STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marlboro County

Thomas A. Russo, Circuit Court Judge

ALLEN J. GATHINGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000358

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did appellate counsel provide ineffective assistance by failing to raise on appeal all grounds on which the trial judge ruled where (1) the trial judge's alternative rulings were obvious in the transcript, (2) long-standing appellate procedural law requires affirmance when all grounds on which the trial judge ruled are not appealed, and (3) there is a reasonable probability Petitioner would have prevailed on appeal had all grounds been raised to the appellate court?

STATEMENT

A Marlboro County grand jury indicted Petitioner for two counts of murder (2007-GS-34-0887; -0888) and grand larceny (2007-GS-34-0909) on September 6, 2007. App. 859-860; App. 862-863; App. 865-866. The state, represented by Elizabeth Munnerlyn and John Holt, called the case for trial before the Honorable Howard P. King and a jury on October 18, 2010. App. 1. Emily Crayton and Richard Jones represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 703, line 15 – App. 704, line 7. Judge King sentenced Petitioner to life imprisonment without the possibility of parole on each of the murder convictions and ordered the sentences to be served consecutively. He sentenced Petitioner to five years' imprisonment for grand larceny, and ordered this sentence to be served concurrently with the other two sentences. App. 714, line 18 – App. 715, line 6.

Petitioner filed a timely notice of appeal, which was perfected by Elizabeth A. Franklin-Best. App. 717-730. The Court of Appeals affirmed his convictions and sentences in an unpublished opinion on August 22, 2012. State v. Gathings, Op. No. 2012-UP-494 (S.C. Ct. App. filed Aug. 22, 2012); App. 756-757. Remittitur was issued on September 7, 2012. App. 758.

Petitioner filed an application for post-conviction relief (PCR) on October 16, 2012. App. 759-766. An evidentiary hearing was held in the matter on July 24, 2014 before the Honorable Thomas A. Russo. App. 772. Joshua Thomas represented the state, and James Marshall Biddle represented Petitioner. App. 772. By an order filed on September 30, 2014, Judge Russo denied Petitioner relief from his convictions and sentences. App. 846-858.

Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Appellate counsel provided ineffective assistance by failing to raise on appeal all grounds on which the trial judge ruled where (1) the trial judge's alternative rulings were obvious in the transcript, (2) long-standing appellate procedural law requires affirmance when all grounds on which the trial judge ruled are not appealed, and (3) there is a reasonable probability Petitioner would have prevailed on appeal had all grounds been raised to the appellate court.

Relevant facts

Trial facts

On June 30, 2007, the bodies of Robbie Polston, and his mother, Loyce Locklear, were found in the home they shared with Petitioner in Clio, South Carolina. App. 113, lines 4-8; App. 124, lines 10-25; App. 131, line 20 - App. 132, line 19; App. 148, line 13 – App. 149, line 24; App. 169, line 12 – App. 173, line 15.[1] Robbie and Loyce were fatally beaten with a baseball bat. App. 369, lines 9-10. On July 2, 2007, the police arrested Petitioner in Conway. App. 293, lines 8-9; App. 294, lines 2-3. Additionally, the police found the light blue Corsica belonging to Loyce, which Petitioner had driven to Conway. App. 290, line 8 – App. 291, line 11.

The only physical evidence connecting Petitioner to the murders was DNA found on Petitioner's shoes, which matched profiles developed from blood standards taken from Robbie and Loyce. App. 304, lines 1-13; App. 366, line 13 – App. 367, line 12; App. 406, lines 9-19; App. 407, lines 16-20. However, there was no blood found in the car, including the gas pedal. App. 424, line 22 – App. 425, line 9. A witness claimed that the shoes Petitioner was wearing when he was arrested "could have made" the footwear impressions found at the scene. App. 304, lines 1-13;

[1] Robbie and Petitioner were lovers. App. 204, line 17 – App. 205, line 7; App. 210, lines 13-22; App. 253, lines 10-11.

App. 353, line 16 – App. 354, line 9; App. 369, lines 12-16; App. 376, line 21 – App. 377, line 24; App. 409, line 6 – App. 415, line 4. The witness could not testify that Petitioner's shoes made the impressions because there were not any individual characteristics to distinguish Petitioner's shoes or the impressions from any other shoes of the same brand. App. 415, lines 3-21. Petitioner's DNA was also found on a bat located in the home, which the police believed was the murder weapon. App. 524, lines 14-22.

