STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI FROM MARLBORO COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-000358

Allen J. Gathings, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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RESPONDENT'S QUESTION PRESENTED

There is evidence of probative value to support the post-conviction relief court's finding that Petitioner failed to meet his burden of establishing appellate counsel was ineffective for only challenging the introduction of evidence of a prior incident between Petitioner and the victims, where there is no reasonable probability the result of the Petitioner's direct appeal would have been different had appellate counsel raised the additional grounds.

STATEMENT OF THE CASE

In September 2007, the Marlboro County Grand Jury indicted Petitioner for two counts of murder (2007-GS-34-887, -888) and one count of grand larceny (2007-GS-34-909). Emily M. Crayton, Esquire, and J. Richard Jones, Esquire, represented Petitioner. On October 18-21, 2010, Petitioner proceeded to trial before the Honorable Howard P. King and a jury. The jury found Petitioner guilty as indicted. Judge King sentenced Petitioner to consecutive terms of life imprisonment without the possibility of parole for the murder convictions, and a concurrent term of five years imprisonment for the grand larceny conviction.

Petitioner filed a timely notice of appeal, and Elizabeth Franklin-Best, Esquire ("appellate counsel"), perfected the appeal. The question presented by Petitioner was, "Whether the trial court judge erred when he allowed the state to elicit improper character evidence at Gathing's trial for two counts of murder and grand larceny when the testimony, involving a physical confrontation two years earlier, was not properly admitted as evidence of common scheme or plan, nor was it relevant to motive." In response, the State presented four questions: 1) whether appellate counsel's failure to appeal from all grounds supporting the trial court's evidentiary ruling makes the ruling law of the case; 2) whether the trial court erred in finding the evidence at issue was admissible to show evidence of animus between the parties; 3) whether the evidence at issue was admissible pursuant to Rule 404(b), SCRE as it established intent; 4) whether the evidence at issue was admissible under a *res gestae* theory. The South Carolina Court of Appeals affirmed Petitioner's conviction on August 22, 2012. State v. Gathings, Op. No. 2012-UP-494 (S.C. Ct. App. filed August 22, 2012). The *per curiam* opinion cited Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), with the parenthetical explanation, "Under 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." The remittitur was returned to the circuit court on September 7, 2012.

Petitioner filed an application for post-conviction relief on October 16, 2012. (App. p. 759-766). Respondent ("the State") filed a return on or about February 22, 2013. (App. p. 767-771) The Honorable Thomas A. Russo ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Darlington County Courthouse on July 24, 2014. (App. p. 772.) Petitioner was present and represented by James Marshall Biddle, Esquire, and Joshua L. Thomas, Esquire was present on behalf of the South Carolina Attorney General's Office. (App. p. 772). The post-conviction relief judge denied relief in an order signed September 8, 2014 and filed September 30, 2014. (App. p. 846-858.) Petitioner filed a notice of appeal on February 11, 2015. Petitioner filed a petition for writ of certiorari on or about November 6, 2015, to which the State filed its return on March 24, 2016. Certiorari was granted by an order of this Court on September 29, 2017. Petitioner filed his brief on November 13, 2017.

STATEMENT OF FACTS

On Friday, June 29, 2007, Lisa Polston ("Lisa") and Loyce, her mother, made plans to take Loyce's cat to the veterinarian's office the following morning. (App. 103-04). When Loyce and Robbie, Lisa's brother who lived with Loyce, failed to answer Lisa's calls the next morning, Lisa drove to Loyce's residence in Clio to check on them. (App. 105-06). Arriving at Loyce's residence, Lisa noticed one of Loyce's two cars, a gray Buick, was parked outside; however, Lisa did not see or hear anyone inside. (App. 106). After unsuccessfully attempting to enter the residence via the back door, Lisa left Loyce's residence and returned home. (App. 107).

