texted and called Victim shortly after 2:00 a.m. on the morning of August 28, and then drove to her duplex. According to Hawes, he told Victim he wanted to end their relationship and an argument ensued. Ultimately, Hawes stabbed Victim twelve times,¹ unclothed her, washed her body, and placed her on a

¹ Victim sustained multiple defense wounds, blunt force trauma ("at least[] three blows to the head"), abrasions, contusions, eleven incised wounds, and one bite mark.

couch in the living room area.² Hawes then cut his own wrists and collected his blood in a cooler bag.

Victim's next-door neighbor at the duplex, Kelly Smith, was awakened at 2:29 a.m. by sounds of "screaming and physical violence" and called 911. Two officers from the City of Columbia Police Department (CPD) arrived at the duplex at 2:47 a.m., but did not enter because they did not observe any lights, sounds of distress, or signs of a struggle.

Over the next few hours, Hawes remained in Victim's home and placed several calls to two former girlfriends (Female 1 and Female 2, respectively). He also searched the internet for "criminal attorney[s] in Columbia, South Carolina." At 5:22 a.m., Hawes sent Female 1 an email with the subject line "Last Will," in which he purported to leave her all of his assets. Around 9:00 a.m., Hawes called a local attorney and authorized him to report Victim's death. Thereafter, Hawes called Female 2 and confided he might be charged with murder and needed \$25,000 for legal representation. He also claimed he had attempted suicide. Female 2 told Hawes she did not have \$25,000 and encouraged him to seek medical attention. EMS subsequently transported Hawes to Baptist Hospital.

CPD responded to Victim's home at approximately 11:30 a.m., where officers found her body on the living room couch.³ Although they found blood at the rear entry to the duplex and in the kitchen, there was very little blood on Victim or the comforter covering her. Later that day, CPD officers arrested Hawes at Baptist Hospital and charged him with murder. On October 5, 2011, the Richland County Grand Jury indicted Hawes for murder.

On December 12, 2012, Hawes moved to disqualify the Fifth Circuit Solicitor's Office from prosecuting the case because an assistant solicitor and her husband were fact witnesses. Following a hearing, the circuit court denied the motion.

² The cause of death was blood loss due to a stab wound to the right side of Victim's neck. However, six of the twelve stab wounds could have been individually fatal. Even if the neck injury had been Victim's only wound, the pathologist opined she would have died within approximately two minutes.

³ EMS arrived at 11:51 a.m. and pronounced Victim dead at the scene.

The case went to trial on October 6, 2014. The circuit court denied Hawes's motions for directed verdict and instructed the jury on the elements of murder, voluntary manslaughter, and self-defense. On October 16, 2014, after two days of deliberation, the jury returned a verdict finding Hawes guilty of murder. The circuit court sentenced Hawes to life in prison.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829. As to evidentiary issues, "we are limited to determining whether the trial judge abused his discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)). "To warrant reversal, an error must result in prejudice to the appealing party." *Id.* at 16–17, 732 S.E.2d at 884.

Law and Analysis

I. Photographs

Hawes argues the circuit court erred in allowing the State to use "unnecessary and prejudicial photographic evidence" during closing argument to arouse the passions and prejudices of the jury. He asserts the crime scene photographs of Victim's unclothed body were unfairly prejudicial because the State juxtaposed them with an irrelevant smiling photograph of the Victim. Hawes contends the erroneous admission of State's Exhibits 46 (right neck and breast wounds), 202 (close-up of neck wound), and 322 (birthday party photograph) suggested an improper, emotional basis for the jury to consider, resulting in his conviction.

Hawes objected under Rule 401, SCRE, to the introduction of two photographs of Victim and other guests at the birthday party Victim attended on the night she was murdered. The circuit court overruled the objection and admitted the photographs as State's Exhibits 322 and 325. Hawes later lodged a Rule 403, SCRE, objection to all of the crime scene photographs. The circuit court excluded several of the photographs and marked them as "Court's Exhibit 3" to ensure they would not be submitted to the jury in error. Thereafter, Hawes again objected to the introduction of the following photographs from the crime scene: State's Exhibits 31 (the body

on the couch), 33 (the body on the couch and cooler on the floor), 38 (a bite mark), 41 (neck and breast wounds), 42 (breast wound), 45 (left neck wound), 46 (right neck wound), 54 (left leg bruise), 60 (close-up of a back wound), and 62 (three back wounds). Hawes argued the crime scene photographs were "gruesome" and would serve only to "elicit an emotional response from the jury" because he did not contest how the body was found.

Citing *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), and *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014), the State argued the crime scene photographs were "necessary to substantiate material facts" regarding the "nature of the crime" and to show evidence of malice. Hawes responded that *Collins* and *Gray* were distinguishable because those cases addressed only autopsy-related photographs, which were necessary to corroborate testimony and rebut opposing testimony, whereas here, the crime scene photographs were unnecessary for corroboration. The circuit court ruled the probative value of the crime scene photographs outweighed their prejudicial effect because they depicted the scene and location of the body. Further, the wound photographs were relevant to the issue of malice.

Hawes subsequently objected to the introduction of State's Exhibit 398 (the crime scene video), which was filmed by CPD crime scene investigator (CSI) George Wise. Specifically, Hawes objected to the portion of the video showing Victim's body, just as he had previously objected to the admission of similar photographs. Lastly, Hawes objected to the introduction of the autopsy photographs. The circuit court overruled these objections and allowed the introduction of the crime scene video and eighteen photographs from Victim's autopsy.

Initially, we find Hawes's abandoned his argument regarding State's Exhibit 398 (the crime scene video) and the autopsy photographs. Hawes briefly argued in his opening appellate brief that all of the crime scene photographs, the crime scene video, and the autopsy photographs should have been excluded because they were unfairly prejudicial. In his reply brief, Hawes argues his appellate brief clearly indicates his appeal includes "all the still photographs from the scene admitted over trial counsel's objection" and "the still photographs from the autopsy." He contends the "outline headings" and "argument text" in his opening brief establish that his appeal includes State's Exhibit 398. However, the "outline heading" simply states, "[t]he [circuit] [c]ourt wrongly allowed the introduction of unnecessary, gruesome photographs and video." And the argument text mentions only that the circuit court admitted the crime scene video over Hawes's objection. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871,

873 n.2 (Ct. App. 1993) (noting a one sentence argument is too conclusory to present any issue on appeal). Hawes failed to include the challenged exhibits in his designation of matter to be included in the record on appeal, and neither the crime scene video nor the autopsy photographs appear in the record. *See* Rule 209 (b), SCACR ("The Designation must clearly identify what the party desires to have included in the Record on Appeal . . ."); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact that does not appear in the Record on Appeal."); *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 488 (2005) (explaining the appellant has the burden of providing a sufficient record).

After careful review, we find Hawes abandoned some—but certainly not all—of his arguments regarding the photographic evidence introduced at trial. Although his arguments focus on State's Exhibits 46 (right neck wound), 202 (close-up of neck wound), and 322 (birthday party photograph), we find Hawes also preserved his arguments addressing State's Exhibits 31 (the body on the couch), 33 (the body on the couch and cooler on the floor), 38 (a bite mark), 41 (neck and breast wounds), 42 (breast wound), 45 (neck wound), 54 (left leg bruise), 60 (close-up of a back wound), and 62 (three back wounds).

Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (quoting *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)).

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *Id.* "'To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Collins*, 409 S.C. at

534, 763 S.E.2d at 28 (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

In *Collins*, the circuit court admitted into evidence seven pre-autopsy photographs of a child who died of "extensive traumatic injury" after being severely mauled by dogs. *Id.* at 528–33, 763 S.E.2d at 25–27. This court reversed, finding the circuit court erroneously admitted the photographs, and the error was not harmless. *Id.* at 533, 763 S.E.2d at 27. However, our supreme court reversed, finding the photographs were "highly probative, corroborative, and material in establishing the elements of the offenses charged; [their] probative value outweighed [their] potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 534–35, 763 S.E.2d at 28.

In *Gray*, the circuit court admitted into evidence eleven photographs of a victim—taken before and during autopsy—who died after being severely beaten during two separate fights on the same day. 408 S.C. at 604–07, 609, 759 S.E.2d at 162, 163–65. This court determined it was within the circuit court's discretion to admit eight of the photographs of high probative value presenting minimal danger of unfair prejudice, noting the photographs "contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice." *Id.* at 609, 759 S.E.2d at 164. As for the remaining three photographs, which were taken during autopsy and showed the victim's exposed skull and brain, we concluded they too had probative value; they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. *Id.* at 612–16, 759 S.E.2d at 166–68.

Here, the crime scene photographs established the circumstances of the crime scene and corroborated the testimony of Smith and CSI Wise. *See e.g.*, *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370 (1995) (finding photographs of the murder victim's nude body lying on the floor, with her face and body visibly swollen from being beaten, and of the blood-smeared walls and floor were relevant to establish the crime scene). Smith, who lived next door to Victim, woke to sounds of "screaming and physical violence" and called 911. He heard the first wave of violence in Victim's bedroom; it then progressed toward the kitchen area where "there was a second wave of more aggressive, just brutal, carnal[,] instant violence." Smith described "physically feel[ing] the vibration in [his] bedroom from what was coming from [Victim's side of the duplex]. . . . [and he] could hear what sounded like a table slamming against the wall, like her body being thrown against the wall." The last thing Smith heard was Victim yelling "no, no, no" and

"pleading for her life." The next morning, CSI Wise photographed and recorded the crime scene. He testified in detail regarding the state of Victim's home as well as the items collected as evidence.

We find the circuit court did not abuse its discretion in admitting the crime scene photographs. *See e.g., Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (explaining it is not an abuse of discretion for a trial court to admit photographic evidence if it is offered to corroborate testimony). Specifically, we find the circuit court correctly applied Rule 403's balancing analysis in ruling the probative value of the crime scene photographs outweighed their prejudicial effect because these photos showed "the scene as it occurred" and "where the body was found in the house."

Further, the circuit court properly evaluated the probative value of the crime scene photographs with respect to the question of malice, explaining that they established "the wounds that were inflicted on the victim, which would go to the issue of malice." As in *Gray*, the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times Victim was attacked. *See* S.C. Code Ann. § 16-3-10 (2015) (defining "murder" as "the killing of any person with malice aforethought, either express or implied"); *State v. Kinard*, 373 S.C. 500, 503–04, 646 S.E.2d 168, 169 (Ct. App. 2007) ("Malice aforethought" is defined as as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime." (quoting *Malice Aforethought*, Black's Law Dictionary (7th ed. 1999))). The crime scene photographs illustrated the extreme nature of this killing as they show multiple wounds and abrasions on Victim's extremities, contusions all over her body, and a bite mark. *See Kelley*, 319 S.C. at 178, 460 S.E.2d at 371 (finding charts, photographs, and a video depicting the excess nature of the killing were both relevant and probative to the issue of malice).

In contrast to the crime scene photographs of Victim's neck wounds (State's Exhibits 46 and 202), the State presented two other photographs from the birthday party Victim attended during the evening before her murder.⁴ State's Exhibit 322 shows Victim in sleeveless attire, arguably to demonstrate her arms and shoulders were devoid of wounds hours before her body was discovered. While the State argues this photograph was relevant to the issue of malice, Hawes cites *State v.*

⁴ Although Hawes's appellate brief does not specifically list State's Exhibit 325, it does reference "photographs of [Victim] smiling in happier times." State's Exhibits 322 and 325 are included in the record on appeal, and we have considered both for purposes of our analysis.

Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), and *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987), for the proposition that "such photographs are irrelevant, inflammatory, and prejudicial."

In *Langley*, our supreme court found the circuit court erroneously admitted a photograph of the murder victim in his high school graduation regalia because the photograph was not relevant to proving defendant's guilt. 334 S.C. at 648, 515 S.E.2d at 100. The victim's identity was not at issue, and the court concluded that the only possible purpose of the photograph was to distance the victim from the drug dealing involved in the case. *Id.* at 648 n.3, 515 S.E.2d at 100 n.3. Similarly, in *Livingston*, the supreme court held a photograph of the victim and her husband taken shortly before she was involved in a fatal automobile accident was of no consequence to the determination of guilt at the defendant's felony DUI trial. 327 S.C. at 20, 488 S.E.2d at 314. In *Johnson*, the State sought to introduce photographs of another murder victim as evidence of other crimes to establish the defendant's motive and intent to kill. 293 S.C. at 325, 360 S.E.2d at 320. However, the court explained that the first victim "died from a gunshot wound to the head and that the body was concealed in the camper" whereas the defendant shot the second victim, a State Trooper, after he initiated a traffic stop and began questioning the defendant. *Id.* at 325, 360 S.E.2d at 320. Thus, the photographs of the first victim's body were irrelevant and erroneously introduced. *Id.*

Here, State's Exhibit 322 was admitted neither to establish Victim's identity nor to demonstrate motive. Instead, the State argues, the photograph was admitted as evidence of malice. We reject this argument and find the admission of the birthday party photographs constituted error. *See e.g., Langley*, 334 S.C. at 648, 515 S.E.2d at 100 (finding the victim's photograph was irrelevant to proving the guilt of the defendant). However, we find the error harmless as it could not reasonably have affected the outcome of Hawes's trial. *See e.g., State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971))); *Langley*, 334 S.C. at 647–48, 515 S.E.2d at 100 ("Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial.").

II. Reply Testimony

Hawes argues the circuit court erred in allowing the State to recall him the day after it had already concluded his cross-examination. The State sought to ask a single question intended to elicit testimony that would permit the State to call impeachment witnesses.

Hawes testified that he killed Victim in self-defense. At the conclusion of the State's cross-examination—during which Hawes claimed Victim was the aggressor—the State argued Hawes "opened the door" to his prior acts of domestic violence and sought to proffer testimony from four of his previous girlfriends regarding physical abuse, threats, and a previous conviction. The State then proposed a condensed proffer of the two most recent and similar events involving Female 1 and another former girlfriend (Female 3). The circuit court declined to hear the proffer at that time, stating it did not believe Hawes had opened the door, and such testimony would not be admissible under *State v. Lyle*.⁵ The circuit court clarified, "Now I'm not saying that some other witnesses may not open the door." The circuit court later determined it would allow the State to proffer the testimony the next day, and then revisit its ruling as to the admissibility Hawes's prior acts.

The following morning, the State proffered the testimony of Female 1 and Female 3 regarding prior incidents of domestic violence by Hawes. Relying on *State v. Michau*, 355 S.C. 73, 583 S.E.2d 756 (2003) and *State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000), the State argued some of the proffered testimony should be admitted to rebut Hawes's self-defense claim. Specifically, the State sought to introduce evidence of a conversation in which Hawes told Female 1 that if she ever called law enforcement, he would make it look like their altercation was her fault. The State also sought to introduce evidence of an incident during which Hawes pulled a knife on Female 3. Hawes objected, arguing Rule 404(b), SCRE,⁶ barred

⁵ 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (explaining the permissible uses of evidence of prior bad acts).

⁶ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Such evidence "may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.* "Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009).

such testimony. The circuit court declined to allow the introduction of the proffered testimony because it was "too remote in time."

Thereafter, the State argued Hawes was still on the witness stand and it wished to ask him one question for impeachment purposes: Did Hawes tell Female 1 that if she ever called law enforcement, he would make it look like it was her fault? Despite Hawes's arguments and strenuous objection, the circuit court determined Hawes was still "technically on cross-examination." The court ruled, "I reopened it for the State and I said I [would] listen to the testimony this morning in camera and make a decision. So I revisited that issue at the hearing. . . . from that standpoint[,] the procedure was not concluded. . . . regardless of what's on the record."⁷ The circuit court explained, "I'm not letting [the proffered testimony] come in [during the State's] case in chief. [The State] wants to ask [Hawes one] question, lay down the foundation for impeachment is the way I understand it. . . . [the State's] cross is not over." Hawes argued, "There is no way for them to put [Female 1] on the witness stand and her to offer testimony that doesn't go into the prior bad acts violence that she alleges took place between her and Mr. Hawes. That is absolutely [Rule] 404." The circuit court responded that Hawes could make his objection if and when the State recalled Female 1.

The State then recalled Hawes to the witness stand and asked, "In the fall of 2010, specifically in October, November, that area, do you remember making a statement to [Female 1] at her home . . . that if she ever called law enforcement, you would make it look like it was her fault?" Hawes answered, "No, I do not."

The State then proposed to recall Female 1 to testify. Hawes again objected under Rule 404. The circuit court explained "the only thing I'm going to allow her to testify to is the statement itself, not what led up to the statement. . . . Not going into threats or any violence or anything else. No pushing or shoving or anything." On direct examination, Female 1 testified, "He told me that if I were to call law enforcement . . . that I would be the one to go to jail."

Appellate courts "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). "Every witness under cross-examination may be asked whether he has made any former statement

⁷ The record reflects that the previous afternoon, when the circuit court asked if the State had "any further cross," the State responded, "No, sir."

relative to the subject matter of the action and inconsistent with his present testimony." *Aakjer v. Spagnoli*, 291 S.C. 165, 170, 352 S.E.2d 503, 507 (Ct. App. 1987).

"When an accused takes the stand, he becomes subject to impeachment, like any other witness. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about 'past transactions tending to affect his credibility.'" *State v. Major*, 301 S.C. 181, 183, 391 S.E.2d 235, 237 (1990) (quoting *State v. Allen*, 266 S.C. 468, 482, 224 S.E.2d 881, 886 (1976)). "First, the accused may be asked about prior bad acts, not the subject of a conviction, which go to his credibility." *Id.* at 184, 391 S.E.2d at 237. However, the cross-examiner must take the accused's answer and may not contradict the accused if he denies them. *Id.* "Second, the accused may be impeached by the introduction into evidence of convictions for crimes of moral turpitude, since they too are past transactions tending to affect credibility." *Id.*

In *Michau*, the appellant requested that the circuit court redact nine sentences from his written statement to the police because those portions of the statement constituted inadmissible propensity evidence under Rule 404(b), SCRE. 355 S.C. at 78, 583 S.E.2d at 759. The circuit court agreed to redact the last six sentences from the statement, but declined to redact three others. *Id.* Our supreme court held the circuit court properly overruled the appellant's Rule 404(b) objection to the three sentences. *Id.* at 79, 583 S.E.2d at 759. The court explained the three sentences did not constitute propensity evidence because they did not refer to any "crimes, wrongs, or acts" generally inadmissible under Rule 404(b). *Id.*

Similarly in *Beck*, our supreme court explained, "Testimony that [the a]ppellant had made a statement of his intent to perpetrate such crimes—albeit four months prior to this event—was highly probative as to a manifestation of that intent through the fatal attack upon [the v]ictim." 342 S.C. at 135, 536 S.E.2d at 682. In particular, the court found that a witness's statement that the appellant had asked him on a specific date "to participate in a plan to call escort services for dates and then rob and have sex with the employees" did not invoke *Lyle*, which concerns prior bad acts. *Id.* at 134–35, 536 S.E.2d at 682. The court held that as a general rule, statements made by the accused are admissible against him. *Id.*

Hawes argues the circuit court erred in admitting Female 1's testimony, as such "bad acts" evidence is barred under Rule 404(b), SCRE. Arguably, the circuit court could have admitted the statement at issue under Rule 404(b) to prove Hawes was not acting in self-defense. *See id.* (stating such evidence "may, however, be

admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent"). But a prior statement of bad intent is not a prior bad act. *See Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (determining a threatening statement was not a bad act); *Beck* 342 S.C. at 134, 536 S.E.2d at 682 (explaining *Lyle* concerns bad acts and other crimes of a defendant, not statements of intent to commit crimes). Thus, we find the circuit court did not abuse its discretion in finding the State's final cross-examination inquiry concerned an impeachment issue, not a Rule 404(b) issue. Whether the State could then recall Female 1 to ask her about Hawes's statement depended on whether Hawes admitted telling her that if she ever called law enforcement, she would be the one to go to jail. In fact, the State agreed that if Hawes admitted to the statement, it would not be able to offer extrinsic testimony.⁸

Female 1's testimony was relevant to Hawes's credibility regarding his claim that Victim was the aggressor, and thus, was significant evidence for the jury's consideration. Contrary to Hawes's testimony that he killed Victim in self-defense, Female 1's statement established that, in the past, Hawes had planned to make a girlfriend appear at fault in the event of a police investigation. Therefore, the testimony was properly admitted. *See State v. Alford*, 264 S.C. 26, 32, 212 S.E.2d 252, 254 (1975), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (where "connection with the offense sufficiently appears, evidence of prior difficulties between [the] accused and a third person is admissible to show malice, premeditation, or general state of mind" (quoting 40 C.J.S. *Homicide* § 209))); *United States v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997) ("The more similar the extrinsic act or state of mind is to the act involved in committing the charged offense, the more relevance it acquires toward proving the element of intent.").

Our review of the record reveals the vast majority of the evidence undermines Hawes's testimony that he acted in self-defense, including, but not limited to: Smith's testimony regarding the attack; the blood evidence found in Victim's home; Victim's badly beaten, bruised, and stabbed body; the bite mark on Victim; Hawes's unresponsiveness to law enforcement's initial inquiry at Victim's home;

⁸ "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible." Rule 613(b), SCRE.

Hawes's lack of non-self-inflicted injuries; his treatment of Victim's body following the attack; and the various contacts he made in the early morning hours following the attack. Simply put, other than his own self-serving testimony, Hawes failed to present any evidence that he acted in self-defense. Thus, even if the circuit court erred in admitting the final cross-examination inquiry and Female 1's testimony, such error would have been harmless due to the overwhelming evidence of Hawes's guilt. *See State v. Chavis*, 412 S.C. 101, 110 n.7, 771 S.E.2d 336, 340 n.7 (2015) (stating an error in admitting certain testimony could be deemed harmless because of the existence of overwhelming evidence of guilt); *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998) ("In determining harmless error regarding any issue of witness credibility, [appellate courts] consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case.").

III. Smith's Prior Argument Testimony and Statement to Law Enforcement

Hawes argues the circuit court erred in allowing Smith to testify regarding a prior argument between Hawes and Victim. Hawes further contends the circuit court's erroneous ruling was based on its belief that Hawes opened the door to this otherwise inadmissible evidence of an alleged prior bad act. According to Hawes, the circuit court's admission of this unduly prejudicial evidence inflamed the passions and prejudices of the jury against him. We disagree.

Prior to Smith's testimony, the State advised the circuit court it wanted to elicit testimony that Smith heard Victim and Hawes fighting a few months before Victim was killed. Specifically, Smith planned to testify he heard Victim "yell out 'no'" in fear. Although the circuit court allowed the State to question Smith regarding what he actually heard, it granted Hawes's motion to exclude Smith's characterization that Victim cried out "like he was hurting her."