Prior to trial, the state moved to admit "prior bad acts" concerning an April 2005 incident involving Petitioner, Robbie, and Loyce. According to the state, Petitioner pushed Loyce, took her pocketbook, and fled in a car borrowed from Robbie's sister, Lisa Polston. These acts resulted in criminal charges. App. 50, lines 15-21. Petitioner had entered guilty pleas to assault and battery, grand larceny, and strong arm robbery, and received three years' imprisonment. App. 50, line 23 – App. 51, line 4. When Petitioner was released from the Department of Corrections in April 2007, he returned to live with Robbie and Loyce. App. 51, lines 5-13. The state argued the evidence was admissible as "evidence under the common scheme or plan" exceptions to the prohibition on character evidence found in Rule 404(b), SCRE. App. 50, lines 2-8; App. 52, line 25 – App. 53, line 10.

Trial counsel argued the exceptions were inapplicable and the probative value of the evidence was significantly outweighed by its prejudicial effect. The state simply wanted the evidence to show Petitioner "acted in conformity with the prior bad act." App. 52, lines 2-9. Trial counsel argued there was no "logical connection" between the prior bad act and the crimes for which Petitioner stood trial. App. 54, line 20 App. 55, line 12.

The state then argued admissibility of the evidence as "separate and aside from the prior bad acts cases and common scheme and plan." According to the state, the evidence was "of previous

quarrels and ill feeling and hostile acts between the parties" and was admissible "to show that animosity probably existed between the parties at the time of the homicide." The state cited State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996) to support its position. App. 55, line 19 – App. 56, line 2. The state conceded that evidence offered under this theory would have to exclude "the details." App. 56, lines 1-4.

In ruling on the motion, the judge held the evidence was admissible pursuant to the common scheme or plan exception "because the victims were the same" and there was "a relatively short time from the release of [Petitioner] from prison and the actual time that these took place." App. 73, lines 9-14. Rather than consider the time when the prior bad act occurred, the trial judge examined the time between when Petitioner was released from prison and when the offenses for which he stood trial occurred. App. 73, lines 9-14; App. 73, lines 21-24. He was persuaded to admit the evidence because the acts were "very, very similar and close" due to them involving the same alleged victims. App. 73, line 25 – App. 74, line 2. The trial judge also found the acts "admissible to show motive or intent" because Petitioner "ha[d] robbed the same victims before." App. 74, lines 9-11. He found the evidence, despite the danger of unfair prejudice, "highly probative of his guilt on the previous assault and battery of these same victims." App. 74, lines 12-15. Additionally, the trial judge, citing State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996), held the character evidence admissible to show "animus that probably existed between the parties" under his view that the evidence showed "previous quarrels, ill feelings and hostile acts between the parties." App. 74, lines 16-23.

He clarified that he was admitting the evidence (1) pursuant to the exceptions found within Rule 404(b), SCRE, (2) after concluding the probative value was not substantially outweighed by

the danger of unfair prejudice, and (3) as evidence of prior disputes between the parties to show animus. App. 74, line 23 – App. 75, line 2.

The state discussed the prior bad acts during opening statements. According to the prosecutor, Petitioner was living with Robbie and Loyce when on April 18, 2005, he "pushed them both down," took Loyce's pocketbook, and "fled" in a car borrowed from Lisa Polston, a family member. App. 96, line 15 – App. 97, line 5. The prosecutor told the jury that Petitioner "was released about three to four months" before the deaths of Robbie and Loyce. Upon his release, he returned to live with Robbie and Loyce. App. 97, lines 9-12.

The state elicited testimony regarding the prior bad acts from its first witness, Lisa Polston, despite the fact that Lisa was not a witness to those acts. App. 112, lines 11-13. According to Lisa, who was the sister of Robbie and daughter of Loyce, Petitioner stole her car in April 2005. App. 110, lines 11-15. However, she thought Robbie had given Petitioner the keys to the car. App. 110, lines 22-24. She claimed that in addition to the theft of her car, Petitioner had caused Loyce's chest to hurt, had broken Robbie's glasses, and had given Robbie a black eye. App. 111, line 22 – App. 9. Lisa was unhappy when Petitioner returned to live with Robbie and Loyce because "he was a bad person." App. 113, lines 9-21.