In the early afternoon, Lisa, now concerned that she had not heard from either Robbie or Loyce, called her other brother, Eddie Polston ("Eddie"), and asked him to check on them. (App. 109). Following his conversation with Lisa, Eddie drove to Loyce's residence where Lisa met him. (App. 126). When he arrived at Loyce's residence, Eddie, like his sister, observed that while Loyce's gray Buick was still parked at her residence, her blue Chevrolet Corsica was missing. (App. 127-28).

Upon walking to the back door and wiggling the doorknob, Eddie was eventually able to get into the residence. (App. 128). After entering the residence, Eddie made his way through the kitchen, dining room and living room, before turning down the hall towards Loyce's bedroom, which he noticed was in disarray. (App. 130-31). Thereafter, Eddie found his mother's lifeless body. (App. 131-32). Next, Eddie noticed the door to his brother's bedroom was slightly ajar, prompting him to approach Robbie's bedroom. (App. 132). When he did, Eddie discovered Robbie's dead body lying by the bedroom door. (App. 132). Following the discovery of Loyce and Robbie's bodies, Eddie called 9-1-1 and contacted a nearby police officer, John Lester.

(App. 132, 169). Authorities were immediately dispatched to the crime scene and the area was quickly secured. (App. 148, 176-77).

At the crime scene, authorities recovered a bloody baseball bat that was later determined to contain DNA from Robbie, Loyce, and Petitioner, as well as a bloody footprint that was consistent with having been made by a pair of size 11 New Balance 608 tennis shoes. (App. 523-24, 413-14). Forensic pathologist Dr. Susan Presnell would later opine that Robbie and Loyce died because of blunt force trauma to the head, consistent with injuries inflicted by a baseball bat. (App. 560, 566, 555).

The ensuing investigation quickly focused on finding Petitioner and the blue Corsica, which authorities believed was stolen in the aftermath of the incident. (App. 289, 291). Due to this suspicion, authorities issued an advisory to be on the lookout for both Petitioner and the Corsica. (App. 289-90). On July 2, 2007, after a five-hour standoff in a trailer park outside of Conway, the Horry County Police Department arrested Petitioner. (App. 290-93). Following the arrest, authorities seized the Corisca, which was outside of the trailer, and took possession of a pair of size 11 New Balance 608 tennis shoes. (App. 294-95, 368, 406). DNA testing would later reveal the tennis shoes contained both Loyce and Robbie's blood. (App. 294-95, 368, 406, 523-25).

At trial, the State introduced evidence that Petitioner, who had been incarcerated by the South Carolina Department of Corrections ("SCDC") until March 30, 2007, for robbing and assaulting Robbie and Loyce in April of 2005, was living with Robbie and Loyce prior to their murder. (App. 110-13, 429, 119, 123-24). The State further established that during Petitioner's time at SCDC Robbie, who was in a homosexual relationship with Petitioner, gave Petitioner money while in prison and actually picked Petitioner up from prison following his release. (App.

203, 209, 252, 260). The State also introduced testimony that while he was in prison, Petitioner threatened to kill Robbie. (App. 270-71).

The State further elicited testimony establishing the following: (1) on the afternoon of Friday June 29th, the day before Eddie discovered Robbie and Loyce's dead bodies, Robbie and Petitioner fought over money (App. 212); (2) the fight turned physical when Petitioner punched Robbie in the ribs, knocking the breath out of him (App. 212-13); (3) after Petitioner punched Robbie, Loyce asked what was going on, prompting Robbie to tell her Petitioner punched him, further agitating Petitioner (App. 215); (4) Petitioner then began telling Robbie, "it wasn't no game"' and he was going to "fuck him up" (App. 216). Additional evidence established that: (1) Petitioner used crack cocaine "every time [he] got money[,]" (App. 221-22); (2) Petitioner would frequently get money from Robbie or Loyce so he could use crack cocaine (App. 221-22); and (3) Petitioner may have been at a local drug house following the altercation with Robbie. (App. 221-22, 251).