On direct examination, Smith testified their duplex residences were "mirrored" and he could "hear everything [Victim and Hawes] said in the living room" so long as it was "above speaking volume." He recalled hearing a prior argument between Victim and Hawes through the common wall of the duplex around the "end of May, beginning of June." In particular, he heard "mumbling and then it led to her saying 'no' very loudly. Like, 'No, No.'" When Victim later approached him in their shared backyard, Smith told her "sometimes relationships get heated" and advised Victim she could call on him "if she needed anything." Smith was alarmed

to see Hawes at Victim's home in August 2011 because he believed they were "on the outs" at that point in time.

Thereafter, Smith testified he woke up on August 28, 2011, at approximately 2:29 a.m., to the sounds of "screaming and physical violence" and called 911. He explained the first wave of violence began in Victim's bedroom and progressed towards the kitchen area where "there was a second wave of more aggressive, just brutal, carnal[,] instant violence." Smith described "physically feel[ing] the vibration in my bedroom from what was coming from [Victim's side of the duplex]. . . . I could hear what sounded like a table slamming against the wall, like her body [was] being thrown against the wall." The last thing Smith heard was Victim yelling "no, no, no" and pleading for her life.

On cross-examination, Smith admitted that his original statement to police did not mention any specific rooms where he believed the attack took place. Hawes inquired, "So when you describe prior difficulties between [Victim and Hawes] in that summer and you're asked whether you ever remember it, you mentioned yes, one time before." Smith confirmed and added, "[o]ne time that stood out."

On redirect, the State noted Smith's statement to law enforcement reflected that the last struggle occurred at the back door. The State asked Smith to continue his answer from cross-examination and explain what was in his statement about the prior altercation. Smith then testified he "heard [Victim] screaming like [Hawes] was hurting her and [Victim] saying 'no.'" Hawes objected and Smith confirmed the description of the prior difficulty was in his written statement.

Outside the presence of the jury, Hawes asserted his line of questioning did not open the door for the State to elaborate on inadmissible evidence and moved for a mistrial. Citing Rule 106, SCORE,⁹ the State argued Hawes's questioning inferred Smith had given incomplete information in his statement and its admission of the remainder of the statement corrected this impression by providing the more complete and detailed account. The circuit court denied Hawes's motion for a mistrial and overruled his objection, finding he opened the door on cross-examination. The court stated, "It was insinuated directly towards [Smith that he]

⁹ "When a . . . recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other . . . recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106, SCORE.

did not hear properly through the walls [but] he heard properly enough to realize, or at least, [think] that she was in danger of being hurt."

This court addressed a similar issue in *State v. Patterson*, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006). There, the circuit court admitted an entire police statement on redirect. *Id.* at 225, 625 S.E.2d at 242. After eliciting testimony from the victim's friend "regarding how careful she was in giving police a correct depiction of the events that led to [the victim]'s murder," the defendant insinuated that the victim's friend's statement was incomplete. *Id.* at 227, 625 S.E.2d at 243. This court found the defendant put the victim's friend's "statement to police at issue, and fundamental fairness required that the entire statement be admitted into evidence." *Id.* at 227–28, 625 S.E.2d at 243. This court continued:

Patterson would have us construe Rule 106 in such a way that inquiries that probed at alleged omissions from a statement would not open the door to the admission of the statement. The purpose behind Rule 106 would be frustrated if the rule's application in a given case depended upon whether an alleged oral assertion was or was not in a written statement. We find the rule of completeness applies to insinuations, innuendos, and omissions. Thus, the trial judge properly admitted [the victim's friend]'s statement.

Id. at 228, 625 S.E.2d at 243.

Once Hawes posed questions challenging the sufficiency and accuracy of Smith's police statement, the State was free to question him regarding the previously excluded details in the written statement that supported Smith's testimony. *See State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004) (explaining Rule 106 is based on the rule of completeness and attempts to avoid the unfairness inherent in the misleading impression created by taking matters out of context); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("The scope of redirect rests in the discretion of the trial court."). Therefore, we find the circuit court correctly determined Hawes "opened the door" based on his "insinuations, innuendos, and omissions" during his examination of Smith regarding Smith's statement to law enforcement. *See State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.").

IV. Disqualification

Hawes argues the circuit court erred in refusing to disqualify the Fifth Circuit Solicitor's Office from prosecuting his case because an assistant solicitor and her husband were two of the fact witnesses. We disagree.

On December 12, 2012, Hawes moved to disqualify the Solicitor's Office, arguing disqualification was necessary to avoid the appearance of impropriety and to allow for a fair trial. At the December 19, 2012 hearing, Hawes argued assistant solicitor Kathryn Ashton was "a material witness" because she was Victim's neighbor. Hawes also asserted Ashton and her husband were material witnesses because they claimed to see Hawes leaving the crime scene in a car they recognized. Hawes did not claim any bias or unfair treatment, but asserted "for appellate things down the road, it is really the appearance of impropriety."

The record establishes that Ms. Ashton immediately informed the Solicitor's Office when CPD identified her as a witness. From that moment on, there was no contact with Ms. Ashton within the Solicitor's Office regarding Hawes's prosecution; the Solicitor's Office built an ethical wall around her. The State explained her only participation in the case was providing law enforcement a statement of what she observed. The State indicated it might not even call Ms. Ashton as a witness at trial and offered for her testimony to be restricted or heard in limine to avoid any hint of impropriety.

By order dated February 1, 2013, the circuit court denied Hawes's motion, determining there was no right to disqualification and Hawes failed to show how Ms. Ashton's position prejudiced him or his right to a fair trial.

Ms. Ashton did not testify at trial. Her husband briefly testified that he saw Hawes leave Victim's home on the morning of August 28, 2011. He described the event as "odd" and "unique," and explained that Hawes "looked like he was driving with his forearms."

"[E]ven if a prosecutor is called as a witness by the defense, it is not always necessary for a trial judge to recuse the prosecutor or the prosecuting office in its entirety." *State v. Inman*, 395 S.C. 539, 558, 720 S.E.2d 31, 41 (2011). "In fact, '[t]here is no inherent right to disqualification when a member of the state attorney's office is called as a witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown.'" *Id.* (quoting 81 Am. Jur. 2d *Witnesses* § 229 (2004 & Supp. 2011)).

South Carolina law "places upon the moving party the burden of showing actual prejudice from the failure to disqualify." *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). In *State v. Smart*, our supreme court addressed the standard for disqualification of a solicitor's office when a lawyer in that office was previously employed by the public defender's office during the pendency of charges against the defendant. 278 S.C. 515, 519, 299 S.E.2d 686, 688–89 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Adopting the requirement that a defendant must show actual prejudice, the court affirmed the denial of Smart's motion for disqualification. *Id.* at 518–21, 299 S.E.2d at 688–89. Thereafter, the court again articulated an actual prejudice standard in *State v. Chisolm*, 312 S.C. 235, 238, 439 S.E.2d 850, 852 (1994).

In *State v. Bell*, a criminal defendant contended the circuit court erred in refusing to disqualify the solicitor's office from prosecuting his case because a current investigator with the solicitor's office had previously interviewed the defendant when the investigator worked for the public defender's office. 374 S.C. 136, 139, 646 S.E.2d 888, 890 (Ct. App. 2007). The defendant argued the investigator's initial involvement with his defense and subsequent involvement in a request for bond reduction and service of subpoenas while employed by the solicitor's office adversely affected his trial and his efforts to plea bargain. *Id.* at 142, 646 at 891. This court found "[t]here simply is no evidence [the investigator] was involved with any substantive or strategic prosecution work suggestive of betrayal of any secrets or confidences." *Id.* at 142, 646 at 892. "Contrary to [his] assertion, . . . no breach of confidence occurred and there was no actual prejudice to [the defendant]." *Id.* at 143, 646 S.E.2d at 892.

Hawes relies heavily on *People v. Conner*, 666 P.2d 5 (Cal. 1983), arguing "this situation would, at minimum, give rise to an appearance of impropriety or partiality" and "at worst, result in the demonstrable unfairness or prejudice." In *Conner*, the prosecutor was both "a witness to, and a potential victim of, [the] defendant's alleged criminal conduct" regarding his escape charges. *Id.* at 6–9. Although the trial court denied the defendant's motion for disqualification of the judge and the prosecutor's office with respect to his original criminal charges for burglary and forgery, it granted the defendant's motion to recuse the entire prosecutor's office as to his escape charges. *Id.* at 7. The appellate court upheld the trial court's determination that there was a conflict of interest in the escape case "[b]ecause of the dramatic and gripping nature of the circumstances, the pervasiveness of the communications regarding [the prosecutor]'s relationship to the incident, and the difficulty in gauging their cumulative effect." *Id.* at 9.

Here, the record reflects that Ms. Ashton neither formerly represented Hawes nor witnessed this attack. In her statement to law enforcement, Ms. Ashton merely stated she saw Hawes driving away from Victim's home on the morning of August 28, 2011. Further, she neither testified at Hawes's trial nor participated in any aspect of his prosecution. While Hawes cites cases from other jurisdictions to support his assertion that an ethical wall is ineffective, he cannot meet South Carolina's test for determining disqualification—the demonstration of actual prejudice. *See Smart*, 278 S.C. at 518–21, 299 S.E.2d at 688–89 (adopting the requirement that a criminal defendant must show actual prejudice from a failure to disqualify). Therefore, we affirm the circuit court's order denying Hawes's motion to disqualify the Fifth Circuit Solicitor's Office.

Conclusion

Hawes's conviction is

AFFIRMED.

GEATHERS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndra G. Benjamin, Circuit Court Judge
J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-00228

RECEIVED
MAR 29 2018
SC Court of Appeals

The State, ... Respondent,
v.
Hank Eric Hawes, ... Appellant.

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant Hank Hawes requests rehearing of this court's opinion issued March 14, 2018, affirming Mr. Hawes' murder conviction. *See State v. Hawes*, Op. No. 5543 (S.C. Ct. App. filed March 14, 2018) (Shearouse Adv. Sh. No. 11, at 63). This court overlooked or misapprehended several points and should therefore grant rehearing and reverse Mr. Hawes' conviction.

ARGUMENT

I. This court erred in affirming the trial court's admission of crime scene photographs that were unfairly prejudicial, cumulative of other evidence, and improperly juxtaposed with other inadmissible photographic evidence.

This court affirmed the admissibility of numerous crime scene photographs, including photographs of the decedent's naked body, solely on the ground that the photographs "established

circumstances of the crime scene” and corroborated other testimony.¹ *Id.* at 69–70. The court did not balance the probative value of the crime scene photographs against the danger of unfair prejudice to Mr. Hawes, as is required by Rule 403 of the South Carolina Rules of Evidence. Rather, the court simply explained that the crime scene photographs “illustrated the extreme nature of the killing” and ended its analysis there. *Hawes*, Op. No. 5543, at 71. The court therefore overlooked or misapprehended several points and should grant rehearing on this issue for three reasons. First, the court failed to analyze the unfairly prejudicial, inflammatory nature of the crime scene photographs and ignored the fact that observers at trial were incited by the photographs. Second, in finding the photographs were “corroborative,” the court failed to recognize that the crime scene photographs were cumulative of a wealth of testimony describing the crime scene in detail and, thus, had little probative value. Finally, the court considered the crime scene photographs in isolation and failed to consider the manner in which the State used the photographs at trial: by juxtaposing them with the birthday party photographs—which this court properly held were inadmissible—to inflame the passion of the jury and cause the jury to decide this case based on its desire to punish Mr. Hawes rather than on a rational view of all the evidence presented at trial.

This court completed only half of the required Rule 403 analysis—it simply found the photographs were “corroborative” of other testimony and affirmed the trial court’s decision to admit the photographs into evidence. *Id.* at 69–72. Evidence is not admissible solely because it

¹ Mr. Hawes disputes the court’s finding that he abandoned this issue as to the crime scene video. For the reasons explained in his reply brief, Mr. Hawes asserts that he properly raised and argued that the trial court erred in admitting the crime scene video. However, because this court considered only the crime scene photographs in its opinion, this petition addresses only the merits of the court’s ruling regarding the photographs.

has probative value or corroborates other testimony. The probative value of the evidence must be weighed against the danger of unfair prejudice posed by the evidence. *See State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (“Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.” (citations omitted)); Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice”) This court failed to engage in the proper balancing test.

The court need not speculate whether the crime scene photographs were calculated to arouse the passion and prejudice of the jury. During trial, an observer became so inflamed by the crime scene photographs that he disrupted the proceedings, leading the trial court to initially sentence him to six months in prison for contempt and ban him from the courthouse. (R. 918–23). The observer’s explanation for his outburst was that “Thursday was, obviously, very forensic and very graphic.” (R. 923). Even the jurors cried in response to some of the photographs. *See* (R. 1127). The record thus demonstrates that this is not a typical case where an appellant thinks photographic evidence *may* have caused a jury to make its decision based on an arousal of passion or emotion. The record shows that the photographs *in fact* inflamed the emotions of people in the courtroom, and Mr. Hawes therefore did not receive a fair trial. This court overlooked the unfairly prejudicial nature of the crime scene photographs.

The court also failed to consider the cumulative nature of the photographs. The information the crime scene photographs convey—the “extreme nature” of the killing, “multiple wounds and abrasions,” “contusions all over [Ms. Wilson’s] body,” and “a bite mark,” *Hawes*, Op. No. 5543, at 71—was neither necessary nor essential for the State to prove its case. Those facts were established by a substantial amount of witness testimony from emergency responders, crime scene

investigators, and a medical examiner. (R. 58–59, 61–62, 709–14, 720–24). The mere fact that photographic evidence is “corroborative” of witness testimony does not establish the admissibility of the photographic evidence. Because the crime scene photographs were duplicative of other evidence, and because the jury already had all the information it needed to infer malice, the danger of unfair prejudice far outweighed what little probative value the photographs presented. The crime scene photographs are a quintessential example of photographs that must be excluded. *See State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (“[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded *if they are irrelevant or unnecessary to the issues at trial.*” (emphasis added); *see also State v. Johnson*, 293 S.C. 321, 325, 360 S.E.2d 317, 320 (1987) (noting that where the victim’s cause of death was not contested at trial, the introduction of a photograph of the victim’s body was “irrelevant as introduced to show motive and intent, and their admission constituted error”); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387, 390 (1942) (holding “photographs of the body of the deceased showing his ghastly wounds” were erroneously admitted because it was “quite clear from reading the testimony of this doctor, who explained the location and nature of the fatal wounds, that the photographs had no probative value whatever, and really added nothing to the oral testimony, although their influence would naturally be prejudicial to the defendant”). This court overlooked the cumulative, unnecessary nature of the crime scene photographs and should grant rehearing on this issue.

Finally, the crime scene photographs cannot be considered in isolation. This court misapprehended this evidentiary issue by separately analyzing the crime scene photographs and the smiling photographs of the decedent taken at a birthday party the night she was killed. The two sets of photographs must be considered together. The error in Mr. Hawes’ trial was not solely

the admission of gruesome photographs or solely the admission of smiling photographs, although the court correctly found the smiling photographs were inadmissible. The error was the juxtaposition of those sets of photographs, which compounded the unfair and prejudicial effect of each set—neither of which was relevant and necessary to prove Mr. Hawes’ mental state when he killed the decedent. The State demonstrated the purpose of the photographs in its closing argument when it showed both sets of photographs to the jury:

On August 28th, this was Jennifer Wilson (indicating). Lucky for her, she went out that night with friends and she had a good time. . . . After he finished with her and left her there -- This is what was left (indicating), and the two stab wounds, one to each breast, one the length of the knife, one almost.

(R. 1106–07). The State used the smiling photographs to arouse the sympathy and emotions of the jury and followed with the crime scene photographs to inflame the passion and anger of the jury. The photographs must all be considered together and analyzed in light of the State’s use of the photographs at trial. They cannot be considered in isolation. This court overlooked and misapprehended the danger of unfair prejudice posed by the photographs, which substantially outweighed what little probative, “corroborative” value the photographs presented. Accordingly, this court should grant rehearing and reverse Mr. Hawes’ conviction.

II. This court overlooked the nature of Stacey Newsom’s testimony about a prior threat made by Mr. Hawes and erroneously considered it a statement of intent.

This court affirmed the trial court’s decision to allow Mr. Hawes’ ex-girlfriend—Stacey Newsom to testify about a threat Mr. Hawes made to her two years before Mr. Hawes killed Ms. Wilson. *Hawes*, Op. No. 5543, at 72–77. This court based its decision on the conclusion that Ms. Newsom did not testify about a prior bad act committed by Mr. Hawes; instead, she testified about

a “prior statement of bad intent.” *Id.* at 75. The court’s conclusion is a misapprehension of the law and Ms. Newsom’s testimony.

The court is correct in characterizing Mr. Hawes’ threat to Ms. Newsom as a “prior statement of bad intent.” *Id.* But that is exactly the point. The State used the testimony to show a prior occasion where Mr. Hawes indicated malicious intent and prove that he acted in conformity with that prior malicious behavior when he killed Ms. Wilson. Ms. Newsom’s testimony is, therefore, textbook inadmissible character evidence. *See* Rule 404(b), SCRE (“Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) (“It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual.”). It shows that Mr. Hawes has a propensity to threaten women in his life—and to claim that he can get away with it—and implies that he acted in conformity with that propensity.

Moreover, the argument that Ms. Newsom’s testimony is admissible as a statement of intent under Rule 404(b) is absurd. It cannot be reasonably suggested that Mr. Hawes’ statement to Ms. Newsom was a statement that he intended to murder a *different* woman, *a year later*, and assert self-defense at trial after being charged with that crime. Rule 404(b) allows the admission of prior statements that demonstrate an intent to commit a particular crime. *See, e.g., Johnson*, 293 S.C. at 324–25, 360 S.E.2d at 319 (noting the exception permitted evidence of past bad acts that “establish some element, *i.e.*, intent or motive, *of the crime* charged.” (emphasis added)). It does not allow the admission of prior statements of general intent to commit crimes. That is inadmissible character evidence, and that is what the trial court allowed through Ms. Newsom’s testimony. The time lapse between the threat to Ms. Newsom and the killing of Ms. Wilson—

combined with the fact that the two events involved different women—demonstrates that Ms. Newsom’s testimony is propensity evidence designed to show the jury that Mr. Hawes is violent toward women and that his killing of Ms. Wilson conformed with his propensity. *See State v. Nelson*, 331 S.C. 1, 12, 501 S.E.2d 716, 722 (1998) (“We find the State’s argument this evidence was relevant to show motive or intent is merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual offenses.”). Propensity evidence is inadmissible. Rule 404(b), SCRE. This court misapprehended the nature of Ms. Newsom’s testimony and should grant rehearing on this issue and reverse Mr. Hawes’ conviction.

Finally, the trial court’s error in admitting evidence of a prior bad act was not harmless. The State presented overwhelming evidence that Mr. Hawes killed Ms. Wilson, but Mr. Hawes does not dispute that he killed Ms. Wilson. The issue at trial was Mr. Hawes’ mental state at the time of the killing. The examples of evidence this court found was overwhelming have a trait in common—the jury must *infer* Mr. Hawes’ mental state from the evidence. *See Hawes*, Op. No. 5543, at 76–77. Although the primary evidence in support of Mr. Hawes’ self-defense claim was Mr. Hawes’ own testimony, that is likely to be true in any murder case in which the defendant claims self-defense. The improper admission of Ms. Newsom’s prior bad act testimony robbed Mr. Hawes of the possibility that the jury would find his testimony credible, reject the inferences suggested by the physical and forensic evidence, and decide the case in his favor. The evidence of Mr. Hawes’ mental state, therefore, was not overwhelming.

III. This court misapprehended the purpose of Rule 106, SCRE, in affirming the admissibility of testimony from Ms. Wilson’s neighbor.

This court affirmed the trial court’s decision to allow the State to elicit testimony from Ms. Wilson’s neighbor—which the trial court previously ruled inadmissible—on the ground that Mr.

Hawes “posed questions challenging the sufficiency and accuracy of [the neighbor’s] police statement” and the State was therefore “free to question him regarding the previously excluded details in the written statement that supported [the neighbor’s] testimony.” *Id.* at 77–79. This court based its ruling on Rule 106 of the South Carolina Rules of Evidence. *Id.*

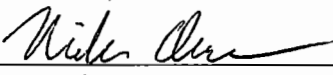
The court’s ruling misapprehends the purpose of Rule 106. Rule 106 is based on the “rule of completeness” and exists to avoid the unfairness inherent in the misleading impression created by taking matters out of context. *See State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004). It does not serve the purpose of Rule 106 to allow the State to question the neighbor about testimony—previously ruled inadmissible—that had no relation whatsoever to any inconsistencies pointed out by defense counsel. By affirming the trial court’s decision to allow the neighbor’s testimony about the details of Mr. Hawes’ prior altercation with Ms. Wilson, this court misapprehended the purpose of Rule 106 and affirmed the admission of prior bad acts testimony that is improper under Rule 404(b). Accordingly, this court should grant rehearing and reverse the trial court on this issue.

CONCLUSION

For the foregoing reasons, Appellant Hank Hawes requests that this court grant rehearing, reconsider its ruling on each of the above issues, and reverse Mr. Hawes’ conviction.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Appellant Hank Eric Hawes

Columbia, South Carolina

March 29, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED
MAR 29 2018
SC Court of Appeals

The State,

Respondent,

v.

Hank Eric Hawes,

Appellant.

Appellate Case No. 2014-002288

Opinion No. 5543 (S.C.Ct.App. filed March 14, 2018)

PETITION FOR REHEARING

On March 14, 2018, this Court issued an opinion in the captioned case affirming Appellant's murder conviction. Respondent, the State, agrees with the ultimate determination; however, Respondent would respectfully ask the Court to reconsider its ruling regarding the in-life photographs. Pursuant to South Carolina Appellate Court Rules 221 and 224, the State petitions for rehearing¹ and asks the Court to consider the following points that may have been misapprehended or overlooked in regard to the photographs:

¹ Respondent also makes this petition to specifically preserve the issue for consideration should the appeal continue. See *Sloan v. Department of Transp.*, 365 S.C. 299, 307-308, 618 S.E.2d 876, 880 (2005) (issue not argued in petition for rehearing may not be argued on certiorari); *State v. Humphries*, 354 S.C. 87, 91, n. 2, 579 S.E.2d 613, 615, n.2 (2003) (consideration of argument presented on certiorari review as an additional sustaining ground for affirmance discretionary if not included in petition for rehearing and raised in an appeal); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Since technically the Supreme Court would have to reverse part of the Court of Appeals' opinion to accept this position if the issue is to be litigated further, out of an abundance of caution, Respondent makes this petition.