The state's second witness, Eddie Polston, Robbie's brother and Loyce's son, also testified to Petitioner's prior bad acts. Although he did not witness the alleged crimes, he claimed that in April 2005, Petitioner "took the car, pushed [Loyce] down, and took her pocketbook and all." He also claimed Petitioner "kidnapped" Robbie by taking him "down a dirt road" where Robbie thought "he was going to kill him." App. 123, lines 12-20.

In addition to the testimony elicited from Lisa and Eddie, the state introduced certified copies of the arrest warrants, indictments, and sentence sheets for Petitioner concerning grand

larceny, robbery, and assault and battery resulting from the April 2005 incident. App. 195, line 9 – App. 197, line 2.

Finally, the state argued the prior bad act evidence during closing. The prosecutor informed the jury the evidence of the April 2005 incident was presented "to show common scheme or plan." She argued the similarities between the April 2005 incident and the incident for which Petitioner was being tried proved Petitioner was guilty of the current offenses. App. 660, lines 4-16.

Direct appeal

Appellate counsel challenged the trial judge's admission of "improper character evidence" concerning the physical confrontation between Petitioner and Robbie and Loyce that occurred two years prior to their deaths as not "evidence of common scheme or plan" or "relevant to motive." App. 720.

The state argued that "by failing to appeal from all grounds supporting the trial court's evidentiary ruling on the April 2005 incident," the trial court's ruling was the law of the case. App. 743. The state argued that the trial court ruled the April 2005 incident was admissible under multiple theories, including exceptions to Rule 404(b), SCRE, and as evidence of animus between the parties. App. 743-744.

The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences pursuant to Rule 220(b), SCACR based upon the "two issue rule." App. 757. Specifically, the Court quoted Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) for the proposition that "[u]nder the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." App. 757. Essentially, the Court of Appeals concluded that appellate counsel's failure to raise all grounds on which the trial judge admitted the evidence rendered the issue

presented not cognizable on appeal. Had the Court of Appeals addressed the issue presented by appellate counsel, the opinion would be advisory because the trial judge's ruling was based on reasons in addition to that raised in the appellate brief.

PCR hearing

Petitioner acknowledged that his trial counsel moved to exclude evidence of prior bad acts during a pre-trial hearing. App. 785, lines 19-22. However, the judge overruled the motion and permitted the state to introduce the alleged prior bad acts. App. 785, line 23 – App. 786, line 4. Petitioner expressed his concern that trial counsel failed to renew the objection when the witnesses testified regarding those acts. App. 786, lines 5-16.

Trial counsel recalled moving to exclude the character evidence during a pre-trial motion, but was uncertain if she objected to the evidence during the course of the trial. App. 810, line 10 – App. 811, line 1. Trial counsel's testimony showed her belief that the objection was preserved for appellate review based upon her pretrial motion and her renewal of the objection when the state sought to introduce certified copies of the convictions despite the testimony of two witnesses concerning the prior bad acts preceding the state's offer of introduction. App. 811, line 2 – App. 814, line 6.

During cross-examination, the state's questioning demonstrated agreement with trial counsel that the issue was preserved for appeal:

> Q. And just real quick, so you discussed with him the Lyle evidence and how that was damaging to him if it came in.
>
> A. Yes, we did.
>
> Q. And did you make a motion to exclude that pretrial.
>
> A. I believe we did. We made numerous motions. I can look back.

Q. And so the first two witnesses who testified are the ones that elicited the Lyle evidence.

A. It looks that way, yes.

Q. But when they went to introduce the actual certified conviction, you objected to that?

A. We did. We - - and the judge noted our previous objection.

Q. And in fact on page 196 there, he says your objection. Your objection is preserved.

A. Yes.

App. 819, line 17 – App. 820, line 10. The state's position that this alleged error was preserved for review was abundantly clear in the state's closing argument to the PCR judge. Concerning this issue, the state argued "[t]he case law is clear that if you have a motion in limine, if the first witness that testifies, testifies to the evidence you're trying to keep out in limine, you don't have to object to preserve it. And they did object when they actually tried to introduce the physical documents. ... They objected to those instruments being introduced. So there is, that's preserved for appellate counsel." App. 842.[2]

Order denying relief

The order denying relief recognized that a defendant is entitled to the effective assistance of appellate counsel pursuant to the United States Constitution. App. 853. Further, the PCR judge recognized that when the claim of ineffective assistance is based upon a failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present