The State also presented testimony from Julius Lynch, who shared a cell with Petitioner in December of 2007 for approximately one month. (App. 320). In his testimony, Lynch explained that Petitioner confessed to murdering both Robbie and Loyce. (App. 321-23). Specifically, Lynch testified Petitioner told him that, following his initial altercation with Robbie, he decided to go to the beach, and had changed into a pair of shorts, a t-shirt, and tennis shoes. Before leaving, though, Petitioner convinced Robbie to take him to get some cocaine. (App. 322). After getting the cocaine, Lynch said Petitioner told him he began snorting the cocaine and then "flipped out" beating Robbie and Loyce to death with a baseball bat that was beside Robbie's computer. (App. 323). When Lynch asked Petitioner why he killed Robbie and Loyce, Petitioner responded, "I don't know why. I don't know why I would have done it." (App.

323). Lynch further added that Petitioner told him he fled in Loyce's blue Corsica and went to a trailer park where he used to live where he began drinking, doing cocaine, and taking pills before surrendering to authorities. (App. 324).

After the conclusion of the State's case, the defense presented testimony from Carl Moore, who claimed he was drinking and doing cocaine with Petitioner from 3:30 p.m. Friday afternoon until the following Monday when Petitioner was apprehended in Moore's trailer. (App. 586, 589). Moore added that, while he remembered Petitioner was driving a blue car, he did not remember going to the bank with Petitioner on Saturday morning, despite evidence from the State that clearly showed Petitioner had visited a bank in Horry County at approximately 10:30 on Saturday morning. (App. 591-92, 279-80).

Presentation of Issue at Trial

Prior to trial, the State sought a ruling regarding the admissibility of the April 2005 incident in which Appellant pushed Robbie and Loyce, took Loyce's pocketbook, and fled in Lisa's car. (App. 49-50). Specifically, the State argued the event was admissible under Rule 404(b), SCRE as evidence of common scheme or plan explaining there were similar victims and similar circumstances surrounding both incidents, namely that Appellant wanted money and assaulted both Robbie and Loyce in order to get money. (App. 50-51). In response, defense counsel maintained the evidence did not meet any of the exceptions listed in Rule 404(b), SCRE, and was highly prejudicial. (App. 52). Replying to defense counsel's argument, the State passed up a case, State v. Derrick Ford and Nancy Brown, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999), in which the Court of Appeals found evidence that the accused had robbed and attempted to rob the victim on two prior occasions was admissible under Rule 404(b), SCRE exceptions for motive, intent, and common scheme or plan. Ford and Brown, 334 S.C. at 450-53, 513 S.E.2d at

388-89. The trial court then took the matter under advisement telling the parties it would review the case. (App. 53).

Thereafter, when court resumed, defense counsel argued that Ford and Brown was distinguishable from the present case because, in addition to having the same victim, the defendants in Ford and Brown stated during every encounter that if the victim did not give them $200, they were going to shoot him in the head. (App. 54-55). Responding to defense counsel's attempt to distinguish the present case from Ford and Brown, the State argued that "separate and aside from the prior bad acts and common scheme and plan, there is a separate case, State v. Williams, which addresses the use of evidence of previous quarrels and ill feeling and hostile acts between parties as admissible in homicide cases to show that animosity probably existed between the parties at the time of the homicide." (App. 55-56). Continuing, the State added that there would be other witnesses who would testify that there were additional threats made by Petitioner to Robbie while Petitioner was still in prison. (App. 56).

After briefly dismissing and reconvening again, the trial court found the April 2005 incident was admissible as part of a common scheme or plan, citing to Ford and Brown. In his ruling, the trial court explained that, like Ford and Brown, the prior bad act at issue in the present case involved similar crimes and the same victims. (App. 72-74). Additionally, the trial court noted that while the timeframe for the prior bad acts was more remote than in Ford and Brown, the fact that Petitioner was in prison during much of the intervening time, and the relatively short amount of time between when he was released and when the murder occurred, mitigated the remoteness of the timeframe. (App. 73-74). Performing the Rule 403 analysis, the trial court found the April 2005 incident was highly probative and thus the prejudicial value of the previous conviction did not substantially outweigh its probative value. (App. 74).