This Court found the crime scene photographs introduced were admissible: “...the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times Victim was attacked” and “illustrated the extreme nature of this killing as they show multiple wounds and abrasions on Victim’s extremities, contusions all over her body, and a bite mark.” *State v. Hawes*, No. 2014-002288, 2018 WL 1309539, at *5 (S.C. Ct. App. Mar. 14, 2018). Then the Court found the in-life photographs – admittedly taken just hours before the murder – were not admissible in further proof of malice. These photographs show Ms. Wilson in sleeveless attire and her arms and shoulders do not have the bite mark and bruises that are on her body at death several hours later. (Compare R. p. vii [State’s 38] with R. p. vii [State’s 322 and 325]).² In his brief, Appellant argued the photographs were prejudicially used in closing. (FBOA, pp. 9-10; Reply Brief, p. 5). He argued: “Whatever minimal and redundant probative effect the photo may have had was outweighed by the danger – and demonstrated reality – of unfair prejudice. (FBOA, p. 12). There is, however, no unfair prejudice where the photograph was used in argument commenting on the State’s showing of malice.

Respondent submits, in these discrete circumstances, there is no clear record support for finding the trial judge abused his discretion in admitting the photographs, and, critically, there was no error in allowing the State to reference these admitted photographs in regard to the State’s showing of malice. The Court’s reliance on *State v. Langley*, 334 S.C. 643, 515 S.E.2d

² The photographs were offered and accepted without clear discussion on the record. The record reflects the trial court heard objections at a bench conference, and overruled an objection to relevance in admitting the photographs. (R. pp. 145 and 146). Defense counsel later put on the record the offered reason at the time to admission was for “state of mind.” (R. p. 1126, line 11 – p. 1127, line 9). The photographs were obviously in evidence and the solicitor referenced the bite mark directly before making the contrast in closing, (see R. p. 1106, lines 9-13). The contrast is plain. Moreover, as the judge indicated, the State is allowed to make persuasive arguments on the evidence already admitted. (See R. p. 1125, line 25 – p. 1126, line 1).

98 (1999); *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313, (1997); and *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987) in finding error and prejudice is misplaced.³ The facts and resulting holdings in these three cases are distinctly and critically dissimilar.

In *State v. Langley*, the Court rejected the State's argument an in-life photograph was offered for identity of the victim, because the identity of the victim was not contested. 334 S.C. at 648, 515 S.E.2d at 100 n. 3. Further, the Court found the photograph amounted to good character evidence of the victim, which was not admissible. *Id.* While this specific ruling from *Langley* is referenced in the opinion, the Court appears to have overlooked there is no suggestion in this case the photographs were necessary for simple identity, or that there was an issue on identity. Rather, the photographs were used in argument in reference to the State's showing of malice. *Langley* is inopposite.

In *State v. Livingston*, a photograph of the victim and her surviving husband – who was testifying mere months after his wife's death – was introduced in a trial for felony DUI. The State offered the husband's testimony about the wife and the couple's photograph for identity, but the Court found, as in *Langley*, that identity was not in issue. 327 S.C. at 20, 488 S.E.2d at 314. Further, the Court found the *irrelevant* photograph "highly inflammatory" in a case that did not present overwhelming evidence of guilt. *Id.* The Court makes reference to *Livingston*, but again, like its treatment of *Langley*, does not speak to evidence here which was used in argument in regard to the State's showing of malice – a key and relevant showing in a murder trial.

The results in *Langley* and *Livingston* tend to support the narrow finding that photographs in cases where identity is not an issue are irrelevant. That is not a basis for wholesale rejection

³ Again, Appellant has not cleanly preserved and presented the issue. The ruling on admissibility is not on the record, or any argument on the prejudicial effect versus probative value at the time of the photographs were offered and accepted.

of any in-life photograph or any argument related to such photographs.⁴ *Johnson* is the only case cited that reaches beyond the identity of the victim line of cases. It, in fact, references a photograph of another victim in a prior bad act showing – an even greater distinction.

In *Johnson*, a photograph of another murder victim was introduced along with excessive detail of the prior murder and armed robbery. The Court concluded “it can be asserted with reasonable certitude that the prejudicial impact of the excessively detailed evidence presented concerning appellant’s prior crimes outweighed its probative value.” 293 S.C. at 326, 360 S.E.2d at 320. The Court makes reference to *Johnson*, but does not speak to vast difference between photographs of *another murder victim* and evidence of an in-life photograph of the actual victim taken hours before the murder. The photograph here demonstrates the absence of the multiple of wounds which the Court had – within in the same opinion – found to be proof of malice. The Court erred in its reliance upon *Johnson*.

In sum, Appellant’s complaints the in-life photographs were “irrelevant” and used merely to inflame the emotions, (see FBOA, pp. 12-13), ring hollow in light of the specific and substantial probative value in the instant case – proof that Appellant not only killed her, but did so with great malice as evidenced by the multiple stabs, bruises, cuts, and the vivid bite mark. Respondent urges the Court to reconsider finding error in admission of the in-life, close-in-time photographs, referenced in argument on proof of malice. The comparison shows in stark and

⁴ This Court has just recently visited in-life photographs again in *State v. Johnson*, Opinion No. 5533 (S.C.Ct.App. re-filed March 28, 2018). In *Johnson*, this Court again found identity was not an issue in the murder case to support admissibility of in-life photographs of the two murder victims, and noted “nothing in the photograph served to make any fact in issue more or less likely.” *Id.* The Court continued, “[n]either the State nor the circuit court offered *any rationale for how the predeath photographs were relevant* to establishing Johnson’s guilt.” *Id.* (emphasis added). Again, the photographs here were a part of the argument in support of the State’s showing of malice, not for identity. This subsequent ruling, also depending upon *Langley*, is also inopposite.

readily understandable detail, the very wounds the Court finds support malice were Appellant's work and not wounds or marks – in whatever measure or part – otherwise existing. *Langley*, *Livingston*, and *Johnson* simply do not control and are not comparable.

WHEREFORE, based on the foregoing, Respondent urges the Court to reconsider its ruling in this regard. Respondent, though, fully agrees that any error could only be harmless in light of its position above, but also based upon the overall strength of the case as outlined in the Opinion.

Respectfully submitted,

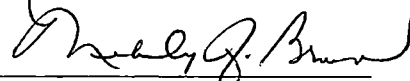
ALAN WILSON
Attorney General

DONALD J. ZELENKA
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DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY:



MELODY J. BROWN
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Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

March 29, 2018.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

The South Carolina Court of Appeals

The State, Respondent,

v.

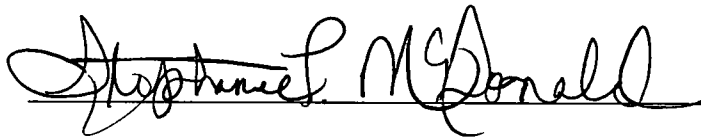
Hank Eric Hawes, Appellant.

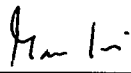
Appellate Case No. 2014-002288

ORDER

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


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

FILED

cc:

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Melody Jane Brown, Esquire

Allen Mattison Bogan, Esquire

Daniel Edward Johnson, Esquire

May 24, 2018

Robert Michael Dudek, Esquire
Nicholas Andrew Charles, Esquire
The Honorable DeAndrea G. Benjamin
The Honorable J. C. Nicholson, Jr.

2019CP400 1308

STATE OF SOUTH CAROLINA

County of RICHLAND

In the Court of Common Pleas

HANK ERIC HAWES #361739
Full name and prison number (if any) of Applicant,

vs.

STATE OF SOUTH CAROLINA
Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEF

2019 MAR -6 AM 9:29
JEROME L. HARRIS, JR.
CLERK OF COURT

INSTRUCTIONS -- READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Leiber Correctional Institution, P.O. Box 205, Ridgeland, SC 29472
2. Name and location of Court which imposed sentence Richland County Fifth Judicial Circuit-General Sessions
Richland County Judicial Center 1701 Main Street Columbia, SC 29201
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2011-65-40-05012 - Murder
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) October 16, 2014 - Life sentence
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty N/A

(b) after a plea of not guilty Yes

(c) after a plea of nolo contendere N/A

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Court affirmed original finding - denied rehearing

ii. _____

iii. _____

(c) the date of each such result:

i. May 24, 2018

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 2014-06288 - ORDER - Rehearing denied

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) SEE ATTACHED

(b) SEE ATTACHED

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) SEE ATTACHED

(b) SEE ATTACHED

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law? No

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? No

(d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

SEE
ATTACHED
FOR a, b

- (a) Direct appeal was not appropriate venue for ineffective assistance of counsel.
- (b) Direct appeal was not appropriate venue to ineffective assistance of counsel.
- ☒ Additional pages attached for A and B.

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. DOUGLAS STRICKLER; FIELDLIN PRENGLE; MORGAN EIGENBROT of
RICHLAND COUNTY PUBLIC DEFENDERS OFFICE P.O. BOX 192 COLUMBIA, SC 29202
- ii. MELES COLEMAN; A. MATTHEW BROGAN P.O. BOX 11070 (29211-1070)
COLUMBIA, SC 29201
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. TRIAL ATTORNEYS
- ii. DIRECT APPEAL ATTORNEYS
- iii. _____

18. State clearly the relief you seek in filing this application.

Reversal of conviction and retrial requested, reversal of applicants
judgements and sentences.

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA

County of DORCHESTER

VERIFICATION

I, HANK ERIC HAWES, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 19th

day of FEBRUARY, 2019

[Signature] (L.S.)
Notary Public

My Commission Expires: 6-20-26

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, HANK ERIC HAWES, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.


Applicant

SWORN or affirmed to and subscribed before me this

19th day of FEBRUARY, 2019

[Signature]
Notary Public

My Commission Expires 6-20-26

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

HANK ERIC HOWES

Plaintiff(s)

361739

VS.

STATE OF SOUTH CAROLINA

Defendant(s)

-CP-

2019CP400

(Please Print)

Submitted By: HANK ERIC HOWES

SC Bar #:

Address: LIEBER CORRECTIONAL INSTITUTION
P.O. BOX 205
RIDGEVILLE, SC 29472

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP-
☐ Notice/ File Med Mal (230)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☒ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Sexual Predator (510)

Submitting Party Signature:

Hank Eric Howes

Date: February 19, 2019

1547

p1 Attachments for #9, 10, 15

9. a. Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated before and during his trial.

b. The errors and omissions of Trial Counsel, both prior to and during Applicant's trial, violated Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution as well as Article I, Section 14, of the South Carolina Constitution, and were prejudicial to Applicant to a degree that violated his right to a fair trial in that the result of his trial would have likely been different but for Trial Counsel's deficient representation.

10 a. Trial Counsel failed to develop and present readily available evidence and failed to adequately investigate the charges against the Applicant. Further the Trial Counsel failed to explore potential defenses to the charges against the Applicant.

b. Trial Counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections and legal arguments during Applicant's trial and

P2

10b. cont. Failed to adequately argue objections made during applicant's trial.

15a,b Allegations raised herein would not have been properly heard on direct appeal. Collateral review through ACR presented the first appropriate opportunity to address these claims.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Hank Eric Hawes, # 361739)
Applicant,)
v.)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2019-CP-40-1308

RETURN
(COUNSEL APPOINTED)

RICHLAND COUNTY
FILED
2019 JUN 10 AM 9:22
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

In response to the action for post-conviction relief (PCR) commenced by Hank Hawes (Applicant) on March 6, 2019, the State makes this return:

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the October 2011 term of the Richland County Grand Jury for murder (2011-GS-40-5012). Public Defenders Doug Strickler, Fielding Pringle, and Megan Eigenbrot represented Applicant.

A jury trial was held on October 6–16, 2014, before the Honorable J.C. Nicholson, Jr. The jury convicted Applicant as charged. Judge Nicholson sentenced Applicant to life imprisonment. Applicant appealed.

On appeal, Applicant was represented by Chief Appellate Defender Robert M. Dudek; and A. Mattison Bogan and Nicholas A. Charles, both of Nelson Mullins Riley & Scarborough, LLP. The court of appeals affirmed Applicant's convictions and sentences. *State v. Hawes*, 423 S.C. 118, 813 S.E.2d 513 (Ct. App. 2018). The case was remitted to the circuit court on July 3, 2018. Applicant timely commenced this PCR action March 6, 2019.

II. Facts

Applicant was charged for the murder of Jennifer Wilson. Applicant admitted at trial he killed Wilson in her home on August 28, 2011. However, Applicant claimed he acted in self-defense. (R. p. 819, line 10 – p.828, line 9; p. 904, line 20 – p. 905, line 1).

Wilson's neighbor Kelly Smith testified at trial he woke to the sounds of screaming and physical violence coming from the bedroom area of the Wilson's home. Smith testified he "heard screaming and physical violence" and he "recognized Jen's voice immediately" but did not hear another voice. (R. p. 85, line 5 – p. 86, line 4). He testified he could feel the energy of the attack, "it literally, was a violent situation. Her scream was she was being harmed." (R. p. 86, lines 9-11). He then noticed a pause, movement to the hallway progressing into the kitchen area, then:

[T]here was a second wave of more aggressive, just brutal, carnal instant violence. And I could physically feel the vibration in my bedroom from what was coming from the other room. . . . I could hear what sounded like a table slamming against the wall, like her body being thrown against the wall.

(R. p. 86, lines 13-22).

Smith then heard Wilson for the last time, yelling "no, no, no" and pleading for her life. (R. p. 86, line 24 – p. 87, line 1). Smith knew Applicant from Applicant's romantic relationship with Wilson. He also knew the relationship had turned "rocky." (R. p. 79, line 8). Smith testified he called 911. (R. p. 88, lines 1-9). Though he did not become involved at that time, Smith assumed the officers talked to "Jen and Hank." (R. p. 91, lines 4-11). Later that morning, Smith left his home and noticed Applicant's vehicle, a Range Rover, in the driveway along with Wilson's car and his own car. (R. p. 91, lines 21-25).

Law enforcement responded after Smith called 911 and arrived at approximately 2:47 am. (R. p. 112, line 17 – p. 113, line 5; p. 114, lines 20-21). However, the lights in Wilson's home were off, and after hearing and seeing nothing out of the ordinary, and having no cause to enter

the home, the officers only stayed outside briefly, then left. (R. p. 113, line 11 – p. 116, line 25). They noted a Range Rover parked behind the house with two other cars. (R. p. 115, lines 5-12).

Applicant testified at trial he unclothed Wilson, washed her body, and placed her body on the couch in the living area. (R. p. 831, lines 12-17; p. 843, line 7 – p. 846, line 23). He cut his own wrists and collected his blood in a cooler. (R. p. 879, line 2 – p. 881, line 7). He stayed in the home for hours, calling an ex-girlfriend, Stacy Newsom. The first call was at 2:37 am. (R. p. 294, lines 10-12). He was crying and upset, and sometimes would keep the phone connection with Newsom even though nothing was said. (R. p. 293, line 11 – p. 294, line 21). He eventually left and drove a short distance to his own home. Another one of Wilson's neighbors, Eric Ashton, testified he saw Applicant leave that morning, driving his automobile in an odd way—with his forearms instead of his hands. (R. p. 124, line 15 – p. 125, line 8). Starting at 8:48 that morning, Applicant searched the internet for defense attorneys. (R. p. 462, line 15 – p. 463, line 3).

Around 10:00 am he called another ex-girlfriend, Kimberly Williams, and confided he could be charged with murder. He stated he had been in contact with an attorney and needed \$25,000.00 for representation. She advised him she did not have such money. Further, he stated he had acted in self-defense though no one was going to believe him. He also stated he tried to commit suicide by slitting his own wrists. Williams advised him to seek medical attention. (R. p. 267, line 2 – p. 268, line 1).

Applicant called Newsom again later that morning, and she advised him to call EMS if he was not feeling well. (R. p. 294, line 18 – p. 295, line 6).

Eventually, Applicant spoke to well-known criminal defense attorney Jack Swerling. Swerling testified that, with Applicant's permission, he placed a 911 call to law enforcement reporting a possible murder. (R. p. 50, line 23 – p. 52, line 22).

During the time Swerling was reporting the murder, Applicant called 911 for help, reporting he had cut his wrists. An officer was dispatched at 11:45 am to meet EMS at the scene. (R. p. 311, lines 7-12). Robin Haselden with Richland County EMS testified Applicant's clothes were wet, his cuts were no longer bleeding, and there "was no blood noted on him anywhere." (R. p. 316, line 21 – p. 317, line 10). An emergency room doctor, Dr. John Robinson, treated Applicant. Applicant would not answer questions. Robinson noted a concern that Applicant "was being deceptive" about self-inflicted wounds or had some type of trauma induced amnesia; however, that "was inconsistent with the fact that he was alert and oriented with everything else." Robinson determined the wounds were self-inflicted, not life threatening, and nothing accounted for "amnesia" Applicant appeared to present. Robinson released Applicant into the custody of officers who had arrived at the hospital. (R. p. 328, line 16 – p. 334, line 21).

Officer Hudson testified law enforcement responded to Wilson's home at approximately 11:30 am as a result of Swerling's report. (R. p. 60, lines 15-23). The officers noted blood on the rear entry. Smtih was outside and also advised them of the sounds of violence he had reported earlier that morning. (R. p. 54, lines 18 – 25). The officers entered the home from the backdoor and were met with a bloody scene in the kitchen. (R. p. 55, lines 1-4). Upon further investigation, the officers found Wilson's body on the living room couch covered, with the exception of one portion of one arm, by a "blanket." (R. p. 57, line 9 – p. 58, line 25; p. 61, lines 2-4). Officer Hudson testified that upon moving the blanket:

I observed [Wilson] with multiple stab wounds, the front area (indicating) over her body, and she was unclothed, naked. And her hair seemed to be like it was wet, but sort of dry. . . . No signs of life.

(R. p. 59, lines 3-8).

EMS arrived at 11:51 am. (R. p. 68, lines 4-5). EMS pronounced Wilson dead at the scene. (R. p. 59, lines 18-22; p. 61, line 2 – p. 67, line 16). Though the scene was exceptionally bloody, there was little blood on the blanket that previously covered Wilson's body. (R. p. 61, lines 11-24). In fact, the body appeared to have been cleaned and showered, apart from one smear of blood near the neck that had "a curved angle to it like the body had been wiped." (R. p. 62, lines 8-19). However, EMS noted multiple "straight cuts stab wounds," and bruising along the neck wound. (R. p. 62, line 19 – p. 63, line 17).

The pathologist who performed the autopsy noted multiple defense wounds on Wilson's hands; blunt force trauma to her head ("at least three blows"); cuts, bruises on arms and legs, lip and chin injury; twelve stab wounds; eleven slashes; and, one bite mark. The cause of death was blood loss from the stab wound, with the neck wound most likely being the fatal wound. However, the sum total of her wounds was fatal. The pathologist opined Wilson would have died within approximately two minutes. (R. p. 711, lines 5 – 23; p. 713, line 14 – p. 714, line 6; p. 720, line 22 – p. 747, line 23). He testified it was a brutal homicide. (R. p. 748, lines 16-19).

As noted, the hospital examination for Applicant, as discussed above, noted only his self-inflicted wounds. While in custody, officers found only one small mark on one of Applicant's fingers. (R. p. 388-89, 904).

Applicant testified in his defense that Wilson was the aggressor, and, though he remembered little else, the incident was clearly her fault. (See R. p. 819, line 10 – p. 828, line 9; p. 904, line 20 – p. 905, line 1). Cross-examination uncovered a series of implausible assertions by Applicant when considered with the forensic evidence and other testimony. For example, he claimed she had a large knife, but no large knife was found. He claimed his shirt "may have been damaged" during the fight, and buttons pulled off, but there were no buttons found at the crime

scene. He claimed she had on a top at the time of the violence but no top was recovered with any stab wound tears. He had collected his blood in an insulated bag to not get it on the carpet, and yet his blood was on the scene. (See R. p. 856, line 20 – p. 904, line 24).

In addition to Smith, several friends testified as to the rocky relationship between Wilson and Applicant, and the fact that she was frightened. Wilson's friend, Janelle Bondr, testified that she knew of the relationship from its start in February 2011. She further testified she observed a change Wilson. Wilson had become anxious, her health seem to be poor, "she had been terrified" during the months before her murder, and demonstrated becoming upset during a SKYPE call when Applicant "arrived at the house." (See R. p. 132, line 11 – p. 134, line 24).

David Virtue, another of Wilson's friends, testified that at a dinner party at his home on August 14, 2011, Applicant and Wilson were together but "seldom on the same side of the room or part of the house during that evening." Virtue also testified Wilson had confided in him over the summer she was attempting to withdraw from Applicant and end the relationship. (R. p. 135, line 18 – p.138, line 2).

Wilson had remained friends with a former boyfriend, Drew Kabbe, and they had been communicating fairly frequently. Kabbe testified he spoke to Wilson the night/early morning of August 27–28, 2011. Wilson was in a good mood and happy at that time, returning home from a birthday party. However, she had previously told Kabbe about Applicant, though they normally did not, by agreement, discuss their romantic relationships. Wilson told Kabbe "[s]he was frightened of [Applicant]." Kabbe heard, over the phone, Wilson arrive safely home the night of the party before their telephone conversation ended. (R. p. 171, line 14 – p. 174, line 15).

Other friends testified consistent with Kabbe's testimony that on the night before her death, Wilson attended two birthday parties and appeared to be in a happy mood and enjoying herself. (See R. p. 141, line 12 – p. 144, line 18; p. 151, lines 1-7).

Another friend, Tasha Laman also heard Wilson express and/or demonstrate distress over the relationship. Laman advised Wilson to go to a counselor. (R. p. 269, line 15 – p. 272, line 4). Laman also testified Wilson had confided to her Applicant had threatened to "ruin her life." (R. p. 273, line 23 – p. 274, line 1; p. 275, lines 5-18). Laman, like Bondr, similarly noticed a loss of weight and an anxiousness in Wilson. (R. p. 274, lines 9-19). Laman testified Wilson did go to counseling and went to couple's counseling on at least one occasion. (R. p. 277, lines 7-12). Laman testified Wilson "was very nervous after talking with Ms. Stewart and Ms. Stewart telling her this was a classic case of domestic violence," and, further, that Wilson intended to break off the relationship with Applicant. (R. p. 276, lines 1-7).

Wilson's counselor, Jamme Stewart, testified she was very concerned about a new relationship that had so quickly turned to "constant contact," and that Applicant had "threatened to expose something embarrassing about [Wilson]" should Wilson break off the relationship. (R. p. 278, lines 8-14). Stewart responded she did have reservations about domestic violence. (R. p. 279, line 25 – p. 280, line 12). Stewart testified that Wilson did not want to stay in the relationship but had difficulty with making the break. Stewart noted Wilson was concerned about Applicant's constant contact and jealousy. (R. p. 281, line 12-24). Wilson was killed just four days after meeting with Stewart. (R. p. 282, lines 13-17).