[2] Petitioner notes the state's position during PCR is contrary to the state's position on direct appeal. In fact, the state "highlight[ed]" in its brief on direct appeal that defense counsel did not renew the objection when the state introduced the details of the April 2005 incident when Lisa and Eddie testified. Thus, the state argued, any objection to the specific facts related to the prior conviction was not preserved for review. App. 745 (footnote 3).

significant and obvious issues on appeal." App. 854 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Nevertheless, the PCR court noted that Petitioner "failed to present any testimony from appellate counsel" on his issue of ineffective assistance of appellate counsel. App. 854. To this point, the court refused to "speculate" why the second ground for admitting the evidence was not briefed. App. 854. However, the PCR court found the objection to the character evidence was preserved. App. 851. Specifically, the PCR judge held "[t]rial counsel was under no duty to renew the objection when the first two witnesses testified as to the nature of those crimes." App. 851 (citing State v. Mueller, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995)). The PCR court explained that a "motion in limine need not be renewed when the first witness at trial testifies to matters sought to be excluded by the motion." App. 851.

Concerning prejudice, the PCR judge explained, the applicant must prove "there is a reasonable probability he would have prevailed on appeal." App. 854 (quoting Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003)). The PCR court only considered whether Petitioner could show he was prejudiced by appellate counsel's failure as evidenced by the court's finding that Petitioner "failed to demonstrate he would have been successful on appeal had this issue been raised." App. 854. The PCR court cited State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996) to explain that "evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide." App. 854-855. According to the PCR court, Petitioner's prior convictions for similar crimes were hostile acts from which the jury could determine prior animosity between Petitioner and the victims. App. 855.

Discussion

All criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland v. Washington, 466 U.S. 668 (1984). See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, the reviewing court asks whether appellate counsel's performance was deficient and whether the defendant was prejudiced by the deficient performance. Id. The prejudice test is whether the defendant was "prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Appellate counsel is not required to raise all non-frivolous claims, but may exercise sound professional judgment in selecting the appropriate grounds for a direct appeal in order to maximize the likelihood of a favorable result. Smith v. Robbins, 528 U.S. 259, 288 (2000).

Deficient performance

In discussing a criminal defendant's right to the effective assistance of appellate counsel, the United States Supreme Court noted the difficulty in demonstrating appellate counsel's incompetency by citing to Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) to explain that "[g]enerally, 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. The Court also distinguished the deficient performance analysis when a defendant challenges appellate counsel's filing of a no-merits brief versus filing of a merits brief. According to the Court:

> With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the Strickland test, for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present.

Id.

The Seventh Circuit elaborated on the deficiency prong by explaining that appellate counsel renders deficient performance by "fail[ing] to raise a significant and obvious issue." Gray, 800 F.2d at 646. After identifying "[s]ignificant issues which could have been raised," the reviewing court should compare those to the issues which were raised. Id. Further, "[a] reviewing court can evaluate appellate counsel's choice of issues on appeal by examining the trial record and the appellate brief." Id. The Seventh Circuit accepted the notion that appellate counsel may exercise strategy in selection of the issues on appeal, but held "the determination of whether the decision was strategic require[d] an examination of the trial record." Id. In remanding the case to the district court on the ineffective assistance of appellate counsel claim, the Seventh Circuit instructed the lower court "to review the trial court record and determine whether the issues which petitioner claims appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial, and were so obvious from the trial record that the failure to present such issues amounted to ineffective assistance of appellate counsel." Id. Reiterating the point that testimony from appellate counsel was unnecessary, the Seventh Circuit denied the request for an evidentiary hearing and explained that an evidentiary hearing would be necessary "only if a review of the record [was] not sufficient to resolve factual disputes regarding the choice of issues." Id. The court explained that "[w]hen a claim of ineffective assistance of counsel is based on failure to raise issues on appeal, ... it is the exceptional case that could not be resolved on an examination of the record alone." Id.

In the present case, the PCR court clearly erred in analyzing Petitioner's ineffective assistance of appellate counsel claim. Although the PCR court quoted Gray, supra, the court still noted Petitioner presented no testimony from appellate counsel and stated the court could not

speculate why appellate counsel failed to brief the second ground for admitting the evidence. By requiring testimony from appellate counsel in order to evaluate the deficiency prong, the PCR court erred.