Additionally, the trial court noted the April 2005 incident was admissible under State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996), explaining "[e]vidence of previous quarrels, ill feelings and hostile acts between the parties is admissible to show the animus that probably existed between the parties." (App. 74). Continuing, the trial court summarized its ruling, stating "[s]o the court's ruling is that the proposed evidence does meet the requirements of State. v. Lyle, Rule 404(b); that the probative value outweighs prejudicial effect, and further that it is admissible under State v. Williams." (App. 74-75).

Following opening arguments, the State called Lisa, who testified regarding the April 2005 incident without objection. (App.109-13). Thereafter, defense counsel extensively cross-examined Lisa regarding the incident. (App. 115-16). Similarly, Eddie testified regarding the April 2005 incident without objection. (App. 123-24). Four witnesses later however, when the clerk of court was called to introduce the prior conviction itself, defense counsel, for the first time, renewed its objection. (App. 196).

Finally, in its charge to the jury the, trial court instructed:

> Now ladies and gentlemen, with regard to evidence of over (sic) crimes, the evidence is limited to the consideration by you as it relates to: (1) motive for the offense charged in this case[;] (2) intent in regard to the commission of the offenses charged in this case[;] (3)absence of mistake or accident in reference to the offenses charged in this case[;] (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or [;] (5) the identity of the person charged with the commission of the crime on trial. The evidence is limited to those purposes and uses. This evidence cannot be used for any other purpose. This type of evidence must not be considered in any other fashion.

(App. 691-92).

Issue Raised on Appeal

Petitioner's argument on appeal was that "[t]he trial court judge erred when he allowed the state to elicit improper character evidence at Gathings's trial for two counts of murder and

grand larceny when the testimony, involving a physical confrontation two years earlier, was not properly admitted as evidence of common scheme or plan, nor was it relevant to motive." The analysis of this issue focused on the factual dissimilarity between the two events, and included consideration under Lyle and Rule 403, SCRE. The State, in its briefs, noted that Petitioner's brief did not analyze the ruling under the trial court's separate finding of admissibility under Williams.

STANDARD OF REVIEW

The proper standard of review in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts strongly presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this

Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

Similar to evaluations of trial counsel, the Court applies a two-pronged test in evaluating allegations of ineffective assistance of appellate counsel. The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581, S.E.2d 834 (2003). The burden of proof is upon petitioner to show counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. The petitioner must then prove that because of appellate counsel's deficient performance there is a reasonable probability that, but for appellate counsel's unprofessional errors, the result of the proceeding (*appeal, not trial*) would have been different. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed [to] present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Appellate counsel need not, and perhaps should not, raise every nonfrivolous claim, "but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288 (2000) (referring to Jones v. Barnes, 463 U.S. 745, (1983)). In a review of the strength of the issues appellate counsel raised, [s]ignificant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray

v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Where the result of an appeal would have been different had appellate counsel not been deficient, the appropriate remedy is to grant a new trial. Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001).

ARGUMENT

The post-conviction relief court was correct in ruling that trial counsel was effective in its handling of prior bad acts evidence, as all three grounds for objecting were effectively made and preserved; therefore, there is no reasonable probability that, even if they were raised on appeal, appellate counsel would have been successful.

Probative evidence exists for this Court to uphold the post-conviction relief judge's findings. In particular, "Applicant has failed to demonstrate the outcome of his appeal would have been different had appellate counsel raised this issue. Anderson, 354 S.C. at 434, 581 S.E.2d at 835." (App. p. 855, referring to Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003).) Ultimately, Petitioner did not prove that there is a reasonable probability that, but for appellate counsel's alleged ineffective assistance, the result of the proceeding would have been different. Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (citing Strickland, 466 U.S. at 696).[1]

The trial court ruling from which all of these arguments stem is the allowance of evidence of prior bad acts. During pretrial motions, the trial judge ruled that evidence of Petitioner's prior convictions from an incident with the victims would be admissible.[2] In particular, the trial judge states that he found it admissible pursuant to "State v. Lyle and 404(b); that the probative value outweighs prejudicial effect, and further that it is admissible under State v. Williams." (App. p.74, line 23-p.75, line 2.) These admissions were made over the objections of defense counsel, and these objections were renewed throughout the trial. These rulings were