A series of text messages between Applicant and Wilson showed a back and forth relationship between the two, turning accusatory and threatening toward Wilson. (See, for example, R. p. 420, line 1 – p. 421, line 25; p. 604, line 25 – p. 605, line 3). Wilson's messages

reflect both a fear of Applicant and her confusion about him. (See, for example, R. p. 548, line 4 – p. 549, line 10). The last call to Wilson from Applicant was at 2:14 am the morning of her death. The next call was at 2:37am to Stacey Newsom. (R. p. 460, lines 7-23).

Applicant's phone records also reflected contacts with multiple other women. (See R. p. 573, line 3 – p. 592, line 25; p. 608, line 10 – p. 609, line 25). In fact, he was making plans to meet a woman matched to him through a dating website on August 28th, according to a text message sent August 27th. (R. p. 755, line 20 – p. 760, line 7). Also, the night of the incident, Applicant was happy, outgoing, and expressed that he was excited about "getting back together with his girlfriend." (R. p. 767, line 3 – p. 770, line 7).

Applicant argued the evidence demonstrated self-defense and/or supported the lesser-included offense of voluntary manslaughter. (R. p. 1068, lines 9-17). The jury convicted Applicant of murder.

III. Current Application

Applicant alleges he is being held in custody unlawfully due to ineffective assistance of trial counsel. Specifically, Applicant alleges:

1. Trial counsel failed to develop and present readily available evidence and failed to adequately investigate the charges against Applicant. Further, trial counsel failed to explore potential defenses to the charges against Applicant.
2. Trial counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections and legal arguments during trial and failed to adequately argue objections made during trial.

Applicant requests relief in the form of reversal of his conviction and a remand for new trial.

Attached to this return and incorporated herein are the Richland County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's direct appeal records, and the records of this PCR action.

IV. Response to Allegation of Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of trial counsel are without merit. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "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.

Strickland v. Washington, requires that trial counsel must be given leeway to make reasonable strategic decisions. 466 U.S. 668 (1984). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland* at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. *Strickland* therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* Further, "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).

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). However, “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). The applicant must present evidence to show what counsel could have discovered had he more fully investigated. *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998). “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.” *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003). However, counsel is presumed to have adequately assisted and exercised reasonable professional judgment in making decisions in the case. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64. “[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531.

Applicant cannot satisfy either requirement of *Strickland*. However, the record likely does not directly disprove Applicant’s allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

V. Any Future Amendments

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to the Uniform Post-Conviction Relief Act¹ and Rule 71.1 of the South Carolina Rules of Civil Procedure. *See also* Rules 15(a)–(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRPC. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRPC.

VI. Response to Any and All Other Allegations

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

VII. Request for an Evidentiary Hearing

WHEREFORE, the State requests an evidentiary hearing be held on the allegation of ineffective assistance of counsel.

¹ S.C. Code Ann. §§ 17–27–10 to –160.

Respectfully submitted,

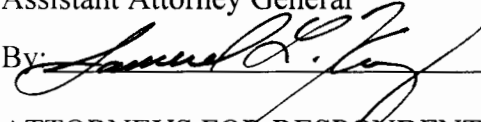
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

SAMUEL L. KEY
Assistant Attorney General

By:

A handwritten signature in black ink, appearing to read "Samuel L. Key", written over a horizontal line.

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

June 5, 2019

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Hank Hawes, 361739,

Applicant,

Vs.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

**AMENDMENT TO APPLICATION FOR
POST CONVICTION RELIEF**

Case No. 2019-CP-40-1308

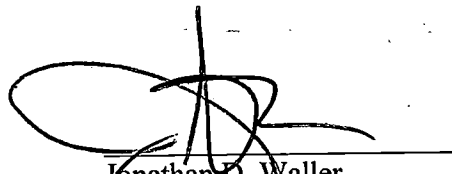
RICHLAND COUNTY
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2023 JUL 19 AM 10:45
JANET W. MCBRIDE
CLERK & C.S.

Applicant, by and through his Attorney, Jonathan D. Waller, Esquire, would amend his Application for Post-Conviction Relief filed March 6, 2019, by adding the claims of ineffective assistance of appellate counsel to question 10 and by adding the following specific prayers for relief to his original allegations:

1. As to representation rendered by Robert Dudek, Esquire, Allen Bogan, Esquire, and Nicholas Charles, Esquire:

- a. Counsel were ineffective for failing to petition for writ of certiorari to the South Carolina Supreme Court or to inform Applicant of his right to do so.

Respectfully submitted,



Jonathan D. Waller
Angell Molony, LLC
210 Newberry Street NW
Aiken, South Carolina 29801
ATTORNEY FOR APPLICANT

July 14, 2023

Aiken, South Carolina

The court of appeals affirmed Applicant's convictions and sentences. State v. Hawes, 423 S.C. 118, 813 S.E.2d 513 (Ct. App. 2018). The Remittitur was returned to the circuit court on July 3, 2018.

This PCR action follows.

FACTS

Applicant was charged with the murder of Jennifer Wilson. Applicant admitted at trial that he killed Wilson in her home on August 28, 2011. However, Applicant claimed he acted in self-defense. (R. p. 819, line 10 – p.828, line 9; p. 904, line 20 – p. 905, line 1).

Wilson's neighbor Kelly Smith testified at trial that he woke to the sounds of screaming and physical violence coming from the bedroom area of Wilson's home. Smith testified he "heard screaming and physical violence," and he "recognized Jen's voice immediately" but did not hear another voice. (R. p. 85, line 5 – p. 86, line 4). He testified he could feel the energy of the attack, "it literally, was a violent situation. Her scream was she was being harmed." (R. p. 86, lines 9-11). He then noticed a pause, movement to the hallway progressing into the kitchen area, then:

[T]here was a second wave of more aggressive, just brutal, carnal instant violence. And I could physically feel the vibration in my bedroom from what was coming from the other room. . . . I could hear what sounded like a table slamming against the wall, like her body being thrown against the wall.

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was not feeling well. (R. p. 294, line 18 – p. 295, line 6).

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Applicant testified in his defense that Wilson was the aggressor, and, though he remembered little else, the incident was clearly her fault. (See R. p. 819, line 10 – p. 828, line 9; p. 904, line 20 – p. 905, line 1). Cross-examination uncovered a series of implausible assertions by

Applicant when considered with the forensic evidence and other testimony. For example, he claimed she had a large knife, but no large knife was found. He claimed his shirt "may have been damaged" during the fight, and buttons pulled off, but there were no buttons found at the crime scene. He claimed she had on a top at the time of the violence, but no top was recovered with any stab wound tears. He had collected his blood in an insulated bag to not get it on the carpet, and yet his blood was on the scene. (See R. p. 856, line 20 – p. 904, line 24).

In addition to Smith, several friends testified as to the rocky relationship between Wilson and Applicant, and the fact that she was frightened. Wilson's friend, Janelle Bondr, testified that she knew of the relationship from its start in February 2011. She further testified that she observed a change in Wilson. Wilson had become anxious, her health seem to be poor, "she had been terrified" during the months before her murder, and demonstrated becoming upset during a SKYPE call when Applicant "arrived at the house." (See R. p. 132, line 11 – p. 134, line 24).

Another of Wilson's friends David Virtue testified that at a dinner party at his home on August 14, 2011, Applicant and Wilson were together but "seldom on the same side of the room or part of the house during that evening." Virtue also testified that Wilson had confided in him over the summer that she was attempting to withdraw from Applicant and end the relationship. (R. p. 135, line 18 – p.138, line 2).

Wilson had remained friends with a former boyfriend, Drew Kabbe, and they had been communicating fairly frequently. Kabbe testified he spoke to Wilson the night/early morning of August 27–28, 2011. Wilson was in a good mood and happy at that time, returning home from a birthday party. However, she had previously told Kabbe about Applicant, though they normally did not, by agreement, discuss their romantic relationships. Wilson told Kabbe, "[s]he was frightened of [Applicant]." Kabbe heard, over the phone, Wilson arrive safely home the night of

the party before their telephone conversation ended. (R. p. 171, line 14 – p. 174, line 15).

Other friends testified, consistent with Kabbe's testimony, that Wilson attended two birthday parties the night before her death and appeared to be happy and enjoying herself. (See R. p. 141, line 12 – p. 144, line 18; p. 151, lines 1-7).

Another friend, Tasha Laman, also heard Wilson express and/or demonstrate distress over the relationship. Laman advised Wilson to go to a counselor. (R. p. 269, line 15 – p. 272, line 4). Laman also testified Wilson had confided to her Applicant had threatened to "ruin her life." (R. p. 273, line 23 – p. 274, line 1; p. 275, lines 5-18). Like Bondr, Laman similarly noticed weight loss and anxiousness in Wilson. (R. p. 274, lines 9-19). Laman testified that Wilson did go to counseling and went to couple's counseling on at least one occasion. (R. p. 277, lines 7-12). Laman testified that Wilson "was very nervous after talking with Ms. Stewart and Ms. Stewart telling her this was a classic case of domestic violence," and that Wilson intended to break off the relationship with Applicant. (R. p. 276, lines 1-7).

Wilson's counselor, Jamme Stewart, testified she was very concerned about a new relationship that had so quickly turned to "constant contact," and that Applicant had "threatened to expose something embarrassing about [Wilson]" should Wilson break off the relationship. (R. p. 278, lines 8-14). Stewart responded that she did have reservations about domestic violence. (R. p. 279, line 25 – p. 280, line 12). Stewart testified that Wilson did not want to stay in the relationship but had difficulty with making the break. Stewart noted Wilson was concerned about Applicant's constant contact and jealousy. (R. p. 281, lines 12-24). Wilson was killed just four days after meeting with Stewart. (R. p. 282, lines 13-17).

A series of text messages between Applicant and Wilson showed a back-and-forth relationship between the two, turning accusatory and threatening toward Wilson. (See, for

example, R. p. 420, line 1 – p. 421, line 25; p. 604, line 25 – p. 605, line 3). Wilson's messages reflect both a fear of Applicant and her confusion about him. (See, for example, R. p. 548, line 4 – p. 549, line 10). The last call to Wilson from Applicant was at 2:14 am the morning of her death. The next call was at 2:37 am to Stacey Newsom. (R. p. 460, lines 7-23).

Applicant's phone records also reflected contacts with multiple other women. (See R. p. 573, line 3 – p. 592, line 25; p. 608, line 10 – p. 609, line 25). In fact, he was making plans to meet a woman matched to him through a dating website on August 28th, according to a text message sent on August 27th. (R. p. 755, line 20 – p. 760, line 7). Also, on the night of the incident, Applicant was happy, outgoing, and expressed excitement about "getting back together with his girlfriend." (R. p. 767, line 3 – p. 770, line 7).

Applicant argued that the evidence demonstrated self-defense and/or supported the lesser-included offense of voluntary manslaughter. (R. p. 1068, lines 9-17). The jury convicted Applicant of murder.

CURRENT APPLICATION

Applicant alleges he is being held in custody unlawfully due to ineffective assistance of trial counsel. Specifically, Applicant alleges:

1. Trial counsel failed to develop and present readily available evidence and failed to adequately investigate the charges against Applicant. Further, trial counsel failed to explore potential defenses to the charges against Applicant.
2. Trial counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections and legal arguments during trial and failed to adequately argue objections made during trial.

Applicant requests relief in the form of reversal of his conviction and a remand for new trial.

On July 19, 2023, Applicant amended his application for PCR to allege the following additional grounds:

1. Ineffective Assistance of Appellate Counsel
 - a. Appellate Counsel failed to file a Petition for Certiorari with the South Carolina Supreme Court or to inform Applicant of his right to do so.

RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Applicant alleges appellate counsel was constitutionally ineffective for failing to file a Petition for Writ of Certiorari with the South Carolina Supreme Court or to inform Applicant of his right to do so. Just as a defendant is entitled to effective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836; see also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "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, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . .

counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Here, Applicant's appellate counsel made the decision not to file a Petition for Writ of Certiorari because he did not think it was warranted. Appellate Counsel informed Applicant in a June 8, 2018, letter of that decision and that they would be closing the file. Further, Appellate Counsel provided Applicant with a copy of an application for post-conviction relief and instructions as well as federal habeas instructions. See Attachment #1.

Accordingly, in order to meet his burden of proof, Applicant must establish a reasonable probability that, but for appellate counsel's failure to file the Petition for Writ of Certiorari, he would have prevailed on his appeal. Smith, 528 U.S. at 285-86. Based on this standard set forth above, Respondent submits Applicant cannot meet his requisite burden of establishing any constitutional ineffectiveness of appellate counsel as to his allegations against appellate counsel.

CONCLUSION PAGE FOLLOWS

CONCLUSION

WHEREFORE, the evidentiary hearing was already held on July 19, 2023, before the Honorable Deadra L. Jefferson. At that hearing Judge Jefferson permitted Respondent to file a response to Applicant's amended application and to supplement the record with Attachment #1.

Respectfully submitted,

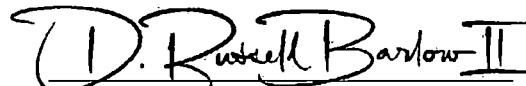
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By:



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July 25, 2023

**SCCID**

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 8, 2018

Mr. Hank E. Hawes #361739
Kirkland Correctional Institution
4344 Broad River Road
Columbia, SC 29210

Dear Mr. Hawes:

Enclosed is a copy of the order of the Court of Appeals denying the petition for rehearing that was filed in your case. Your attorney, Matt Bogan, does not think certiorari is warranted and will be closing your case along with this letter.

Please be aware that there is a **one year statute of limitations for filing an application for post-conviction (PCR) relief**. This is one year from the date of the enclosed opinion. This statute of limitations is **very strictly enforced**, so please be sure that you comply with it. Please understand *it is your responsibility alone to be sure the enclosed PCR application is timely filed*. **This application must be filed with the clerk of court in the county of your conviction.** There is also now a **one year statute of limitations for filing for federal habeas**. However, you must **exhaust your PCR claims** in state court, before raising them in federal court.

Please be aware that the time between your direct appeal becoming final, and the date your PCR application is filed **will count against your federal habeas statute of limitations in the future**. I do wish you the best. If you have any questions concerning this matter, please do not hesitate to contact me or Mr. Bogan.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/cp

Enclosure: Post-Conviction Relief Application

COURT OF COMMON PLEAS
2019-CP-40-01308

July 19, 2023

BEFORE:

THE HONORABLE DIEDRE L. JEFFERSON, JUDGE.

APPEARANCES:

D. RUSSELL BARLOW, II, ASSISTANT ATTORNEY GENERAL
Attorney for the State

JONATHAN D. WALLER, ESQ.
Attorney for the Applicant

KAREN AMBROZIAK
Official Court Reporter

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1 MR. BARLOW: Your Honor, on the next case, there's
2 one item I need to supplement you with. I don't have a
3 copy of it. May I send it to your law clerk?

4 THE COURT: You can. What is it?

5 MR. BARLOW: It's an amendment to the application.
6 It's one allegation.

7 MR. WALLER: Yes, Your Honor.

8 THE COURT: Do you have a copy, Mr. Waller?

9 MR. WALLER: I didn't bring a copy, Your Honor. I
10 sent it to -- we are unable to E-file in PCR cases or, at
11 least, most of them, so it was mailed last week. I
12 incorrectly assumed that Mr. Barlow would include the
13 packet. That's my mistake. I do have a copy. It would
14 be the same thing. I don't have a hard copy.

15 THE COURT: What's the substance of the amendment?

16 MR. WALLER: Your Honor, his appeal -- the Court of
17 Appeals, there was a petition for rehearing filed and then
18 denied. There was no petition for writ of certiorari to
19 the Supreme Court. That's the substance, none was filed
20 to the Supreme Court and Mr. Hawes was not aware of his
21 right to do so.

22 THE COURT: When did you file that?

23 MR. WALLER: Last week, Your Honor. It was the 14th.

24 THE COURT: You actually have a filed copy of that?

25 MR. WALLER: I have not gotten a filed copy, Your

1 Honor. As of yesterday, it had not been clocked with the
2 court.

3 THE COURT: Did you check downstairs to see if they
4 received it?

5 MR. WALLER: I have not this morning, Your Honor.

6 THE COURT: This is Hank Eric Hawes versus the State
7 of South Carolina, 2019-CP-40-130. It is before the court
8 on an application for Post-Conviction Relief, which was
9 filed on April 6th of 2019.

10 What date was your return filed? I have an unfiled
11 copy.

12 MR. BARLOW: Your Honor, our return was filed
13 June 10th, 2019.

14 THE COURT: He was indicted on 2011-GS-40-5012 for
15 the offense of murder. He was represented by Doug
16 Strickler, Fielding Pringle and Megan Eigenbrot. They had
17 a trial October 6th through 16th of 2014 before Judge
18 Nicholson.

19 He was convicted. He was sentenced to life
20 imprisonment. He was represented on his appeal by Robert
21 Dudek and Madison Bogan and Nicholas Charles. His
22 conviction was affirmed in State vs. Hawes, 423 S.C. 118
23 in 2018. PCR was filed on March 6th. I'm sorry, it's
24 hard to make that out on this copy.

25 What date was the appeal from the Court of Appeals in

1 2018?

2 MR. WALLER: The conviction was affirmed March 14th,
3 2018.

4 THE COURT: I found it.

5 Ready to proceed?

6 MR. BARLOW: The State is ready, Your Honor.

7 THE COURT: Applicant?

8 MR. WALLER: Applicant is ready, Your Honor.

9 THE COURT: You may proceed.

10 MR. WALLER: Your Honor, would you like me to put
11 anything on the record or just proceed directly?

12 THE COURT: I'm at a loss as to what you need --
13 we've already published the procedural history. I think
14 the application speaks for itself. You've already told me
15 about the amendment.

16 MR. WALLER: Thank you, Your Honor. The Applicant
17 would call Nicholas Charles.

18 THE COURT: Sir, if you would come to the stand and
19 be sworn.

20 NICHOLAS CHARLES, after being duly
21 sworn, testified as follows:

22 THE WITNESS: Nicholas Charles.

23 DIRECT EXAMINATION:

24 BY MR. WALLER:

25 Q All right. Good morning, Mr. Charles, how are you

1 today?

2 A Doing well, how are you?

3 Q Doing well. Thanks for asking. Mr. Charles, where
4 do you currently work?

5 A I currently work for McLeod Law Group.

6 Q And back in 2018, where were you employed?

7 A Nelson Mullins.

8 Q Did you work on some criminal appeals for Nelson
9 Mullins?

10 A I did.

11 Q Is that how this case came across your desk?

12 A Yes.

13 Q If you can, what -- was this the only one you did or
14 did you do multiple criminal appeals?

15 A This was the only one that I had primary
16 responsibility for handling. I helped other people on
17 similar cases through Nelson Mullins pro bono program.

18 Q That was my next question. How does this come to
19 Nelson Mullins?

20 A Nelson Mullins has -- I don't know all the details.
21 They have some kind of relationship with the Office of
22 Appellate Defense where Nelson Mullins will handle some
23 appeals that are assigned to appellate defense. Usually,
24 an experience will handle the appeal with the supervision
25 of an experienced partner. And this is one of those

1 cases.

2 Q I see Mr. Dudek, Robert Dudek, also, listed on all
3 the appellate filings. What was his involvement, as you
4 recall?

5 A During the time that I worked on it, it was minimal.
6 We kept him apprized of what was going on. With his name
7 being on the pleading, he received all filings. And that
8 was about it.

9 Q Did he handle any -- to your knowledge, did he handle
10 any client communication or was that your responsibility
11 or how did that work?

12 A My understanding was in those cases where appellate
13 defense cases were handled by Nelson Mullins, the Office
14 of Appellate Defense maintains contact with the client,
15 communicates with the client in writing.

16 Q Now, I don't see your name listed on the initial
17 brief. When did you, I guess, come into the case or when
18 did your involvement start?

19 A A couple weeks before oral argument, Matt Bogan, the
20 partner on the case asked me if I wanted to argue the case
21 and I said yes. So I prepared for oral argument and
22 argued the case and handled it from there.

23 Q So you weren't involved with the drafting of any of
24 the written materials?

25 A Correct, that had all been filed before I started.

1 The briefs, at least, had been filed before I started at
2 Nelson Mullins, so I had no involvement with that.

3 Q So once the case progressed to oral arguments, you
4 were involved from there until the end?

5 A Correct.

6 Q So the conviction was obviously affirmed by Court of
7 Appeals. The issues, I think you just testified, were
8 already kind of set by the time you became involved?

9 A Correct.

10 Q After the conviction was affirmed, what was your next
11 step?

12 A File a petition for rehearing.

13 Q And what goes through your process when you're
14 working on that?

15 A It's a prerequisite to file a cert petition. To keep
16 the case alive past the opinion, you have to file a
17 petition for rehearing. It's a pretty perfunctory thing.
18 99 percent of the time, they're denied. But that really
19 is the -- to complete the Court of Appeals process, you
20 have to file a petition for rehearing and get an order
21 denying that petition.

22 Q Do you file a brief or anything with the actual
23 petition or is it just almost like a notice?

24 A It's -- the petition is the brief. You raise all the
25 grounds and argue -- make your arguments in the actual

1 petition.

2 Q And how do those grounds raised in the petition
3 relate to the final brief that was filed before oral
4 arguments?

5 A You're limited to the issues that were raised in the
6 brief. You can't raise anything new in a petition for
7 rehearing.

8 Q That petition for rehearing was, ultimately, as well;
9 is that correct?

10 A Correct.

11 Q What did you do after that?

12 A Started evaluating whether to file a petition for a
13 writ of certiorari. In my professional judgment, there
14 were no winnable issues to raise to the Supreme Court. I
15 felt that we had won on the only winnable issue, which was
16 the issue of photographs of the victim earlier in the
17 night she was killed when she was at a birthday party.
18 The Court of Appeals reversed the admission of those
19 photographs, but held it was harmless error in light of
20 the overwhelming evidence of Mr. Hawes' guilt.

21 So with that issue, essentially, off the table, I
22 didn't believe that any of the remaining issues were -- I
23 didn't believe the Supreme Court would grant certiorari,
24 much less reverse the conviction, particularly coupled
25 with the Court of Appeals finding of overwhelming evidence

1 of guilt.

2 Q Okay. What's the timeframe from the denial of the
3 petition for rehearing to when you're able to file that
4 petition for certiorari -- writ of certiorari if you chose
5 to?