There can be little doubt that the trial judge admitted the evidence of prior bad acts on *three* grounds: (1) exceptions found within Rule 404(b), SCRE, (2) the danger of unfair prejudice did not significantly outweigh the probative value of the evidence, and (3) as evidence of animus. In arguing for admissibility, the state explained its argument regarding animus was "separate and aside from the prior bad acts cases and common scheme and plan." App. 55, line 19 – App. 56, line 2. In ruling on the admissibility, the trial judge explained "the court's ruling is that the proposed evidence does meet the requirements of State v. Lyle, [125 S.C. 406, 118 S.E. 803 (1923)] 404(b); that the probative value outweighs prejudicial effect, and further that it is admissible under State v. Williams[, 321 S.C. 327, 468 S.E.2d 626 (1996)]." App. 74, line 23 – App. 75, line 2. Further, there can be little doubt that appellate counsel must appeal all grounds upon which the ruling was based. This is long-established law in South Carolina. Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012); State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010) Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996); Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993).

Thus, appellate counsel's deficient performance is clear from a review of the record and the appellate brief. Appellate counsel selected an issue for appeal – a strong and obvious issue. However, appellate counsel simply failed to raise all grounds on which the judge ruled in relation to that issue. In doing so, appellate counsel guaranteed Petitioner's convictions and sentences would be affirmed as the Court of Appeals would have no choice but to affirm given the law in South Carolina requiring all grounds upon which a ruling was based to be appealed. By not attacking the

alternative bases for admissibility, counsel filed, in effect, no appeal at all. It was doomed to failure under the "two issue rule." No testimony from appellate counsel could justify this as a strategic or tactical choice. See Stacey v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986)(nothing "that labeling counsel's actions as 'trial strategy' does not 'automatically immunize an attorney's performance from Sixth Amendment challenges'")(quoting Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)). Without question, an issue raised on all grounds on which the judge ruled is *ipso facto* a stronger issue than one in which only one ground is raised, which by its nature requires an appellate court to affirm, no matter how meritorious the issue or egregious the error.

Prejudice

Rule 404(b), SCRE

The South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In fact "[e]vidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987). As explained by this Court in State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011), in order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation.[3] The prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631

[3] Due to the danger this type of evidence poses, "[e]vidence of other crimes must be put to a rather severe test before admission." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

One of the exceptions contained within Rule 404(b), SCRE is when the evidence is offered to show a common scheme or plan. Evidence of other crimes or bad acts is admissible to show a common scheme or plan when there is "a connection between the prior bad act and the present crime." State v. Parker, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993)(citing State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979)). The connection "must be more than just a general similarity." Id. (citing State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983)). The prior bad act evidence must have a "close degree of similarity" to the crimes charged. State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009). "The evidence must be logically relevant to the particular purpose or purposes for which it is sought to be introduced." State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990).

In Parker, this Court held that a previous fight between the defendant and the deceased was only of a general similarity. The two had met in the same parking lot six months prior to the fatal fight and the defendant had declined the deceased's invitation to fight at that time. 315 S.C. at 234, 433 S.E.2d at 833. The record failed to disclose the similarities or to draw a real connection between the incidents. Id.

In the instant matter, the 2005 incident and the 2007 homicides were not of a sufficient degree of similarity. The 2005 incident alleged involved Petitioner pushing Loyce and Robbie, which was significantly different than the brutal beating death suffered by Loyce and Robbie in

2007. There was no allegation of a bat or any weapon being used in 2005; however, the state alleged Loyce and Robbie were beaten to death by a baseball bat in 2007. Additionally, the temporal connection between the two events was non-existent. At least two years separated the events, but this fact was discounted by the judge, who looked at the time between Petitioner's release from prison and the deaths, in making his ruling. In light of the factual dissimilarities and the lack of a temporal connection, the evidence was inadmissible to show a common scheme or plan.

Motive and intent are additional exceptions to the rule prohibiting the introduction of prior bad acts. As these exceptions "are closely related," Appellant will discuss them together. See State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 4 (Ct. App. 2009). On this point, the South Carolina Supreme Court has explained that

> [I]n a prosecution for homicide, evidence of other crimes committed by the defendant which are in time and circumstances so intimately connected with and a part of the crime with which he is being charged as to show a motive for the commission of the homicide or a state of mind indicating a purpose for its commission, is admissible to establish such motive or state of mind.

State v. Grainger, 275 S.C. 417, 421, 272 S.E.2d 175, 176 (1980).