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[1] In his brief, Petitioner argues that there is a difference between "reasonable probability" of success on appeal as required by Southerland and guaranteed success on appeal. Defined in Strickland, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.This is a sufficiently high bar that comparing it to the statement "the outcome of his appeal would have been different had appellate counsel raised this issue," as mentioned by Petitioner, is appropriate. There is a logical fallacy in saying that the PCR judge "seemed to require" an inappropriately high standard, as the standard stated is the one required.

[2] The ruling is at page 72, line 21 – page 75, line 2 of the Appendix.

the sole issue presented by appellate counsel in her brief before the Court of Appeals. Because the trial court's rulings were appropriate and correct, there was no prejudice suffered by Petitioner due to any failures by appellate counsel, as there is no reasonable probability that the outcome would have differed.

Petitioner analyzed each of the three "alternative rulings" he found in the case, attempting to provide an explanation for why each was incorrect and should have been raised on appeal. A similar, yet converse, analysis follows below.

Evidence of Animus

The trial court correctly found, under State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996), that the evidence at issue was admissible to show evidence of animus between the parties. Indeed, South Carolina law clearly allows for the admission of previous quarrels, ill feelings, or hostile acts between the parties in a homicide prosecution. See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("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."). Both the post-conviction relief judge and Petitioner cited these cases, though for different points. Petitioner argues that, under Braxton, any evidence allowed under the stated exception should not be of criminal acts, but rather should be of arguments or disagreements, for example. State v. Clinkscales, 231 S.C. 650, 654, 99 S.E.2d 663, 665 (1957), is also cited as being in support of this proposition, yet it contains the language, "in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible[.]"

Petitioner pursues the point that the trial judge further erred in allowing testimony regarding specific facts of the 2005 incident, as this line of cases forbids this as evidence.

Specifically, he argues that, because of his arrest, indictment, plea (and, the State adds, incarceration), this was more than "previous quarrels and ill will" as contemplated by Braxton. Braxton, 343 S.C. at 636, 541 S.E.2d at 836-37. The State submits that, if this can even be considered error, it is harmless. Further, any evidence introduced to show "what demeanor each party had reason to expect from the other when they met and the fatal difficulty occurred" is useful, per Clinkscales. 231 S.C. at 654, 99 S.E.2d at 665.

Due to the volatility of this relationship, evidence of the 2005 incident is just as relevant as evidence of the fact that the decedents allowed Petitioner back into the home after his release, as well as the fight the night before the incident. There seems to have been no way for anyone to expect a certain demeanor, so all of this evidence is relevant, and the jury could have clearly found animus between the parties. The trial court, much like the trial court in Williams and Clinkscales, identified the hostile act, in the present case, an assault and strong armed robbery, was probative of the relationship between Petitioner and his victims. In fact, the April 2005 incident serves as a manifestation of Petitioner's will to get money, by whatever means necessary, in order to purchase drugs. Moreover, the April 2005 incident was probative in that it detailed Petitioner had no problem confronting his lover or his lover's mother, the specific victims in this case, to get what he wanted. Additionally, the April 2005 incident gave the jury a background of the history of the relationships between the parties, much like the evidence in Braxton that the victim was scared of the appellant based upon a previous encounter. Indeed, had the jury not been able to hear of the April 2005 incident, it would have been unable to completely assess the volatility of the relationship between Robbie and Appellant, nor would they have understood the significance of Appellant's threat that he was going to "fuck [Robbie] up." Further, the jury would not have had a context in which to evaluate Lisa and Eddie's

concern in regards to Appellant moving in with Robbie and Loyce. Therefore, the trial court correctly found the April 2005 incident was admissible to show evidence of animus between the parties.