6 A The cert petition is due 30 days after the order
7 denying rehearing.

8 Q So in that 30 days, what did you do? Specifically,
9 who did you talk to? Did you make the decision by
10 yourself or include anyone else in your decision process?

11 A It was primarily my decision. I spoke with Matt
12 Bogan about it several times. At some point, we had a
13 conference call with Bob Dudek. He told us that it was up
14 to our judgment whether to file a cert petition or not.
15 And that was it.

16 Q Did you have a call or any communication with
17 Mr. Hawes during that time?

18 A No. I believe a letter was sent to Mr. Hawes. Since
19 I'm not at Nelson Mullins, I don't have access to the file
20 anymore. I can't remember whether it was on Nelson
21 Mullins letterhead or appellate defense letterhead
22 informing him that we were not filing cert petition.
23 That's the only communication I'm aware of.

24 Q Do you have any recollection of maybe when that
25 letter would have gone out, at day one or day 29 or any

1 recollection at all?

2 A It was after we decided not to file a cert petition.
3 I don't know within the deadline window when it went out.
4 I just don't remember.

5 Q Did you or anyone that you're aware of ask Mr. Hawes
6 if he wanted to pursue it?

7 A I did not. I'm not aware of anyone at Nelson Mullins
8 doing so. I don't know whether appellate defense would
9 have done that or not.

10 Q To your knowledge or recollection, did the letter
11 that was sent, whether it came directly from Nelson
12 Mullins or not, do you know if it informed Mr. Hawes of
13 his options to pursue it if he wanted to?

14 A I don't recall.

15 Q Okay. Obviously, no petition was filed?

16 A Correct.

17 MR. WALLER: Beg the Court's indulgence.

18 (Pause.)

19 Thank you. I have nothing further.

20 MR. BARLOW: Nothing from the State.

21 THE COURT: Any objection to the witness being
22 excused?

23 Let me ask a question. You said you don't recall
24 when the letter would have been acceptable, but that would
25 have been your usual practice to send a letter advising of

1 the decision?

2 THE WITNESS: I know a letter would have been sent.
3 I just don't recall whether it came from Nelson Mullins or
4 if it came from appellate defense. I think appellate
5 defense, but under oath, I'm hesitant to say that's a
6 fact.

7 THE COURT: And I would assume based on your
8 testimony as it has been elicited in direct exam that you
9 felt it was a strategic decision based on legal precedent
10 as to whether it would be fruitful to file an appeal?

11 THE WITNESS: Correct.

12 THE COURT: And do you feel based on case law that
13 you were required to discuss that with Mr. -- with the
14 Applicant, Mr. Hawes?

15 THE WITNESS: My recollection of the arrangement when
16 Nelson Mullins handled appellate defense cases is that
17 appellate defense handled the communication with the
18 client. That's just how I recall that process working.
19 So I would have --

20 THE COURT: So you would not have felt it was
21 something you needed to discuss with him based on the
22 arrangement?

23 THE WITNESS: Correct, I would have left it to
24 appellate defense.

25 THE COURT: Any questions as a result of the court's

1 questions from the State?

2 MR. BARLOW: None, Your Honor.

3 THE COURT: From the Applicant?

4 MR. WALLER: None, Your Honor.

5 THE COURT: Any objection to the witness being
6 excused from the Applicant?

7 MR. WALLER: No, Your Honor.

8 THE COURT: From the State?

9 MR. BARLOW: None, Your Honor.

10 THE COURT: Thank you. You're excused.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: You're welcome.

13 You may proceed.

14 MR. WALLER: Thank you, Your Honor. I would call
15 Hank Hawes.

16 THE COURT: Sir, if you would come to the stand and
17 be sworn.

18 HANK HAWES, after being duly sworn,
19 testified as follows:

20 THE COURT: Sir, state your full name for the record,
21 spelling your last name for the court reporter.

22 THE WITNESS: Hank Eric Hawes, H-A-W-E-S.

23 THE COURT: You may proceed.

24 MR. WALLER: Thank you, Your Honor. May it please
25 the Court?

1 THE COURT: Yes, sir.

2 DIRECT EXAMINATION:

3 BY MR. WALLER:

4 Q Good morning, Mr. Hawes. How are you today?

5 A Good morning.

6 Q All right. Mr. Hawes, I want to take you back in
7 time, if I can, to September of 2011. You had just been
8 arrested on these charges. Do you recall that?

9 A Yes.

10 Q And what were you -- you were convicted of murder.
11 Were you charged with anything else at that time?

12 A Not that I'm aware of.

13 Q So your trial was just on the one charge?

14 A Correct.

15 Q Who was -- I don't want to get into anything anyone
16 said at this point. Who was your first lawyer on the case
17 or what lawyer did you first have communications with?

18 A The first attorney I had communications with would
19 have been Jack Swerling.

20 Q Okay.

21 A And then over the course of time, it went to the
22 Public Defender's office and then it was Douglas
23 Strickler.

24 Q Okay. So before any substantive -- any meat of the
25 case, Douglas Strickler was appointed to represent you?

1 A Correct.

2 THE COURT: Is that Strickler or Strickland?

3 MR. WALLER: Strickler, Your Honor.

4 THE COURT: You may continue.

5 MR. WALLER: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 BY MR. WALLER:

8 Q So when you got into the actual meat of the case, he

9 was your attorney and that was through his work with the

10 Public Defender's Office; is that correct?

11 A Correct.

12 Q Okay. Do you recall when you first met with him?

13 A I can't say that I do, not an exact date.

14 Q Okay. I'm sorry, that was a poor question. About

15 how long after maybe you had been arrested, ballpark?

16 A It was quite a while.

17 Q Into 2012 or still in 2011?

18 A I want to say it was probably into 2012.

19 Q Okay.

20 A Or may have been the end of 2011. I'm not sure.

21 Q Did you ever have a bond hearing in this case?

22 A I asked about it and they said that you had one and

23 it was denied.

24 Q Okay. Was Mr. Strickler representing you at that

25 point or do you not remember?

1 A I think he was representing me at that particular
2 point.

3 Q Okay. When did you first have a chance to view some
4 of the discovery in this case?

5 A Again, I can't give you an exact date, but I know it
6 started coming in piecemeal. Doug visited me, and then
7 Fielding visited me. And they were bringing it in
8 piecemeal at a time as they're receiving it, I'm assuming.

9 Q And that's Douglas Strickler we just talked about and
10 Fielding Pringle; is that correct?

11 A Correct.

12 Q Do you know what her role was with the Public
13 Defender's Office?

14 A From my understanding, she was, I guess, an
15 assistant, I don't know, assistant chief. I don't know
16 exactly what her title was.

17 Q You knew she worked at the Public Defender's Office?

18 A Correct.

19 Q All right. When you talked to Doug -- when you
20 talked to Fielding, what did you tell them? What
21 information did you provide them?

22 A Basically, they just asked me kind of the outline of
23 the case, what happened. You know, who have you talked
24 to. I think there were some targeted questions in there.

25 Q Okay. And at trial, you presented -- you testified

1 and you presented, more or less, a self-defense argument,
2 is that your understanding of your trial strategy?

3 A Correct.

4 Q Was that the same from the outset?

5 A I think that was the game plan from the outset.

6 Q Okay. That's your story as always -- you have always
7 maintained; is that correct?

8 A Correct.

9 Q Did you provide Mr. Strickler and Ms. Pringle with
10 information that may help them support that claim?

11 A I gave them everything that I had. I think it was a
12 question or issue over blood, whether it was arterial
13 blood or venous blood and there was some back and forth,
14 but it came out that it was, in fact, arterial blood. So
15 I think that's the only thing we kind of went back and
16 forth on.

17 Q When you say went back and forth, what do you mean?

18 A It was kind of a question of well, we can have this
19 tested. We can find out, but if this isn't this, then
20 this looks bad. I'm like no, I know what this is. And
21 they went forward with it and everything was fine.

22 Q Okay. So that brings a couple of questions. There
23 was some forensic testing done in your case; is that
24 correct?

25 A (Nods in the affirmative.)

1 Q Is that a yes?

2 A Yes.

3 Q Okay. There was fingerprint analysis?

4 A Correct.

5 Q There was blood analysis?

6 A Correct.

7 Q There was DNA analysis?

8 A Correct.

9 Q There was an autopsy?

10 A Correct.

11 Q You didn't get all of those things early on in the

12 case; is that right? Discovery-wise, you didn't give

13 reports produced early on, those came later?

14 A That's correct.

15 Q Did you get a chance to discuss the results of those

16 reports with Mr. Strickler and Ms. Pringle?

17 A We did to a certain extent.

18 Q Okay. Based on that, what did y'all -- did you

19 decide to retain experts of your own?

20 A I believe we did have a blood expert or some kind of

21 forensic expert.

22 Q Okay. Were you part of all the conversations of what

23 your strategy was, what defense you were going to present?

24 A I'm sure I probably wasn't because I wasn't with them

25 all the time when they were discussing my case.

1 Q Okay.

2 A If that makes any sense.

3 Q Sure. At what point did you become aware that the
4 State intended to introduce or call as witnesses either
5 ex-girlfriends or other people that you had relationships
6 with that were not involved, certainly, in this case?

7 A I think that was closer to the beginning of the
8 trial.

9 Q Okay. And what did you and Mr. Strickler or
10 Ms. Pringle discuss about that, those exes or other people
11 involved in the case?

12 A I just remember that when a name would come up, he
13 would kind of tell me oh, this person is apparently going
14 to be added. I remember Ms. Pringle telling me at one
15 point -- you know, we were reviewing some text messages
16 and some other stuff and she said that coupled with the
17 exes' testimony, it looks bad.

18 Q Okay. Do you know what text messages you're
19 referring to there?

20 A Just the back and forth banter.

21 Q Okay. When did you receive that -- I forgot about
22 that. When did you receive the thousands and thousands of
23 pages of documents related to phones and computers? When
24 did y'all know about that?

25 A I can't give you an exact date, but I want to say

1 that was -- again, it was coming in all piecemeal, so it
2 was, you know, whatever they had at the time, whatever was
3 being released to them at the time.

4 Q Okay. Your trial was just over three years after
5 your arrest. Did y'all have everything in advance where
6 you felt your lawyers were prepared to defend you?

7 A At that particular time, I felt like they had the
8 information that they needed, yes.

9 Q Okay. I'm going to ask that question again. Do you
10 think they were prepared?

11 A I think things could have always been done better,
12 but that's kind of hindsight.

13 Q We're here today. What do you think could have been
14 done better?

15 A Again, I don't know their strategy, but I know at one
16 particular point, we were sitting there, it was during the
17 trial and an issue of, I think it might have been a blouse
18 top or something like that came up. And I said it's there
19 in the photo and Doug was chasing photos all around the
20 desk. I didn't know if that was part of his strategy to
21 not find it or he had misplaced it.

22 There were some things that we had talked about as
23 far as questioning character and other things like that
24 and he said that's -- we're not going to do that, that's
25 not a good idea. So I just kind of went with it.

1 Q Well, let me back up just a second to the article of
2 clothing. You said you saw it in one of the photographs
3 that was admitted. Was that -- did you have an issue --
4 was that article of clothing, was it missing from some of
5 the reports?

6 A Well, the prosecutor asked me if -- it was sort of
7 like a leading question asking me where the top was and I
8 was, like, well, it should have been there. And she was
9 like, Well, where is it? I'm almost sure it made it on
10 the evidence sheet, as well, but they kind of spun' it like
11 it wasn't there. I guess it was kind of to paint a
12 certain picture or certain type of picture.

13 Q So it was on a picture and you believe it was on one
14 of the logs or one of the reports; is that right?

15 A I believe so.

16 Q What was Mr. Strickler's response to you raising a
17 concern about it?

18 A Just said we'll go forward and get past it kind of
19 thing. Like I said, it was kind of -- I was kind of in a
20 halfway state of shock listening to this stuff and
21 Fielding was on my left trying to keep me calm and Doug
22 was standing up and doing his thing and it was kind of
23 like a lot of stuff going on.

24 Q Okay. Prior to the trial starting, particularly, as
25 it relates to some of your past relationships and some of

1 the people you may have been talking to kind of in the
2 days leading up to this incident occurring, did you ask
3 Mr. Strickler or Ms. Pringle or Ms. Eigenbrot, for that
4 matter, to speak with any of these potential witnesses the
5 State was going to call?

6 A I don't think I did because I think they were all
7 exes to my understanding.

8 Q Okay.

9 A I don't know why I would have, but...

10 Q Do you know if they did speak with any of them?

11 A I don't.

12 Q I believe the testimony at trial both from them, as
13 well, as you that you remained friends with several of
14 them; is that correct?

15 A I guess to the degree that you can remain friends.

16 Q Understood, okay. When you were preparing for
17 trial -- when did Ms. Eigenbrot come into the picture?

18 A I want to say I met with her a couple of times in
19 county, maybe. She was towards the tail end, getting
20 ready to go into the trial.

21 Q Okay. So she came on to assist in preparing for
22 trial?

23 A (Nods in the affirmative.)

24 Q Okay. All right. You testified at the trial. Tell
25 me what discussions you had with Mr. Strickler or

1 Ms. Pringle regarding your decision to testify and kind of
2 what went into that and when was that decision made?

3 A I don't recall -- and I could be wrong here, but I
4 don't recall having it with Fielding or Megan, but I do
5 remember specifically talking to Doug about it. I said,
6 Well, do I have to testify? He said, Well, I think you're
7 going to have to. I think you're going to have to get up
8 there for this to go forward for them to hear your side of
9 it.

10 Q That's to support your self-defense defense?

11 A I assume.

12 Q Ultimately, the judge during the trial, Judge
13 Nicholson went over your rights to testify or not, so your
14 decision was made officially that day, but you had already
15 discussed that, is that what you're testifying to?

16 A Say that again now.

17 Q You decided in the courtroom after Judge Nicholson
18 went over your right to testify or not?

19 A Uh-huh.

20 Q Your official decision was then?

21 A Correct.

22 Q Is it your testimony today that you and Mr. Strickler
23 had already discussed whether, in fact, you would testify
24 prior to coming into court that day?

25 A We had talked about it and I had kind of gotten mixed

1 messages about well, if you don't testify or if you do
2 testify, so I was sort of on the fence about it. And he
3 said, you know, I believe you're going to have to testify,
4 I guess, to support the self-defense claim.

5 Q Okay. There were no other witnesses or anything to
6 the incident, were there?

7 A You mean to us talking?

8 Q No, to the incident of August 27th, 2011?

9 A No.

10 Q Okay. Was it your understanding that -- the fact
11 there was no one else, that went into his suggestion that
12 you needed to testify or that you should testify?

13 A Right, correct.

14 Q Mr. Hawes, in your application, you have alleged that
15 your counsel failed to adequately investigate the charges
16 against you. When you write that, what do you mean
17 specifically?

18 A I just felt like they could have dug a little deeper
19 as far as character-wise. In fact, I remember Fielding
20 sitting on my left and I don't recall exactly what
21 Mr. Strickler did, but I remember looking over her saying,
22 do something. Why don't you take the case? And she said,
23 I can't, he's my boss. Or something like that's his case
24 or something like that.

25 Q Okay. What was your -- I mean, what impression did

1 you get from that interaction?

2 A Truthfully, I thought she was more competent than he
3 was.

4 Q Okay. How does that play with what you're alleging
5 they failed to adequately investigate the charges against
6 you?

7 A I would probably have to say as far as, like, some of
8 the witnesses they brought forward, the character, the
9 actual charges against me. There were things I brought
10 up, like, about potentially a weapon or about how things
11 went down. None of that really seemed to come up. It was
12 more about the -- and it might have been strategy working
13 from the end result backwards.

14 Q When you say strategy, were any of the strategies
15 discussed with you? Did you have questions? Was it
16 explained to you why this was a strategic decision or is
17 this just your assumption now?

18 A The only thing that I ever remember as far as a
19 question related to that would probably be, you know, I
20 said listen -- we were arguing back and forth -- not
21 really arguing, but kind of like discussing back and
22 forth. And I was saying listen, this was a self-defense
23 issue -- or I felt it was a self-defense issue. And they
24 said, you know, if you go after self-defense, you're going
25 to get life.

1 Q Okay. And what was your response to that?

2 A I mean, it's like I can either say it was something
3 that I didn't feel it was to potentially get a lighter
4 sentence or I can go forward with what I thought it was
5 and roll the dice.

6 Q In that same allegation, you have alleged that trial
7 counsel failed to explore potential defenses to the
8 charges. Is that what you're talking about? You raise
9 self-defense, but were there additional things you thought
10 could have been presented?

11 A You know, I thought about all kinds of stuff. I
12 thought about, like, we never really talked about crime of
13 passion, we never talked about any of that other stuff.

14 Q Okay. You further allege that trial counsel failed
15 to adequately impeach the State's witnesses. Which
16 witnesses are you talking about?

17 A I would have to say it would probably be,
18 specifically, Stacy Newsome and Christine Dahleimer.

19 Q And those were two of your ex-girlfriends?

20 A Correct.

21 Q Or you had prior relationships with?

22 A Correct.

23 Q What information did you -- I may have already asked
24 you this, but when were you aware they were going to
25 testify?

1 A I think I was pretty aware of Stacy Newsome's
2 testimony early on. I can't say when I found out about
3 Christine Dahleimer.

4 Q And Stacy Newsome was a witness partly because you
5 placed a phone call or several phone calls to her shortly
6 after or in the day after this incident; is that right?

7 A Partly.

8 Q So you were aware that she could potentially be
9 called as a witness early on?

10 A Yes.

11 Q What impeachment evidence would you -- did you
12 provide Mr. Strickler or Ms. Pringle any information that
13 would help them develop impeachment materials?

14 A Well, when she first got on the stand and testified,
15 everything was pretty well cut and dry. And there was
16 no -- it didn't seem like there was any animosity or
17 anything. And then when the State rested its case and
18 then, subsequently, let her come back on the stand, it was
19 a different -- I mean, it was a totally different
20 demeanor, talking about, like, there was some violent
21 action or something like that -- and I asked him, I said
22 Listen, this never happened. There was no reports,
23 nothing. And there was a continued relationship even
24 after that.

25 Q Okay. So Judge Jefferson understands, she testified

1 in the State's case earlier on.

2 Judge, I believe her testimony starts at --

3 THE COURT: I've read the transcript.

4 MR. WALLER: Thank you, Your Honor.

5 THE COURT: But if you want to put those pages on the
6 record, you're welcome to.

7 MR. WALLER: Sure.

8 BY MR. WALLER:

9 Q She is called on Page 536 is her original testimony,
10 and then she was recalled by the State later on; is that
11 correct?

12 A Correct.

13 Q She, also, I believe, proffered some testimony
14 outside the presence of the jury later on, as well?

15 A To my understanding.

16 Q So what information did you provide Mr. Strickler and
17 Ms. Pringle that would help them develop any impeachment
18 regarding their testimony?

19 A Just the fact that there was an ongoing -- I mean,
20 you could see in the texts, I had 6,000 text messages
21 where a litany of them were back and forth with her.

22 Q Okay.

23 A So you see what I'm saying. Everything was peachy
24 keen up until the day I get arrested. What would change
25 that?

1 Q Right. Okay all right. How about Ms. Dahleimer,
2 what was your concern there and what information did you
3 provide your attorneys?

4 A Basically, the same thing. She said that -- I think
5 she said that I had pulled a knife on her in her kitchen
6 or something like that. And we had an ongoing
7 relationship and financial ties and they never explored
8 any of that.

9 Q Financial ties were the vehicle; is that correct?

10 A Correct.

11 Q Were there any other witnesses, whether you were able
12 to provide information or not, that you discussed any
13 impeachment that your counsel may have to any of the
14 State's witnesses?

15 A The next door neighbor, Kelly Green, I think we had
16 spoken about his abuse of alcohol and drugs and then him
17 being a reliable credible witness. I don't know that that
18 ever went anywhere. And then the next door neighbor,
19 which was a state -- she worked for the Solicitor's
20 Office.

21 Q And her husband testified; is that correct, but she
22 did not?

23 A Correct.

24 Q What conversation did you have with your lawyers
25 about the neighbors and any sort of conflict of interest?

1 A I know that they knew the victim very well, and they
2 had some interactions and some other stuff like that. And
3 I was concerned she worked for the prosecutor's office and
4 it happened in their neighborhood and there are, you know,
5 ties of friendship or whatever else, so...

6 Q Okay. When you're walking in the courtroom the first
7 day, what was your understanding of what -- what was your
8 ultimate strategy and your ultimate defense to the charge?

9 A From my understanding, it was going to be, you know,
10 we're going to lay this case out as far as, you know,
11 here's some background on you, here's some background on
12 these other individuals or on the victim and we're going
13 to proceed forward. And we're going to use logic as far
14 as what happened, you know. They didn't really use the
15 word speculative, but going to paint a picture, basically.

16 Q Okay. Mr. Hawes, I believe I've asked you all the
17 questions I have for you. Is there anything else that I
18 have neglected to ask you that you think it's important
19 for Judge Jefferson to know about your representation by
20 Mr. Strickler, Ms. Pringle or Ms. Eigenbrot?

21 A Like I said, it just -- I mean, again, Megan came at
22 the end. I didn't have a whole lot of interaction with
23 her. My main issue was really with some of the
24 understanding with Doug and, I guess, his strategies, not
25 explaining, you know, the subsequent process, if things

1 failed, where were we going to go from there.

2 Q When you say subsequent process and if things failed,
3 you mean like little things within a day of the trial and
4 you need to pivot or, ultimately, your conviction? When
5 you say things fail, can you clarify what you mean?

6 A Mainly, down the road, so probably after the trial.
7 If there was a conviction, what it was going to look like,
8 what these processes involve, what my exhaustive methods
9 would have been.

10 Q Anything else, Mr. Hawes?

11 A No.

12 MR. WALLER: Thank you. Please answer any questions
13 Mr. Barlow has.

14 MR. BARLOW: Thank you, Your Honor. May it please
15 the Court?

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION:

18 BY MR. BARLOW:

19 Q Good morning, Mr. Hawes, how are you doing today?

20 A Good morning.

21 Q Good. So you're here today alleging ineffective
22 assistance of your trial counsel, correct?

23 A Correct.

24 Q And that's all three of the people that represented
25 you at trial?

1 A It's mainly Doug Strickler. I can't really say that
2 Megan did anything right or wrong. And as far as Fielding
3 goes, there were some issues in there where I wanted her
4 to take over, but she couldn't from my understanding. I
5 think at one point, I had a concern about a relationship
6 with my jury foreman and her -- or her fiancée at the time
7 or whatever. They worked together.