In State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980), this Court allowed evidence of a verbal altercation between the victim and the defendant three days prior to the killing. This Court explained that "[e]vidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motive *where there is some connection of cause and effect between the evidence and the crime*." Id. (emphasis added). Only where the prior bad act evidence shows motive on the part of the accused and is not so remote in time as to negate its probative value may the evidence be admitted. Id.

The 2005 incident bore no relation to motive and intent largely due to the passage of time between the prior incident and the 2007 deaths. Although Petitioner had been convicted of prior crimes against Robbie and Loyce, there were no hard feelings among the parties as evidenced by Robbie and Loyce allowing Petitioner to live with them after his release. Further, the evidence showed Robbie visited with and provided money to Petitioner while he was incarcerated. App. 261, lines 10-20. Any animosity or ill feelings that existed at the time of the 2005 incident or as a result of the prosecution for the 2005 incident had long since dissipated. Thus, the 2005 incident failed to establish motive or intent and should not have been admitted by the trial judge.[4]

Animus

"In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide." State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-837 (2001). Importantly, this legal principle is not an additional exception to the rule against character evidence. Instead, it applies to acts that are *not* bad acts, but are probative of animus between the parties. Id. at 636, 541 S.E.2d 836. In Braxton, this Court found no error in the admission of testimony that the defendant and the deceased argued one month for the deceased's death. Id. This Court explained the "testimony did not refer to any bad act." Id. Instead, the testimony "merely revealed" the defendant and the deceased "argued." Id. As such "there [was] no indication the prior disagreement was the result of a bad act committed by [the defendant]." Id. Additionally, "although evidence of previous

[4] On direct appeal, the state argued "as it relates to motive, that the trial court never ruled on and was never asked to rule on whether the April 2005 incident was relevant to motive under Rule 404(b), SCRE." App. 744 (footnote 1). However, the record disclosed the trial judge also found the acts "admissible to show motive or intent" because Petitioner "ha[d] robbed the same victims before." App. 74, lines 9-11. Thus, the state's position on direct appeal was incorrect and the judge had ruled upon the motive exception to Rule 404(b), SCRE.

quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide, the details of the difficulties should be excluded." State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996)(citing State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957)).

Here, the 2005 incident clearly referred to "prior bad acts" committed by Petitioner. In fact, Petitioner had been arrested, indicted, and pled guilty to those prior bad acts. Thus, the trial judge erred in permitting the evidence to be introduced under the theory that the evidence showed merely "previous quarrels and ill feelings or hostile acts." Further, the trial judge erred in permitting the state to elicit specific facts of the 2005 incident if the basis for the ruling was the introduction of animus between the parties as the case law clearly *forbids details* of the prior conduct when the evidence is admitted to show ill feelings between the parties.

Rule 403, SCRE

Generally, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means 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. However, even relevant evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. Thus, consideration of whether evidence is relevant and admissible requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two. The links among Rules 401, 402, and 403 are undeniable.

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value'

is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the

court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Applying this analytical framework to the present case reveals that balancing of the low probative value of the prior bad acts offered by the state, the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the 2005 incident. The starting point for determining the relevancy, probative value, and danger of unfair prejudice is with the ultimate issue before the jury – whether Petitioner had murdered Loyce and Robbie. The 2005 incident failed to provide proof of the events of June 29-30, 2007. Instead, the 2005 incident served only to show that Petitioner had acted violently in the past against Loyce and Robbie and, therefore, he had probably acted violently again. See State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984)(explaining that "[u]nder our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts"). The danger of unfair prejudice – that the jury would use the 2005 incident as propensity evidence and decide the case on emotion, not facts – was very high. The probative value of the 2005 incident was very low due to the passage of two years between the incidents and the events during that time frame showing any animosity or ill feelings had dissipated. Balancing the two leads to but one conclusion – the danger of unfair prejudice substantially outweighed the evidence's low probative value. As a result, it should have been excluded.

Had appellate counsel raised all grounds on appeal concerning the issue presented there is a reasonable probability Petitioner's convictions would have been reversed in light of the controlling case law governing prior bad acts, the introduction of animus evidence, and the rule requiring exclusion of evidence where the probative value was substantially outweighed by the danger of unfair prejudice. As a result, Petitioner is entitled to a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marlboro County

Thomas A. Russo, Circuit Court Judge

ALLEN J. GATHINGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Allen J. Gathings #279208, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 6th day of November, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of November, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.