This overwhelming weight in favor of admissibility due the existence of supports the argument that a failure to brief it was not prejudicial to Petitioner. Because of the trial judge's entire analysis, and particularly in light of other evidence of the Petitioner's guilt, the fact that the jury heard details of the prior incident and convictions was not fatal to the case. For the above reasons, the State submits that the prior bad act evidence was admissible to show animus, particularly under Williams, and that appellate counsel did not cause any prejudice to Petitioner in her briefing of the issue.

Rule 403, SCRE

In making his decision regarding the admissibility of this evidence, the trial court complete a proper analysis under Rule 403, SCRE, in that he weighed the prejudicial versus probative value of the evidence before allowing it to be presented to the jury. Admissible evidence "may be excluded if its probative value substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2.d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime). Furthermore, "[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case." State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). Here, the State submits the April 2005 incident is highly probative of Petitioner's guilt, as (1) it highlights the relationship

between the parties; (2) it makes it more probable Petitioner acted with malice aforethought, since he previously assaulted and robbed both victims for drug money; and (3) the existence of the prior bad act is not disputed. Furthermore, since the jury was instructed on the limited purpose for which it could consider prior bad acts, and there is a presumption juries follow the law, the State submits the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C., 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.").

Having established the trial court followed proper procedure, as well as that there is plentiful and convincing evidence that his result was proper, the State argues that any failure on appellate counsel's part to brief this issue did not ultimately prejudice Petitioner. Were this issue briefed, there is no reasonable probability that the outcome of the appeal would have been different, as this ruling is bolstered by strong facts and properly applied case law. Petitioner argues that evidence of the prior conviction is meant to appeal to emotion[3], and it puts Petitioner on trial for a prior criminal or immoral act[4]. These accusations are improper and unfounded, given the weight of the probative value of the prior conviction. Therefore, as the evidence was properly admitted, there could be no ineffective assistance of counsel in failing to brief the issue, as Petitioner was not prejudiced by this action.

404(b), SCRE

[3] Citing United States v. Mohr, 318 F.3d 613, 619-20 (4th Cir. 2003). BOP, p.36.
[4] Citing State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). BOP, p.36.

The argument on direct appeal by Petitioner was that the character evidence "was not properly admitted as evidence of a common scheme or plan, nor was it relevant to motive." (App. 722). Certainly, common scheme or plan and motive are two of the exceptions to the rule, which ordinarily precludes introduction of evidence of a defendant's other crimes. In his brief, Peittioner cites to the canon of case law regarding admissibility of evidence under these exceptions, particularly under common scheme or plan, as that was briefed on direct appeal. This includes a citation to State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011) for a description of how such evidence must be introduced and what tests the trial court must engage in before determining its admissibility. He then continues to quote a string of cases describing evidence of a prior bad act must be sufficiently "similar"[5] and "logically relevant to the particular purpose or purposes for which it is sought to be introduced."[6]

However, all of Petitioner's analysis focuses on how these facts do not fall into the guidelines of a common scheme or plan. The argument made by Petitioner now and in his appeal is that the trial judge erred in his evaluation of the various elements and came to an improper conclusion regarding admissibility. This is contrary to the findings of both the trial and post-conviction relief judges, whom found that the evidence was clearly admissible to show a common scheme or plan.

Petitioner compares Petitioner's crimes to those in State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993), which dealt with a death resulting from beating injuries and, during the trial of which, *in camera* witnesses were offered to testify to a prior altercation between the parties.

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[5] "The connection 'must be more than just a general similarity.' [State v.] Parker, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993) (citing State v. Stokes. 279 S.C. 191, 304 S.E.2d 814 (1983)); see also State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997)."

[6] "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).

The facts of that case were that Parker and the decedent had met before, in the same place, and Parker had declined the deceased's invitation to fight. The relationship deteriorated, but there was no violence between the two before the night of the incident. These instances were deemed not to be similar enough to allow the evidence.