8 Q Okay. Let's see. You testified on direct that you
9 were represented at one point by Jack Swerling. And that
10 was at the very beginning, correct?

11 A That was at the very, very beginning.

12 Q How did you come to be represented by Mr. Swerling?

13 A I contacted his office. He met me at the Alvin S.
14 Glenn Detention Center. Then he started a process of
15 trying to get some stuff and then there was no money.

16 Q Did you talk to Mr. Swerling before you were in jail?

17 A I think he was contacted prior to me going to jail,
18 several hours prior to me going to jail. So I think it
19 would have been within maybe four or five hours.

20 Q And it was you who contacted him, correct?

21 A Yes.

22 Q Do you recall Luke Shealy representing you for a
23 short period?

24 A Luke and Brian, yes.

25 Q Okay.

1 A Well, actually, I take that back. They sent me a
2 letter in the county saying they were going to represent
3 me, and then they said that Judge DeAndrea Benjamin had
4 pulled them off my case.

5 Q All right. So let's jump into your allegations.
6 You've got failed to present readily available evidence.
7 And in your direct testimony, you discuss something, you
8 called it this. What is this, the evidence that they
9 failed to present?

10 A Everything that I just mentioned prior to it.

11 Q What evidence?

12 A The failure to develop witnesses, the failure to
13 explore the victim's character, to inform me of any and
14 all strategies, to make sure I understand them.

15 Q So it's your testimony that they should have gone
16 into the character of the victim?

17 A I believe so, yes.

18 Q And there was, also, some testimony about an article
19 of clothing, a blouse. Tell me about that again. Exactly
20 what was the deficiency on trial counsel's part on the
21 blouse?

22 A So the prosecutor, Luck Campbell, was trying to paint
23 a picture in the jury's mind of, you know, did this
24 individual -- when this individual was injured or stabbed,
25 how she put it, you know, was she clothed, was she not

1 clothed? And I said, Yes, she was clothed. She said,
2 Well, where's the top? I said, Well, what do you mean?
3 It's there in the photo. She said, Well, I don't see it.
4 And it was like there was some digging around on the
5 table, and it just kind of moved on.

6 Q Correct me, are you saying that this was on
7 Solicitor's Campbell's questioning of you?

8 A It was during her questioning of me.

9 Q And you told her the blouse, that she was dressed
10 when she was stabbed?

11 A Correct. And I think it was when Doug was trying to
12 question me or at some point, I asked him about the photos
13 and he was kind of shuffling stuff around on the desk.

14 Q Let me ask you this. I don't mean to talk over you.

15 A No, you're fine.

16 Q What was the deficiency on trial counsel's part in
17 that blouse?

18 A I don't feel like they adequately defended that
19 accusation.

20 Q But for that accusation, the jury would have found
21 you not guilty?

22 A I think there were multiple failures.

23 Q I'm asking you just about just this one?

24 A No, but I think some of that stuff is cumulative.
25 Damage is cumulative.

1 Q Again, I just want to ask you to the blouse itself,
2 was that so prejudicial or but for that action on trial
3 counsel's part, you would have been found not guilty?

4 A It could have helped.

5 Q Okay. Moving on to the next allegation, your failure
6 to investigate. Exactly what did you want them to
7 investigate?

8 A When somebody alleges -- or somebody alleges that
9 you've done something and then there's no details to
10 follow it up or you don't investigate it to find out
11 whether or not that allegation was true or maybe they had
12 a reason for saying that.

13 Q Are you saying that trial counsel, all three of them,
14 none of them ever talked to you about it? They never got
15 your side of the story?

16 A I mean, of course, you can talk to me all they want,
17 until they're blue in the face, but unless you present it
18 to the court, it doesn't really matter then, does it?

19 Q Mr. Hawes, it was your direct testimony that you were
20 the only person present when the murder occurred, correct?

21 A Correct.

22 Q All right. Who better to tell then, than you?

23 A I'm talking about Stacy Newsome, I'm not talking
24 about the victim.

25 Q Stacy Newsome is the ex-girlfriend?

1 A One of them.

2 Q That comes into the failure to cross. I'm trying to
3 figure out the failure to investigate?

4 A I apologize. So failure to investigate character,
5 there was no development of this individual's character or
6 find out if there could have been any aggressive side or
7 tendencies or anything else. You can parade a show of
8 ex-girlfriends up on my behalf, but you find multiple
9 samples of DNA on the victim and it's like we don't talk
10 about that kind of stuff.

11 Q Let me ask you this. Did the State not call several
12 friends and coworkers of the victim?

13 A They did.

14 Q So your counsel was able to cross-examine them?

15 A I believe they did, yes.

16 Q Tell me -- the next allegation is fail to explore
17 potential defenses, what defenses should they have
18 explored?

19 A Well, when we initially started this, it was
20 self-defense and the phrase that I got was if you stick
21 with self-defense, you're going to get life. So it was
22 like, okay, do we -- I mean, there was no -- all right,
23 well, could it have been a heat of passion type thing. We
24 may need to explore and develop something like this.

25 Q Do you recall the jury panel being charged with

1 voluntary manslaughter?

2 A I can't say that I do.

3 Q Do you recall the jury being charged with
4 self-defense?

5 A I think they were charged with self-defense and then
6 possibly murder, I'm not sure.

7 Q And on your direct testimony, I'm a little confused
8 because you say now that you were told that you would get
9 life if you went with self-defense, but on direct, you
10 said that Doug told you you had to testify to the jury as
11 to self-defense?

12 A He said that for -- I asked him do I have to testify
13 and he said, I think for you to paint your picture of
14 self-defense, you would have to get up and testify.

15 Q So your allegation for the potential defenses is
16 self-defense, they should have explored that more?

17 A They should have explored every option, self-defense
18 a little bit deeper. They should have informed me hey,
19 listen, there's crime of passion, there's this. Could it
20 have possibly been this.

21 Q Okay. We'll move on to the next one. We'll get into
22 the failure to adequately cross witnesses. And I believe
23 it was your testimony that it was Dahleimer and Stacy,
24 correct?

25 A Newsome, yes.

1 Q And on Ms. Newsome's testimony, but for their failure
2 to adequately, in your terms, cross-examine her, the
3 result of your trial would have been different?

4 A I think that and allowing her to get back on the
5 stand after the State had closed, but I know that's a
6 separate issue.

7 Q And Ms. Dahleimer, as well, but for her testimony,
8 your trial would have been different?

9 A I think it could have affected the outcome.

10 MR. BARLOW: Your Honor, I think that's it. Nothing
11 further.

12 THE COURT: Any redirect?

13 MR. WALLER: I have nothing further, Mr. Hawes.
14 Thank you.

15 THE COURT: You may step down.

16 You may proceed.

17 MR. WALLER: Nothing further from the Applicant, Your
18 Honor.

19 THE COURT: You may proceed, Mr. Barlow.

20 MR. BARLOW: Thank you, Your Honor. The State would
21 call Fielding Pringle.

22 THE COURT: Witness would come to the stand and be
23 sworn.

24 FIELDING PRINGLE, after being duly
25 sworn, testified as follows:

1 THE CLERK: Give us your first and last name, spell
2 your last name.

3 THE WITNESS: Fielding Pringle, P-R-I-N-G-L-E.

4 THE COURT: You may proceed.

5 MR. BARLOW: May it please the Court?

6 THE COURT: Yes, sir.

7 DIRECT EXAMINATION:

8 BY MR. BARLOW:

9 Q Morning, Ms. Pringle.

10 A Morning.

11 Q How are you?

12 A Good. Thank you.

13 Q Good. How long have you been practicing law?

14 A Since 1996.

15 Q And how much of that has been criminal law?

16 A With the exception of two years at the South Carolina
17 Supreme Court, the entire time.

18 Q And what is your position now?

19 A I'm the circuit defender for the Fifth Judicial
20 Circuit.

21 Q And what was your position when you represented
22 Mr. Hall?

23 A I was the chief public defender under Doug Strickler,
24 who was the circuit defender at that time.

25 Q Thank you. And do you recall, roughly, how long

1 before trial you came to represent Mr. Hawes?

2 A It looks like I was brought in by Doug in June
3 of 2014, so a handful of months, five months.

4 Q And during that time, did y'all receive discovery?

5 A We probably --

6 Q Y'all had received discovery?

7 A We would have already had a lot of the discovery at
8 that point. Of course, discovery can often be something
9 that goes on up until, unfortunately, close to trial, so
10 we were probably still receiving items, but I'm sure at
11 that point, we had a tremendous amount.

12 Q In the time that you were representing him or from
13 the notes that you had, did you review discovery with
14 Mr. Hawes?

15 A Yeah, I mean, I met with Mr. Hawes. We spoke, met
16 many times, conferenced. I don't remember specifically
17 what discovery I reviewed with him versus what discovery
18 Doug reviewed with him, but that would have been an
19 integral part of our conversations and preparation.

20 Q And could you give us a brief overview of what your
21 understanding of the State's evidence in this case was?

22 A Well, it really wasn't a question of identity.
23 Mr. Hawes on the evening that this happened had been at
24 Ms. Wilson's home, had parked his car there. There was an
25 eyewitness, who was a neighbor, who knew the car, who knew

1 Mr. Hawes, who knew something about the history between
2 him and Ms. Wilson.

3 Mr. Kelly, I can't remember his last name, he was
4 able to pretty quickly identify Mr. Hawes as the suspect.
5 Mr. Hawes injured himself at the time of the incident with
6 self-inflicted wounds to his wrist. And so as I recall,
7 and this was many years ago, but I believe he ended up
8 calling EMS for his injuries from his home and I think he
9 was arrested at that point in the hospital. So they were
10 able to connect it pretty quickly to him.

11 I don't think he gave a statement. There was a
12 tremendous amount of forensic evidence. There was a
13 tremendous amount, as it turned out, of his blood and her
14 blood at the scene. And so, ultimately, it was a question
15 of whether it was self-defense or voluntary manslaughter,
16 but the State's case was a combination of all those
17 factors.

18 Q Do you recall the evidence the State had of telephone
19 calls made by Mr. Hawes to particular ex-girlfriends?

20 A That night, to Dr. Newsome?

21 Q Correct.

22 A Yeah, he called Dr. Newsome, I think, after the
23 incident. Stacy Newsome was a previous girlfriend. And I
24 think he told her what had happened. I know that he
25 eventually called, at least, Jack Swerling. But he did

1 call Dr. Newsome and, yeah, I think he told her what
2 happened. Maybe not the specifics, but that there had
3 been an incident.

4 Q So based on the State's evidence, were you guys able
5 to craft a defense strategy?

6 A We were.

7 Q Okay.

8 A The State really wanted to present this as a brutal,
9 sort of -- just a malice murder. I don't know that they
10 would say premeditated, but the forensics that were
11 available to us, the scene, the photographs, the blood
12 evidence, everything that we observed in the crime scene
13 information photos, reports, et cetera seemed very much --
14 it was some kind of crime of passion or argument, fight,
15 incident between the two of them.

16 So, really, like I said a minute ago, it was a
17 question of whether it was voluntary manslaughter. And I
18 will take issue with Mr. Hawes about that because we
19 discussed that many times. I firmly believed that that
20 was a more prudent defense. He was very strong on it
21 being self-defense. I don't recall him ever saying
22 otherwise.

23 It seemed apparent to me and to Doug, when you read
24 the phone records, when you looked at the entire
25 situation, this was a man who was very involved, they were

1 very involved with each other, they were very in love with
2 each other, but it was a very volatile relationship. It
3 was a really classic heat of passion kind of crime, it
4 seemed to me, that was a more available defense. But
5 Mr. Hawes, like I said, was always very strong about it
6 being self-defense and that was what he wanted to argue.

7 As I recall -- I feel like Doug's closing argument
8 was sort of a hybrid, if not this, then that, and so it
9 was between those two things. I think we tried to kind of
10 account for both and, you know, hope that if they didn't
11 find self-defense that, at least, it would be an
12 involuntary outcome.

13 Q And from the testimony and the cross-examination and
14 evidence that was presented at trial, you guys were able
15 to get a murder charge from the jury?

16 A Correct.

17 Q And a voluntary manslaughter and a self-defense?

18 A Correct.

19 Q So let's jump into some of the allegations.

20 Mr. Hawes claims that you failed to readily present
21 evidence that was available to you. Do you recall any
22 evidence that you had that you did not present to the
23 court?

24 A I do not.

25 Q Do you recall the article of clothing, the picture of

1 the blouse and there being an argument about that?

2 A I remember something about the blouse, but I don't
3 remember an argument and I don't remember hunting for
4 pictures. We had all of our pictures in photo albums.
5 That's where they still are, actually. I was looking
6 through the boxes yesterday. So that doesn't resonate
7 with me. I'm not saying it didn't happen, I just don't
8 recall that being an issue. I do remember something about
9 a blouse, but I can't tell you what it was. She was found
10 naked, so I don't even know the significance of it being
11 missing would be. Maybe they thought he took it. I just
12 don't know.

13 Q We'll jump to the next one, failed to adequately
14 investigate the charges in the case. Do you recall doing
15 any investigations into this case?

16 A Yeah, I mean, we hired experts to look. Like I said,
17 a lot of this was, you know, looking at the forensics,
18 trying to figure out what had happened at the scene. They
19 thought all of that blood at the scene was Ms. Wilson's.
20 Hank was adamant it was his.

21 There was a cooler that had a tremendous amount of
22 blood in it at the scene and there was a large amount of
23 blood in the bedroom. And so it made it seem like this
24 was an incident that took place all over the home with
25 Ms. Wilson, so we were trying to really chip away at that

1 and get to the truth of that. He did ask us to test
2 things. We did make sure that if we were going to do this
3 that we weren't asking for something that was going to
4 come back and make it worse for him, which is, of course,
5 what you would do when a client asks you to do something
6 about that. Everything he said about that did end up
7 being accurate. The blood was his in the cooler and in
8 the bedroom, as I recall.

9 So we hired a blood evidence person to look at that
10 entire scene. I think his name was Gurvis (phonetic) was
11 ours, I think. We hired a DNA expert, who I don't think
12 was of any help. We did have an investigator, Lee
13 Connelly. The DNA person was Dr. Astrouski (phonetic).

14 I think with the cell phone, this was one of the
15 first cases where I handled that kind of evidence and I
16 think Mr. VanHouten, I just consulted him. I don't recall
17 if we hired somebody for that.

18 But we interviewed people. I think I specifically
19 talked to Dr. Newsome. I don't recall if I talked to
20 Ms. Dahleimer. I spoke with the yoga instructor. I spoke
21 with their therapist. I actually had the yoga instructor,
22 who was a good friend of Ms. Wilson's and had observed
23 them together, spent quite a bit of time with Ms. Wilson.
24 I don't remember everything that we did, but we spent a
25 tremendous amount of time on this case. My file is a huge

1 file, our file, you know.

2 Q I'm sorry, do you recall how many boxes?

3 A It's ten banker boxes.

4 Q All right. And that's your file of Mr. Hawes,
5 correct?

6 A That is Mr. Hawes' file. It is downstairs and,
7 fortunately, you said I did not need to bring it, but it
8 is here.

9 Q All right. Let's jump on to -- you've already
10 covered the potential -- or your failure to explore
11 potential defenses, so let's see. Do you recall
12 cross-examining Stacy Newsome?

13 A I actually do, but I don't remember the specifics.

14 Q Do you recall why she was recalled?

15 A No.

16 Q Do you recall extensively cross-examining her,
17 though?

18 A When he testified to that a minute ago, I started to
19 look and it looked like it was fairly lengthy. There was
20 an in-camera hearing. Looks like I was trying to keep
21 that testimony out, but I wasn't able to spend enough time
22 to get into details on that.

23 Q How about Ms. Dahleimer?

24 THE COURT: Please spell her name for court reporter.

25 MR. BARLOW: Your Honor, one second.

1 THE WITNESS: Do you want me to spell it?

2 MR. BARLOW: Sure.

3 THE WITNESS: D-A-H-L-E-I-M-E-R. I believe her first
4 name was Christine.

5 I think Ms. Dahleimer, she was a former love interest
6 who helped him -- who co-signed a car for him. And I
7 think we did speak with her. I don't know if it was Lee
8 or me or both, but as I recall her testimony, it was
9 fairly limited.

10 MR. BARLOW: Beg the Court's indulgence.

11 (Pause.)

12 Nothing further, Your Honor.

13 THE COURT: Any questions of the witness?

14 CROSS-EXAMINATION:

15 BY MR. WALLER:

16 Q Ms. Pringle, good morning.

17 A Good morning.

18 Q Were you aware leading up to the trial that domestic
19 violence was going to be mentioned or made any sort of
20 issue in the trial?

21 A Yes.

22 Q Prior to this incident, were there any allegations
23 that would have met the definition of domestic violence?

24 A Between him and Ms. Wilson?

25 Q Correct.

1 A I don't recall specifically. I mean, they had a
2 volatile relationship. They would argue. I don't
3 remember a physical or anything like that. I do know her
4 friends were worried for her with this situation and
5 relationship, but, physically, I just can't remember
6 specifically.

7 Q Okay. Did they -- I guess, did they meet any of
8 criteria that would have any charges for domestic
9 violence, did they have a child in common, live together,
10 any of those things?

11 A I'm sorry, no. No.

12 Q Was there any consideration made to filing a motion
13 to exclude any reference to domestic violence?

14 A I don't recall.

15 Q Okay. Do you have your copy of the transcript up
16 there?

17 A Yes.

18 Q If you would, please, turn to Page 259?

19 A I have the record on appeal. Is that --

20 Q Should be?

21 A Of the transcript.

22 Q The direct of Kelly Smith?

23 A I'm there.

24 Q You have the same page number as I do?

25 A Yes, I'm there.

1 Q Okay. This was -- Mr. Smith was Mr. Strickler's
2 witness. Do you recall that?

3 A Yes.

4 Q And, obviously, so the court is aware, Mr. Strickler
5 is no longer with us; is that correct?

6 A Correct. He passed away in 2018.

7 Q Was there any -- that you're aware of now after the
8 fact or after this took place or the statement was made,
9 beginning on line five and through line six, was there any
10 strategy decision to not objecting to any reference to
11 domestic violence?

12 A Not that I would be aware of. I can't say.

13 Q Is that something that you and Mr. Strickler had
14 discussed, either leading into that witness or following
15 the testimony at any break or point in time?

16 A I may be misremembering this. The only thing that I
17 remember about conversations about that is at some point
18 becoming aware that it was domestic violence awareness
19 month, I think. And we discussed whether or not to raise
20 that or try to, you know, make sure that that didn't come
21 in. I don't remember if we ever did anything with that
22 specific topic, subject. That's really -- when you say
23 domestic violence, that's what comes to my mind.

24 Q Sure. Okay. There were some additional references
25 made to domestic violence by Ms. Stewart, the yoga

1 instructor or therapist, I believe. I don't mean it like
2 that. She held both titles, I guess, a therapist, who
3 Ms. Wilson saw on a couple of occasions. Did you and
4 Mr. Strickler have any discussions about potentially any
5 motions or objections to her mentioning domestic violence
6 and her concerns about a domestic violence situation?

7 A Not that I recall.

8 Q During her testimony -- this is again Ms. Stewart,
9 and I'm on Page 322. There were some direct quotes that
10 she testified to on page -- I apologize, Page 514,
11 beginning on line 12. She had not been qualified as an
12 expert at that time. Did you see any reason to object to
13 her quoting Ms. Wilson, and if not, why not?

14 THE COURT: What line are you referring to?

15 MR. WALLER: Beginning on line 12, Your Honor, is the
16 first answer. And then continuing through 24, it's an
17 additional question and answer in there, as well.

18 THE WITNESS: I'm sorry, what was your specific
19 question?

20 BY MR. WALLER:

21 Q What was your basis for not objecting to any hearsay?

22 A Which question specifically -- or answer
23 specifically?

24 Q Just the direct quotes, or what seemed to be direct
25 quotes. On line 12, she said --

1 A Oh, okay.

2 Q Anything following she said on 12 and, again,
3 beginning on line 20?

4 A With respect to the answer 12 to 16, lines 12 to 16,
5 she said he was too intense, the friends were worried, I
6 don't have any reason. I would think that the lines 20 to
7 24 are probably helpful as opposed to harmful.

8 Q Okay. So it wasn't any sort of consideration of her
9 role in acting as a therapist or anything like that. It
10 was -- there wasn't any strategy, you thought the answer
11 was helpful?

12 A That's what I would think, yeah.

13 Q Beg the Court's indulgence, please.

14 (Pause.)

15 Ms. Pringle, were you involved at all or kept
16 apprized of any of the appeals in this case?

17 A No.

18 Q Did you have any chance to discuss with Mr. Hawes
19 after his conviction what that process may look like?

20 A I don't think so.

21 Q Do you know whether Mr. Strickler or Ms. Eigenbrot
22 had any of those conversations with him?

23 A I do not. I know that Mr. Strickler would have
24 advised him that we would be filing notice of intent to
25 appeal. That's would be our normal practice. Beyond

1 that, that's not something that, typically, we would have
2 gone into in any detail. That's just not our --

3 Q Sure. When an appeal is filed and taken up, are you
4 notified of the outcome through your previous
5 representation of him, whether it's granted or denied?

6 A No.

7 Q If the case is reversed and it comes back, does it
8 come in fresh or would you pick up right where you left
9 off if you previously represented someone?

10 A I'm not sure I follow the question. It just would
11 depend. I mean, with a case that's really old, the people
12 might be different, the lawyers might be different. We
13 might make a decision that a different attorney should try
14 it again. It just depends, really.

15 Q So it wouldn't automatically just come right back on
16 your desk?

17 A No, no, no. I mean, if it were to be reversed now,
18 this case, then it would be opened in the office, so it
19 would be on my desk to some degree and then we would have
20 to figure out what to do with it. If it were reversed in
21 PCR, direct appeal, just kind of depends. Every situation
22 is quite different.

23 MR. WALLER: Sure. Thank you, Ms. Pringle. I have
24 nothing further.

25 THE COURT: Any redirect?

1 MR. BARLOW: Nothing from the State, Your Honor.

2 THE COURT: You may step down.

3 You may proceed.

4 MR. BARLOW: Your Honor, that concludes the State's
5 case.

6 THE COURT: Any rebuttal testimony?

7 MR. WALLER: Your Honor, I would request to recall
8 Mr. Hawes. I just have one question I neglected to ask
9 him.

10 THE COURT: He can remain at counsel table. I'll
11 remind him he's still under oath.

12 You may proceed.

13 I assume the State has no exceptions.

14 MR. BARLOW: No objection.

15 HANK HAWES - RECALLED, after having
16 being previously duly sworn, testified as follows:

17 DIRECT EXAMINATION:

18 BY MR. WALLER:

19 Q Mr. Hawes, did you receive any communication either
20 from Nelson Mullins or from the Office of Appellate
21 Defense regarding your petition for rehearing to the Court
22 of Appeals had been denied and the next step was the
23 decision not to pursue petition for writ of certiorari to
24 the Supreme Court?

25 A I don't recall it specifically, but I probably did

1 receive something from them saying it had been denied, but
2 not the next step.

3 Q Do you recall when you would have received that in
4 relation to when the petition was denied?

5 A I don't.

6 MR. WALLER: Thank you. I have nothing further.

7 THE COURT: Any questions for the witness?

8 MR. BARLOW: Nothing, Your Honor.

9 THE COURT: Anything further from the Applicant?

10 MR. WALLER: Nothing further, Your Honor.

11 THE COURT: I'll be glad to hear any closing
12 argument.

13 Let me ask, though, did the State make any attempts
14 or did the Applicant make any attempts to get the file
15 from appellate defense and determine when the letter was
16 sent? Because I'm certain that's a part of their
17 protocol.

18 MR. BARLOW: Your Honor, the appellate argument just
19 came in, that allegation was just made. I have been
20 juggling five different lawyers, so no, ma'am, I didn't.

21 THE COURT: I'm going to leave the record open for
22 the State to have the opportunity to ascertain and receive
23 that letter from the appellate defense. Since the
24 amendment was just made, frankly, it hasn't been filed by
25 the clerk's office yet, so they haven't even had a chance

1 to file their return to it.

2 MR. BARLOW: Thank you, Your Honor.

3 THE COURT: Anybody have any closing arguments? If
4 so, you're welcome to proceed at this time.

5 MR. WALLER: Nothing formal, Your Honor. I would
6 just ask that you consider the arguments made, the
7 testimony presented to you. I know you've mentioned
8 you've read the transcript. I would ask you to consider
9 that along with the, hopefully, soon-to-be-supplemented
10 record and grant Mr. Hawes the relief he's requesting.

11 MR. BARLOW: Thank you, Your Honor. And, Your Honor,
12 the State would just -- clearly, there's going to be
13 credibility findings that need to be made by the court on
14 the testimony provided, but we would submit that Mr. Hawes
15 failed to present any evidence that Ms. Pringle or
16 Mr. Strickler or anyone else involved in this case failed
17 to prepare for trial.

18 They were obviously prepared. The record shows that
19 they -- from the testimony, she investigated the -- I
20 think the record speaks for itself, Your Honor.

21 THE COURT: I am going to allow the State to
22 supplement once the amended -- although, it's been fully
23 litigated regarding the amended application, the State, in
24 light of the late timing of that, certainly should be
25 allowed to file a return and response once the clerk's

1 office files that supplemented application. And, also,
2 they would have the ability in light of the supplemented
3 allegation to locate any letters that would have been sent
4 by appellate defense to the Applicant.

5 Preliminarily, however, I would find that the
6 Applicant has failed to meet his burden of proof regarding
7 any allegations of his Post-Conviction Relief. At best,
8 they're conclusory, overly broad and lack specificity
9 regarding any deficiencies in his counsel's representation
10 of him in this case.

11 The matters that have been raised -- and I'll try to
12 deal with each of them individually and, of course, I
13 reserve -- I will give the counsel for the State to make
14 any additional findings of fact and conclusions of law
15 consistent with the record. And I, also, reserve the
16 right to do, as well as the record in this case is
17 voluminous and I'm certainly not going to be able to
18 address each and every one of those issues with page and
19 line citations from the transcript in this limited amount
20 of time that we have available to us.

21 The Applicant has failed to show his counsel's
22 performance fell below an objective standard of
23 reasonableness, that he sustained any prejudice as a
24 result of his counsel's deficient performance. Of course,
25 as we know, the test for ineffective assistance is whether

1 the representation was within the range of competence
2 demanded of attorneys in criminal cases. And to establish
3 prejudice, the Applicant must prove there is a reasonable
4 probability that but for counsel's unprofessional errors,
5 the result of the proceeding would be different.

6 Just looking at the record in this case and I think,
7 more importantly, the testimony of the forensics
8 pathologist, who even if I were to believe that all of
9 these other witnesses had issues with their testimony,
10 just the sheer breadth of his testimony regarding what he
11 characterized as a brutal homicide with defensive wounds
12 by the victim, that in and of itself and coupled with the
13 corroboration of the scene would represent overwhelming
14 evidence of the defendant's guilt of murder in this case.
15 But even in light of that, they were able to convince the
16 court, and I'm referring to counsel, to instruct regarding
17 voluntary manslaughter.

18 I find Ms. Pringle's testimony persuasive when she
19 said that she disagreed with Mr. Hawes regarding his
20 defenses, that they discussed those multiple times,
21 including the voluntary manslaughter defense -- well, not
22 defense, but theory of the case, which they felt was a
23 better defense than self-defense, but that he was adamant
24 regarding self-defense and they deferred to him in that
25 regard with Mr. Strickler making almost a hybrid closing

1 argument regarding that issue.

2 The record reflects that all of the witnesses were
3 very thoroughly cross-examined, so any allegations that
4 somehow counsel was deficient in that regard, even in
5 light of, I think, a conclusory statement by the Applicant
6 that character was not -- the character of the witnesses
7 was not explored.

8 We know the Rules of Evidence, a person's character
9 is rarely able to be raised unless it's for truthfulness
10 and there's no indication in the record that that would
11 have been an applicable argument.

12 The issue when you question a witness goes to the
13 credibility of their testimony, that being their knowledge
14 of the substance of which they're testifying to and it
15 appears that they were all thoroughly cross-examined
16 regarding that.

17 He, also, raised the issue regarding there not --
18 again, it was sort of vague and conclusory regarding the
19 eyewitnesses or sound witnesses that lived next door to
20 the victim in this case and that there was not more done
21 because one of the fact witnesses was employed with the
22 Solicitor's Office.

23 And there's no merit to that argument because it's
24 very clear from the record that on December 12th of 2012,
25 his lawyers moved to disqualify the Solicitor's Office,

1 both the employee and her husband, who were fact witnesses
2 because of her employment with the Solicitor's Office and
3 the circuit court denied that. It was raised on appeal
4 and it was dealt with in a lengthy matter by the Court of
5 Appeals. And that decision by the circuit court was
6 affirmed. So there's, likewise, no merit to that argument
7 as they did pursue that.

8 Again, the Court of Appeals was very thorough in
9 addressing that issue regarding the fact that the
10 Solicitor's Office almost immediately created what we in
11 common parlance in the legal profession refer to as the
12 Chinese wall to keep her segregated from any information
13 regarding this case.

14 I believe in the opinion, they refer to it as an
15 ethical role to make sure that she had no involvement in
16 the case when she immediately advised her superiors that
17 she had been identified as a fact witness in this case.

18 And I have considered the testimony of Mr. Charles.
19 And, again, we'll know more when the record is
20 supplemented regarding any letters that would have been
21 sent by appellate defense. Mr. Charles testified that
22 communication with the client was appellate defense's
23 responsibility, that through the pro bono program at
24 Nelson Mullins, part of that equation was the leg work, so
25 to speak, the filing of the briefs and, otherwise, arguing

1 the case. But he didn't believe he had any actual or
2 ethical responsibility to communicate with Mr. Hawes, that
3 that would have been the responsibility pursuant to their
4 agreement with appellate defense, that they would have
5 communicated that issue to him. That in his professional
6 opinion, he made a strategic decision that applying for
7 certiorari in this case would be not -- would not be a
8 successful venture, that they had already argued the
9 matter before the Court of Appeals and in light of current
10 precedent that he did not feel that filing a certiorari
11 petition would have been fruitful, but that any discussion
12 about that, any communication regarding that would have
13 been the responsibility of indigent defense.

14 And as we know, our case law is very clear that
15 decisions regarding strategy are solely within the
16 province of counsel, that they can discuss it with a
17 client. A client does not have to agree. And that all
18 strategic decisions are within counsel's prerogative and
19 that the court should be highly deferential regarding
20 those decisions and that counsel must be given leeway to
21 make reasonable strategic decisions.

22 There's no particular set of rules regarding when
23 counsel makes those types of decisions, that there are a
24 variety of circumstances that must be weighed by counsel
25 that they are dealing with at the time and that there are

1 legitimate decisions regarding how best to represent a
2 defendant. It's solely within their prerogative, that
3 they are under no particular restriction by a defendant to
4 follow their instructions, that they still must make the
5 appropriate strategic decisions within the realm of
6 advocacy that are in the best interest of a litigant.

7 They're, also, bound by Rule 11, that being bringing
8 actions in good faith and knowing what is appropriate
9 within their ethical boundaries. And Mr. Charles
10 testified that in his good faith assessment from a
11 strategic standpoint that in light of recent rulings by
12 the court regarding photographs, as well, as other issues
13 and just the breadth of the record that the filing of the
14 petition would not have been fruitful in his estimation
15 and that decision was left to him after discussion with
16 Mr. Bogan and Mr. Dudek.

17 So the petition is denied. I will ask counsel for
18 the State to provide the court with a proposed order
19 within ten days of today. It needs to be in word format
20 sent to DJefferson@sccourts.org and, also, please, copy
21 Mr. Waller on that when it is transmitted to the court.

22 MR. BARLOW: Thank you, Your Honor.

23 THE COURT: And, of course, again, I reserve leave to
24 make any other decisions -- any other findings consistent
25 with the record in this case.

1 MR. BARLOW: Thank you, Your Honor.

2 THE COURT: And, also, give you that latitude, as
3 well. Within this confined time, I'm sure there are other
4 things I made notations on.

5 MR. BARLOW: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. WALLER: Thank you, Your Honor. Have a good day.

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9 (Whereupon, the proceedings were concluded.)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th 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 for
Richland County, South Carolina, on the 19th day of July,
2023.

January 3, 2024

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

behalf, and Respondent presented testimony from Chief County Public Defender E. Fielding Pringle, Esquire (Pringle), and Nicholas A. Charles, Esquire (Appellate Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). In October 2011, the Richland County Grand Jury indicted Applicant for Murder¹ (2011-GS-40-05012). Applicant was represented by then Chief County Public Defender Doug Strickler,² Assistant Public Defender E. Fielding Pringle, and Assistant Public Defender Megan A. Eigenbrot, Esquires. Fifth Circuit Assistant Solicitors Dolly J. Garfield, K. Luck Campbell, and Foster M. Mathews, Esquires prosecuted the case.

On October 6 – 16, 2014, Applicant proceeded to a jury trial before the Honorable J.C. Nicholson, Jr. Applicant was found guilty as indicted. Judge Nicholson sentenced Applicant to life imprisonment.

Applicant filed a timely notice of appeal. Nicholas A. Charles, Esquire, of Nelson Mullins Riley & Scarborough, LLP, perfected Applicant's appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Hawes, 423 S.C. 118, 813 S.E.2d 513 (Ct. App. 2018). The Remittitur was returned to the circuit court on July 3, 2018.

¹ The offense of Murder is a violent, most serious felony punishable by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. § 16-3-20 (2015); S.C. CODE ANN. § 16-1-60 (2015); S.C. CODE ANN. § 17-25-45 (2014).

² Douglas Strickler, Esq. was unavailable at the time of the hearing to testify as he passed away on April 13, 2018.

FACTS GIVING RISE TO THE CONVICTION

Applicant was charged with the Murder of Jennifer Wilson. Applicant admitted at trial that he killed Wilson in her home on August 28, 2011. However, Applicant claimed he acted in self-defense. (R. p. 819, line 10 – p.828, line 9; p. 904, line 20 – p. 905, line 1).

Wilson's neighbor Kelly Smith testified at trial that he woke to the sounds of screaming and physical violence coming from the bedroom area of Wilson's home. Smith testified he "heard screaming and physical violence," and he "recognized Jen's voice immediately" but did not hear another voice. (R. p. 85, line 5 – p. 86, line 4). He testified he could feel the energy of the attack, "it literally, was a violent situation. Her scream was she was being harmed." (R. p. 86, lines 9-11). He then noticed a pause, movement to the hallway progressing into the kitchen area, then:

[T]here was a second wave of more aggressive, just brutal, carnal instant violence. And I could physically feel the vibration in my bedroom from what was coming from the other room. . . . I could hear what sounded like a table slamming against the wall, like her body being thrown against the wall.

(R. p. 86, lines 13-22).

Smith then heard Wilson for the last time, yelling "no, no, no" and pleading for her life. (R. p. 86, line 24 – p. 87, line 1). Smith knew Applicant from Applicant's romantic relationship with Wilson. He also knew the relationship had turned "rocky." (R. p. 79, line 8). Smith testified that he called 911. (R. p. 88, lines 1-9). Though he did not become involved at that time, Smith assumed the officers talked to "Jen and Hank." (R. p. 91, lines 4-11). Later that morning, Smith left his home and noticed Applicant's vehicle, a Range Rover, in the driveway, along with Wilson's car and his own car. (R. p. 91, lines 21-25).

Law enforcement responded after Smith called 911 and arrived at approximately 2:47 am. (R. p. 112, line 17 – p. 113, line 5; p. 114, lines 20-21). However, the lights in Wilson's home were off, and after hearing and seeing nothing out of the ordinary, and having no cause to enter the

home, the officers only stayed outside briefly, then left. (R. p. 113, line 11 – p. 116, line 25). They noted a Range Rover parked behind the house with two other cars. (R. p. 115, lines 5-12).

Applicant testified at trial that he unclothed Wilson, washed her body, and placed her on the couch in the living area. (R. p. 831, lines 12-17; p. 843, line 7 – p. 846, line 23). He cut his own wrists and collected his blood in a cooler. (R. p. 879, line 2 – p. 881, line 7). He stayed in the home for hours, calling an ex-girlfriend, Stacy Newsom. The first call was at 2:37 am. (R. p. 294, lines 10-12). He was crying and upset, and sometimes would keep the phone connection with Newsom even though nothing was said. (R. p. 293, line 11 – p. 294, line 21). He eventually left and drove a short distance to his own home. Another one of Wilson's neighbors, Eric Ashton, testified he saw Applicant leave that morning, driving his automobile in an odd way—with his forearms instead of his hands. (R. p. 124, line 15 – p. 125, line 8). Starting at 8:48 that morning, Applicant searched the internet for defense attorneys. (R. p. 462, line 15 – p. 463, line 3).

Around 10:00 am, he called another ex-girlfriend, Kimberly Williams, and confided he could be charged with Murder. He stated he had been in contact with an attorney and needed \$25,000.00 for representation. She advised him that she did not have such money. Further, he stated he had acted in self-defense though no one was going to believe him. He also stated he tried to commit suicide by slitting his own wrists. Williams advised him to seek medical attention. (R. p. 267, line 2 – p. 268, line 1).

Applicant called Newsom again later that morning, and she advised him to call EMS if he was not feeling well. (R. p. 294, line 18 – p. 295, line 6).

Eventually, Applicant spoke to well-known criminal defense attorney Jack Swerling, Esq. Swerling testified that, with Applicant's permission, he placed a 911 call to law enforcement reporting a possible Murder. (R. p. 50, line 23 – p. 52, line 22).

During the time Swerling was reporting the Murder, Applicant called 911 for help, reporting he had cut his wrists. An officer was dispatched at 11:45 am to meet EMS at the scene. (R. p. 311, lines 7-12). Robin Haselden with Richland County EMS testified Applicant's clothes were wet, his cuts were no longer bleeding, and there "was no blood noted on him anywhere." (R. p. 316, line 21 – p. 317, line 10). An emergency room doctor, Dr. John Robinson, treated Applicant. Applicant would not answer questions. Dr. Robinson noted a concern that Applicant "was being deceptive" about self-inflicted wounds or had some type of trauma-induced amnesia; however, that "was inconsistent with the fact that he was alert and oriented with everything else." Dr. Robinson determined the wounds were self-inflicted, not life-threatening, and nothing accounted for the "amnesia" Applicant appeared to present. Dr. Robinson released Applicant into the custody of officers who had arrived at the hospital. (R. p. 328, line 16 – p. 334, line 21).

Officer Hudson testified that law enforcement responded to Wilson's home at approximately 11:30 am as a result of Swerling's report. (R. p. 60, lines 15-23). The officers noted blood on the rear entry. Smith was outside and also advised them of the sounds of violence he had reported earlier that morning. (R. p. 54, lines 18 – 25). The officers entered the home from the backdoor and were met with a bloody scene in the kitchen. (R. p. 55, lines 1-4). Upon further investigation, the officers found Wilson's body on the living room couch covered, with the exception of one portion of one arm, by a "blanket." (R. p. 57, line 9 – p. 58, line 25; p. 61, lines 2-4). Officer Hudson testified that upon moving the blanket:

I observed [Wilson] with multiple stab wounds, the front area (indicating) over her body, and she was unclothed, naked. And her hair seemed to be like it was wet, but sort of dry. . . . No signs of life.

(R. p. 59, lines 3-8).

EMS arrived at 11:51 am. (R. p. 68, lines 4-5). EMS pronounced Wilson dead at the scene. (R. p. 59, lines 18-22; p. 61, line 2 – p. 67, line 16). Though the scene was exceptionally bloody,

there was little blood on the blanket that previously covered Wilson's body. (R. p. 61, lines 11-24). In fact, the body appeared to have been cleaned and showered, apart from one smear of blood near the neck that had "a curved angle to it like the body had been wiped." (R. p. 62, lines 8-19). However, EMS noted multiple "straight cuts stab wounds," and bruising along the neck wound. (R. p. 62, line 19 – p. 63, line 17).

The pathologist who performed the autopsy noted multiple defense wounds on Wilson's hands; blunt force trauma to her head ("at least three blows"); cuts, bruises on arms and legs, lip and chin injury; twelve stab wounds; eleven slashes; and, one bite mark. The cause of death was blood loss from the stab wound, with the neck wound most likely being the fatal wound. However, the sum total of her wounds was fatal. The pathologist opined that Wilson would have died within approximately two minutes. (R. p. 711, lines 5 – 23; p. 713, line 14 – p. 714, line 6; p. 720, line 22 – p. 747, line 23). He testified it was a brutal homicide. (R. p. 748, lines 16-19).

As noted, the hospital examination for Applicant, as discussed above, noted only his self-inflicted wounds. While in custody, officers found only one small mark on one of Applicant's fingers. (R. p. 388–89, 904).

Applicant testified in his defense that Wilson was the aggressor, and, though he remembered little else, the incident was clearly her fault. (See R. p. 819, line 10 – p. 828, line 9; p. 904, line 20 – p. 905, line 1). Cross-examination uncovered a series of implausible assertions by Applicant when considered with the forensic evidence and other testimony. For example, he claimed she had a large knife, but no large knife was found. He claimed his shirt "may have been damaged" during the fight, and buttons pulled off, but there were no buttons found at the crime scene. He claimed she had on a top at the time of the violence, but no top was recovered with any stab wound tears. He had collected his blood in an insulated bag to not get it on the carpet, and yet his blood was on the scene. (See R. p. 856, line 20 – p. 904, line 24).

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In addition to Smith, several friends testified as to the rocky relationship between Wilson and the Applicant, and the fact that she was frightened. Wilson's friend, Janelle Bondr, testified that she knew of the relationship from its start in February 2011. She further testified that she observed a change in Wilson. Wilson had become anxious, her health seem to be poor, "she had been terrified" during the months before her murder and demonstrated becoming upset during a SKYPE call when Applicant "arrived at the house." (See R. p. 132, line 11 – p. 134, line 24).

Another of Wilson's friends David Virtue testified that at a dinner party at his home on August 14, 2011, Applicant and Wilson were together but "seldom on the same side of the room or part of the house during that evening." Virtue also testified Wilson had confided in him over the summer she was attempting to withdraw from Applicant and end the relationship. (R. p. 135, line 18 – p.138, line 2).

Wilson had remained friends with a former boyfriend, Drew Kabbe, and they had been communicating fairly frequently. Kabbe testified he spoke to Wilson the night/early morning of August 27–28, 2011. Wilson was in a good mood and happy at that time, returning home from a birthday party. However, she had previously told Kabbe about Applicant, though they normally did not, by agreement, discuss their romantic relationships. Wilson told Kabbe "[s]he was frightened of [Applicant]." Kabbe heard, over the phone, Wilson safely arrive home the night of the party before their telephone conversation ended. (R. p. 171, line 14 – p. 174, line 15).

Other friends testified consistent with Kabbe's testimony that on the night before her death, Wilson attended two birthday parties and appeared to be in a happy mood and enjoying herself. (See R. p. 141, line 12 – p. 144, line 18; p. 151, lines 1-7).

Another friend, Tasha Laman also heard Wilson express and/or demonstrate distress over the relationship. Laman advised Wilson to go to a counselor. (R. p. 269, line 15 – p. 272, line 4). Laman also testified Wilson had confided to her Applicant had threatened to "ruin her life." (R. p.

273, line 23 – p. 274, line 1; p. 275, lines 5-18). Laman, like Bondr, similarly noticed a loss of weight and an anxiousness in Wilson. (R. p. 274, lines 9-19). Laman testified Wilson did go to counseling and went to couple's counseling on at least one occasion. (R. p. 277, lines 7-12). Laman testified that Wilson "was very nervous after talking with Ms. Stewart and Ms. Stewart telling her this was a classic case of domestic violence," and that Wilson intended to break off the relationship with Applicant. (R. p. 276, lines 1-7).

Wilson's counselor, Jamme Stewart, testified she was very concerned about a new relationship that had so quickly turned to "constant contact," and that Applicant had "threatened to expose something embarrassing about [Wilson]" should Wilson break off the relationship. (R. p. 278, lines 8-14). Stewart responded that she did have reservations about domestic violence. (R. p. 279, line 25 – p. 280, line 12). Stewart testified that Wilson did not want to stay in the relationship but had difficulty with making the break. Stewart noted Wilson was concerned about Applicant's constant contact and jealousy. (R. p. 281, line 12-24). Wilson was killed just four days after meeting with Stewart. (R. p. 282, lines 13-17).

A series of text messages between Applicant and Wilson showed a back and forth relationship between the two, turning accusatory and threatening toward Wilson. (See, for example, R. p. 420, line 1 – p. 421, line 25; p. 604, line 25 – p. 605, line 3). Wilson's messages reflect both a fear of Applicant and her confusion about him. (See, for example, R. p. 548, line 4 – p. 549, line 10). The last call to Wilson from Applicant was at 2:14 am the morning of her death. The next call was at 2:37am to Stacey Newsom. (R. p. 460, lines 7-23).