Petitioner also cites to State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997), a homicide by child abuse case, in which a witness's testimony she had seen Pierce "jerk" her two-year-old son into a stroller was not sufficiently similar to the fact that the child hit his head and appeared uninjured on the night he died. In contrast to Parker and Pierce, the State offers State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), which Petitioner actually used in the brief on direct appeal to show the type of similarity needed to allow in evidence of prior bad acts. Though Petitioner alleged that the evidence in the case at bar did not match the level of similarity in Hallman, the State disagrees. Hallman dealt with sexual abuse in a foster home, but there are descriptions that readily apply to this case – a special relationship existed between the defendant and victims, the extent of the abuse grew more severe over each occasion, and each altercation arose under similar circumstances. Certainly, these can all describe the case at bar, where Petitioner lived with the victims, his harm toward them escalated, and both incidents arose in the home that they shared. In fact, many cases discussing similarity between offenses look at similarity of victims; certainly the fact that these are the same victims proves substantial similarity. To put it more succinctly, "[w]hen a criminal defendant's prior bad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan." State v. Martucci, 380 S.C. 232, 255, 669 S.E.2d 598, 610 (Ct. App. 2008) (citing State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).) "When a review of all pertinent factors establishes a 'close degree of similarity,' no further analysis is necessary; the evidence is

admissible." State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013) (citing State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009).)

As for proximity in time, the State argues that the trial judge properly discounted the time between the events to allow for the period of Petitioner's incarceration for the first offenses. Though Petitioner alleges (without citation to any testimony) "there were no hard feelings among the parties as evidence by Robbie and Loyce allowing Petitioner to live with them after release," the State submits that sharing a home and harboring ill will toward someone are not mutually exclusive. Therefore, the trial judge did not err in his evaluation of the time between incidents, as only two months had elapsed between Petitioner's release and the second offenses.

When considering motive and intent as exceptions to the rules espoused by Lyle and Rule 404(b), Petitioner sites to State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) for the proposition that there must be "some connection of cause and effect between the evidence and the crime" in order to allow evidence of previous difficulties." Id., 275 S.C. at 296, 270 S.E.2d at 128. As discussed above, the State submits more recent cases, all of which stand for the proposition 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" are more appropriate in this evaluation. State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996).

Furthermore, there is another option by which a 404(b) exception could be applied – that of intent. On direct appeal, the State argued that, because murder requires proof of malice, the State should be allowed to introduce evidence regarding the April 2005 incident, as the commission of the previous incident made it more likely Petitioner was acting with malice when he beat Robbie and Loyce to death in order to get more drug money, as he had previously assaulted them in an attempt to get drug money. To support this proposition, the State cited State

v. Wiles, 383 S.C. 151, 158, 679 S.E.2.d 172, 176 (2009) for the conclusion that evidence that is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime, as well as State v. Sweat, 362.S.C. 117, 124, 606 S.E.2d 508. 512 (Ct. App. 2004) for the idea notion that evidence demonstrating the appellant was previously jailed on criminal domestic violence charges and had recently been released from jail prior to the incident which lead to his being charged with assault with intent to kill was admissible as evidence of intent under Rule 404(b), SCRE. Certainly the evidence of the 2005 crime, which involved the same victims and for which Petitioner spent most of the intervening period incarcerated, "tends to establish or make more or less probable the matter in controversy" as it can be used to show intent. Wiles, 383 S.C. at 158, 689 S.E2d at 176.

Both of these examples show ways in which the exceptions of Rule 404(b), SCRE are navigated without running afoul of any rule of law. Certainly, these exceptions exist to allow these types of evidence to be admitted for the benefit of the factfinder. In considering the prior bad act evidence, the trial court reviewed the exceptions under Rule 404(b), SCRE, and performed the appropriate balancing test under Rule 403, SCRE. The result of these actions was that the evidence was deemed admissible. There is no reasonable probability that briefing by appellate counsel, whether better, different, or initial, of these issues would have change the outcome of the appeal as required by Southerland. For these reasons, the post-conviction relief court's decision should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the post-conviction relief court's findings.

Respectfully submitted,

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March 14, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO MARLBORO COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-000358

Allan J. Gathings,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Jessica E. Kinard, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Susan B. Hackett, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 14th day of March, 2018.

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