Applicant's phone records also reflected contacts with multiple other women. (See R. p. 573, line 3 – p. 592, line 25; p. 608, line 10 – p. 609, line 25). In fact, he was making plans to meet a woman matched to him through a dating website on August 28th, according to a text message sent August 27th. (R. p. 755, line 20 – p. 760, line 7). Also, the night of the incident, Applicant was

happy, outgoing, and expressed that he was excited about "getting back together with his girlfriend." (R. p. 767, line 3 – p. 770, line 7).

Applicant argued the evidence demonstrated self-defense and/or supported the lesser-included offense of voluntary manslaughter. (R. p. 1068, lines 9-17). The jury convicted Applicant of murder).

CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Trial counsel failed to develop and present readily available evidence and failed to adequately investigate the charges against Applicant. Further, trial counsel failed to explore potential defenses to the charges against Applicant.
2. Trial counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections and legal arguments during trial and failed to adequately argue objections made during trial.

On July 19, 2023, Applicant, through counsel, filed an amended PCR application adding an additional claim for relief:

1. Ineffective Assistance of Appellate Counsel
 - a. Appellate Counsel failed to file a Petition for Certiorari with the South Carolina Supreme Court or to inform Applicant of his right to do so.

Before this Court are Applicant's application for post-conviction relief, Applicant's amended PCR application, the Richland County Clerk of Court general sessions records from the underlying conviction, the complete trial transcript, Applicant's complete records from his appeal, and Applicant's records from the South Carolina Department of Corrections.

SUMMARY OF RELEVANT PCR EVIDENTIARY TESTIMONY

APPELLATE COUNSEL'S TESTIMONY

On direct examination, Appellate Counsel testified that he worked on Applicant's criminal appeal in 2018 when working at Nelson Mullins Riley and Scarborough LLP, (Nelson Mullins) a

couple of weeks before oral argument. Appellate Counsel testified that Applicant's case came to Nelson Mullins through the Office of Appellate Defense, as Nelson Mullins sometimes handles criminal appeals. Appellate Counsel testified that he did not handle the drafting or filing of the briefs on Applicant's criminal appeal, and testified Robert Dudek, Esq. (Dudek) from the Office of Appellate Defense was listed on the pleadings and was responsible for maintaining contact with Applicant.

Appellate Counsel testified that he made the decision not to file the Petition for Writ of Certiorari to the South Carolina Supreme Court on behalf of Applicant. Appellate Counsel testified that he made this decision after discussing it with Dudek and his supervising partner, Matt Bogan, Esq. Appellate Counsel testified that the decision was a strategic decision based on their win from the Court of Appeals decision concerning the photographs of the Victim. Appellate Counsel testified that he did not believe the remaining issues had merit. Appellate Counsel testified that it was standard practice for a letter to be sent to Applicant informing him of their decision not to file a petition for cert. However, Appellate Counsel testified that he did not recall if Nelson Mullins or Dudek sent the letter, and he does not recall when it was sent out.

On examination by the Court, Appellate Counsel testified that he knew a letter was sent to Applicant, but did not know when. Appellate Counsel testified that it was a strategic decision based on precedent not to file the petition. Appellate Counsel testified that the Office of Appellate Defense handled communications with Applicant, not Nelson Mullins. Appellate Counsel testified that ultimately it was his decision not to file the petition.

APPLICANT'S TESTIMONY

On direct examination, Applicant testified that Doug Strickler, Esq. (Strickler) began representing him at the end of 2011 or the start of 2012. Applicant testified that he reviewed discovery with Strickler and Pringle (collectively "Trial Counsel") as it was coming in, but from

the outset, the game plan was self-defense. Applicant testified that he gave all the information he was able to provide to Trial Counsel.

Applicant recalled Trial Counsel had forensic testing done, blood testing, DNA analysis, and autopsy. Applicant testified that he further recalled Trial Counsel hired experts, informed him when the State added witnesses to their lists and informed him of potentially damaging evidence like the text messages between himself and an ex-girlfriend who testified. Applicant stated that, in hindsight, Trial Counsel could have been better prepared, stating Trial Counsel failed to argue there was photographic evidence of the victim's blouse in evidence when the Solicitor questioned him about it and believes Trial Counsel could have questioned some more on it.

Applicant testified that he did not ask Trial Counsel to speak to his ex-girlfriends and could not think of a reason why he would ask them to do that. Applicant testified that he and his ex-girlfriends remained friends to the extent that any could remain.

Applicant testified that he recalled discussing with Strickler his right to testify, and Strickler told him he would have to testify so that the jury could hear his side. Applicant testified that he assumed that was to support self-defense. Applicant testified that they discussed him testifying prior to court, and he had mixed messages and was on the fence about it. Applicant testified that Strickler told him he would have to testify to support the claim of self-defense. Applicant testified and conceded that the Court fully explained his right to testify and the consequences of testifying prior to his making a decision to testify.

Applicant stated he believed Pringle was more competent than Strickler. Applicant testified that Trial Counsel told him that if he went for self-defense, he was going to get a life sentence. Applicant testified that there were potential defenses, like a crime of passion, that Trial Counsel should have investigated.

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Applicant testified that Trial Counsel could have questioned the character of some of the State's witnesses, like Stacey Newsom (Newsom) and Christine Dahlheimer (Dahlheimer), to impeach them. Applicant testified that Trial Counsel should have impeached Newsom asserting her testimony the first time was fine, but her demeanor, when recalled in-camera, was different. Applicant testified that Trial Counsel could have used the six thousand (6,000) texts that showed everything was fine between them until he was arrested. Applicant testified that Trial Counsel could have done the same thing with Dahlheimer. Applicant testified that Dahlheimer testified he pulled a knife on her, but they still had financial ties together, and no one explored that.

Applicant testified that Trial Counsel could have impeached the neighbor because of his abuse of alcohol and drugs. Applicant testified that he and Trial Counsel discussed the conflict of interest with the neighbors. Applicant testified that the female neighbor worked for the Solicitor's Office and was friends with the Victim.

On cross-examination, Applicant testified that he contacted Jack Swerling prior to turning himself in to the police. Applicant testified that Trial Counsel failed to present readily available evidence like failure to develop witnesses, explore witnesses' character, inform Applicant of strategies, and make sure he understood. Applicant testified that Trial Counsel should have attacked the Victim's character.

Regarding the blouse, the Applicant testified that the Solicitor tried to paint a picture of when Victim was stabbed and whether she was clothed. "I said, 'Yes', and she said, 'Where's the top?', I said, 'It's there in the photos', and she said, 'I don't see it.'" Applicant testified that he felt that Trial Counsel just did not defend the accusation about the blouse. When asked if he believed the jury would have found him not guilty if the blouse picture was found, Applicant testified that it could have helped.

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Applicant testified that Trial Counsel did not discuss the details of the investigation with him, then he testified that they did discuss the investigation with him but did not raise it at his trial. Applicant clarified that he meant Trial Counsel did not investigate Wilson's character—specifically, her aggressive character. Applicant testified that the State called several of the Victim's friends and co-workers to testify, and Trial Counsel was able to cross-examine them.

Applicant testified that Trial Counsel should have explored potential defenses like the heat of passion. Applicant testified that he did not recall the jury being charged with voluntary manslaughter—he thought they were only charges with self-defense and murder. Applicant testified Trial Counsel should have explored crime of passion more. In Applicant's testimony, Applicant made a vague reference to a concern about a juror but did not testify to any additional details.

E. FIELDING PRINGLE'S TESTIMONY

On direct examination, Pringle testified that Applicant called Newsom and Swerling and told them what he had done shortly after it happened. Pringle testified that they crafted a defense strategy knowing the State wanted to present this as a brutal murder; however, the forensics available painted more of a crime of passion from a fight between Victim and Applicant.

Pringle testified that they discussed voluntary manslaughter and self-defense many times with Applicant, and she thought voluntary manslaughter was a more prudent defense. Pringle testified that it was apparent to her and Strickler that Victim and Applicant were in love but had a tumultuous relationship. Pringle testified that Applicant remained adamant that he wanted to present self-defense. As a result, Pringle testified, that they ceded to Applicant's preference regarding self-defense. Pringle testified that Strickler's closing was a hybrid, if not this, then that. Pringle testified that they were able to get Murder, Voluntary Manslaughter, and Self-Defense jury charges.

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Pringle testified that she could recall something about the blouse, but there was no argument, and she did not recall hunting for a picture. Pringle testified that all of the photos were in a photo album and are still in that album—they were never all over the tables at trial. Pringle testified that she could not understand the significance Applicant was placing on this blouse because Victim was found naked—so she is unsure about the relevance of this blouse.

Pringle testified that regarding failure to investigate, they hired experts for blood because there were coolers of collected blood at the scene, and there was blood all over the house in multiple rooms. Pringle testified that Applicant requested blood testing, but they wanted to make sure it did not make things worse for Applicant. Pringle testified that Applicant was correct—the blood collected on the scene also had his blood in it. Pringle testified that they hired a blood evidence investigator to examine the entire scene. Pringle testified that they hired a DNA expert, but they were not helpful. Pringle testified that they consulted an investigator for cellphone evidence and interviewed people. Pringle testified that they spent a lot of time on this case, and she had ten banker boxes in her office containing just this case.

Pringle testified that she recalled Newsom being recalled in-camera, and they did an extensive cross-examination of her. However, she could not recall specifics. Pringle testified that Dahlheimer was a former love interest who co-signed for a car for Applicant. Pringle testified that they did speak with Dahlheimer, but her testimony was limited.

On cross-examination, Pringle testified that she did not recall anything fitting the legal definition of domestic violence. Pringle testified that she recalled Victim and Applicant had a volatile relationship but did not recall anything physical. Pringle testified that she did recall Victim's friends worried for her but could not recall anything physical. Pringle testified that what happened did not meet any criteria for domestic violence. Pringle testified that she could not recall if any motion was filed to exclude any reference to domestic violence. Pringle testified that there

was no strategy in not objecting to a reference to domestic violence in the direct examination of Kelly Smith. (Tr. p. 259, ll. 5 – 6). Pringle was asked why they did not object to Jamme Stewart's hearsay statement and Pringle recalled that it was at best a passing reference and the rest of her testimony was helpful to her client right after that. (Tr. p. 514, ll. 12 – 16; ll. 20 – 24).

Pringle testified that she did not keep Applicant apprised of an appeal, but Strickler did that in practice.

APPLICANT'S TESTIMONY ON RECALL

Applicant testified he did not recall receiving communication about the Petition for Writ of Certiorari being denied, but probably did receive some kind of notification. Applicant did not recall when the letter was received.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of Trial Counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe each of the testifying witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds Applicant has failed to establish any constitutional violations or deprivations that would entitle Applicant to post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief.");

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Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2014):

STANDARD OF REVIEW

Ineffective Assistance of Trial Counsel

The Uniform Post-Conviction Procedure Act³ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "[assistance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not

³ S.C. Code Ann. §§ 17-27-10 to -160.

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receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC. The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing Strickland, 466 U.S. 668). The applicant bears the heavy burden of establishing both prongs of the Strickland standard, and failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all

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the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. Id.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816; see White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992) (instructing reviewing courts evaluating a claim of ineffective assistance of counsel to "at the start presume effectiveness" and "always avoid second guessing with the benefit of hindsight"). "The burden of rebutting this presumption' rests squarely on the defendant, and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" Dunn v. Reeves, 594 U.S. ----, 141 S. Ct. 2405, 2410 (2021) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if the record does not reveal that counsel took an approach that *no competent lawyer would have chosen*.'" Id. (emphasis added) (quoting Titlow, 571 U.S. at 23–24).

Further, [w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The reviewing court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109–10 (2011). "[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." Yarborough, 540 U.S. at 8; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

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Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 688–89 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn, 594 U.S. ----, 141 S. Ct. at 2410 (quoting Harrington, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108).

Thus, a fair assessment of attorney performance requires every effort to 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. Strickland, 466 U.S. at 689; see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify

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reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance 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 v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see id. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In evaluating prejudice, the PCR Court must consider the "specific impact counsel's error had on the outcome of the trial" in addition to "the strength of the State's case in light of all the evidence presented to the jury." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018); see Strickland, 466 U.S. at 695–96 (explaining that the reviewing court must analyze how individual errors of counsel affect the important factual findings in a particular case); see generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case . . . [and] the totality of the evidence before the jury."). In general, "the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Strickland, 466 U.S. at 696) (reiterating that "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

It is therefore not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding" and "[a]n 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." Strickland, 466 U.S. at 691, 693. Rather, counsel's errors must be "so serious as

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to *deprive the defendant of a fair trial.*" Id. at 687 (emphasis added). Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

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. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

Ineffective Assistance of Appellate Counsel

Just as a defendant is entitled to effective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to

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professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836; see also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Accordingly, in order to meet his burden of proof, Applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal. Smith, 528 U.S. at 285-86.

This Court finds Applicant cannot meet his burden as to his claims of ineffective assistance of Trial Counsel and Appellate Counsel. The specific claims are addressed below:

INITIAL FINDINGS

As a matter of general impression, this Court finds Pringle's testimony at the evidentiary hearing credible and persuasive, where she presented testimony of the relevant background, facts, and discussions leading up to and during the trial. This Court finds Applicant's testimony at the evidentiary hearing lacks credibility and is not persuasive. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant that they rendered adequate assistance and exercised reasonable professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1: Trial Counsel Failed to Readily Present Evidence

Applicant alleges Trial Counsel was constitutionally ineffective for failing to present readily available evidence. This Court disagrees and finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified that Trial Counsel failed to argue there was photographic evidence of the Victim's blouse in evidence that Trial Counsel should have explored more.

On cross-examination, when asked what evidence Trial Counsel should have more readily presented, Applicant testified that Trial Counsel should have developed witnesses and explored witnesses' character. Applicant testified that Trial Counsel should have explored the character of the Victim. Applicant went on to testify that he felt Trial Counsel did not defend him on the blouse accusation. Applicant testified that he told them the picture of the blouse was on the table, and

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they went "digging around" for it but could not find it.

On direct examination, Pringle credibly testified that she remembered something about a blouse, but there was no argument of merit to be made because the Victim was found nude, the pictures were all in an album, not spread out in disarray over a table and that the pictures are still in that album.

This Court finds counsel is a criminal practitioner who has significant experience in the trial of serious offenses. This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland). Applicant failed to present "any evidence of how additional preparation or communication would have resulted in a different outcome." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012). Additionally, this Court finds Applicant has failed to meet his burden proving Trial Counsel's alleged deficiency prejudiced him. Whether the evidence Applicant contends should have been more readily presented would have changed the outcome of Applicant's trial is mere speculation in light of the breadth of the trial record. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2: Trial Counsel Failed to Adequately Investigate

Applicant alleges Trial Counsel was constitutionally ineffective for failing to adequately investigate the case prior to trial. Applicant specifically asserted that Trial Counsel failed to

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properly investigate the witnesses' character and the aggressive character of the Victim. In support of this claim, Applicant only provided his self-serving testimony; he did not present the results of any independent investigation and did not present any documentary evidence to establish that any additional investigation would have yielded beneficial information that would have resulted in a different outcome at trial. For these reasons, this Court finds Applicant failed to meet his high burden of establishing that counsel was constitutionally ineffective in her investigation.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, 466 U.S. 668). The Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. See, e.g., Ard at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to that rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness. Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011); see id. at 457, 710 S.E.2d at 64-65. "Although counsel should conduct a reasonable investigation into potential defenses, Strickland does not impose a constitutional requirement that counsel uncover every scrap of

evidence that could conceivably help their client." Green v. French, 143 F.3d 865, 892 (4th Cir. 1998), abrogated on other grounds by Williams v. Taylor, 529 U.S. 362 (2000).

"[S]trategic 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." Strickland, 466 U.S. at 690–91; see id. ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

Further, a PCR applicant must ordinarily present some probative evidence to prevail on a claim of ineffective assistance based on failure to investigate. See Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (reversing the PCR court's grant of relief where the applicant failed to "present any evidence of what counsel could have discovered or what other defenses he would have requested had counsel more fully prepared for the trial"). As discussed above, Applicant failed to present any evidence to establish what benefit an additional investigation would have yielded, and, accordingly, his assertions are merely speculative and do not meet the burden of proof he must establish for relief. Moreover, the Court finds credible Pringle's testimony that a thorough investigation of the case was conducted as reflected by the ten banker boxes of files for the case.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

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Allegation 3: Trial Counsel Failed to Explore Potential Defenses

Applicant alleges Trial Counsel was constitutionally ineffective for failing to explore potential defenses. This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified that he thought about crime of passion and "other stuff" that Trial Counsel should have explored. On cross-examination, Applicant testified that they discussed self-defense, but they did not have any discussions about the heat of passion.

On direct examination, Pringle credibly testified that they discussed Voluntary Manslaughter and Self-Defense with Applicant numerous times. Pringle testified that the prudent defense would have been Voluntary Manslaughter, but Applicant was adamant in pursuing Self-Defense. Pringle testified in consideration of the Applicant's preference self-defense was pursued. Pringle further testified that in the end Strickler pursued a hybrid either or argument in closing that encompassed self-defense and voluntary manslaughter. Pringle testified that in the end, the jury was charged on Murder, Voluntary Manslaughter and Self-Defense.

To prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46 (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46.

This Court finds Applicant has failed to overcome the strong presumption that Trial Counsel rendered adequate assistance. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. In addition, Applicant has not presented any new evidence or defenses that could have been discovered by

Trial Counsel's further review of the discovery, nor has he explained how further review would have changed the outcome of his trial. See Hill, 474 U.S. at 59; see Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where applicant failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 4: Trial Counsel Failed to Adequately Cross-Examine Witnesses

Applicant alleges Trial Counsel was constitutionally ineffective for failing to adequately cross-examine witnesses. This Court disagrees and finds that the record reflects Trial Counsel thoroughly cross-examined the witnesses at Applicant's trial.

Cross-examination is a matter of trial strategy and is subject to the presumption that Counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690); see Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 7 (Ct. App. 2014) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, *[and] whether and how a witness should be cross-examined.*") (emphasis added).

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[Signature]

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 5: Trial Counsel Failed to Make Appropriate Objections

Applicant alleges Trial Counsel was constitutionally ineffective for failing to make appropriate objections. This Court disagrees and finds Applicant has failed to show Trial Counsel's performance fell below an objective standard of reasonableness based on any of the allegedly objectionable instances identified by Applicant. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.* As noted *supra*, Pringle was asked why Trial Counsel did not object to Jamme Stewart's hearsay statement and Pringle recalled it was a passing reference and that the rest of her testimony was helpful to her client right after that. (Tr. p. 514, ll. 12 – 16; ll. 20 – 24). Given the deference owed to real-time, tactically significant decisions about objections made by Trial Counsel, Applicant ultimately failed to demonstrate that, had Trial Counsel objected to these matters, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 689, 694.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Ineffective Assistance of Appellate Counsel Allegation on the Merits

Allegation 1: Appellate Counsel Failed to File A Petition for Writ of Certiorari

Applicant alleges Appellate Counsel was ineffective for failing to file a Petition for Writ

of Certiorari to the South Carolina Supreme Court. However, Applicant had no right to seek discretionary review and, therefore, no right to effective representation when seeking discretionary review. See Douglas v. State, 369 S.C. 213, 216, 631 S.E.2d 542, 543– 44 (2006) ("We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion."); see also Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) (no Sixth Amendment right to counsel in pursuing discretionary appeal); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (no Fourteenth Amendment right to counsel when pursuing discretionary appeal after an appeal of right); State v. Clinkscales, 318 S.C. 513, 458 S.E.2d 548 (1995) (Sixth Amendment right to counsel "extends only to the first right of appeal").

This Court finds Appellate Counsel reasoned why he did not seek the petition as they had won on the issue with merit, and a petition for certiorari on the other issues would have been fruitless. Applicant was provided with a letter explaining that they would not be seeking certiorari and instructing him on the PCR and state *habeas* process. Further, this Court finds that even if Appellate Counsel did not provide a reason for not seeking certiorari, that precedent in South Carolina precludes Applicant's claim and it fails as a matter of law.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence or testimony in support of the claims. Accordingly, this Court deems these allegations abandoned by the Applicant. Therefore, they are hereby **DENIED** and **DISMISSED**.

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CONCLUSION

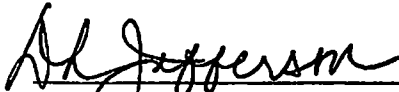
Based on the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by Counsel 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), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR Counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Applicant's attention is also directed to South Carolina Appellate Court Rules 203, 206, and 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 3rd day of October, 2023.



Hon. Deadra L. Jefferson
Presiding Circuit Court Judge
Fifth Judicial Circuit

Charleston, South Carolina
At Chambers

WITNESSES

(S) Sgt. William Pegram - Columbia Police
Department

ARREST WARRANT NUMBER

K689579

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

OCT 05 2011

VERDICT

Guilty

Foreperson of Petit Jury
Date:

10/16/14

DOCKET NO. 2011GS4005012

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

OCTOBER TERM 2011

87

THE STATE
vs.

HANK ERIC HAWES

Indictment for
MURDER

SC Code: 16-03-0010
CDR Code: 0116

After being fully advised of my
legal rights, I hereby waive my right
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JUL 1 2011
CLERK OF COURT
RICHLAND COUNTY
SOUTH CAROLINA

1670

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on ~~OCTOBER~~ ¹5, 2011,
the Grand Jurors of Richland County present upon their oath:

MURDER

That HANK ERIC HAWES did in Richland County, on or about August 28,
2011, willfully, feloniously, and intentionally kill the victim, Jennifer Lee
Wilson, with malice aforethought, either express or implied, by means of
knife/stab wounds, and the victim did die as a proximate result thereof, all
in Richland County, in violation of Section 16-03-0010, S. C. Code of
Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the
statute in such case made and provided.



DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
 STATE VS.
Hank Hawes

AKA:

Race: WHITE Sex: M Age: 40

DOB: [REDACTED] SS#: [REDACTED]

Address: 1420 WOODROW STREET

City, State, Zip: COLUMBIA, SC 29201

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Murder / Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS4005012

A/W#: K689579

Date of Offense: 8/23/2011

S.C. Code §: 16-03-0010

CDR Code #: 0116

SENTENCE SHEET

in violation of § 16-03-0010

of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature]

13433

GARFIELD, DOLLY

SC Bar#

Defendant

Attorney for Defendant

SC Bar# 5391

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114 (BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

CERTIFIED TRUE COPY
 OF ORIGINAL FILED

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk of Court during probation.

RICHLAND COUNTY
 SOUTH CAROLINA

Clerk of Court/ Deputy Clerk

Court Reporter: Holmes

SCCA/217 (03/2011)

Presiding Judge [Signature]

Judge Code: 1672

Sentence Date: 10/16/14