ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG 23 2018
S.C. SUPREME COURT

August 21, 2018

The Honorable Daniel E. Shearouse
Clerk – South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: **Leslie Todd Parvin, Respondent v. State of South Carolina, Petitioner**
Case No. 2017-CP-40-2220

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

Sincerely,

Christian Saville
Assistant Attorney General
SC Bar #103272

CS/can
Enclosures

cc:

Dwight F. Drake, Esquire
Matt A. Abee, Esquire
Richard A. Harpootlian, Esquire
Christopher P. Kenney, Esquire
South Carolina Department of Corrections
Richland County Clerk of Court
Solicitor Daniel E. Johnson
Victim Advocacy Division

RECEIVED

AUG 23 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Case No. 2017-CP-40-2220

Leslie Todd Parvin, #349127 ..... Respondent,

v.

State of South Carolina, ... Petitioner.

NOTICE OF APPEAL

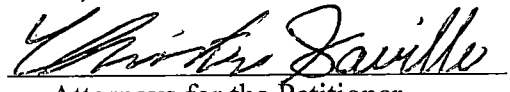
The State of South Carolina appeals the Honorable Brooks P. Goldsmith's order granting post-conviction relief filed June 27, 2018. Petitioner filed its motion to reconsider pursuant to Rule 59(e), SCRCP, on July 9, 2018. Respondent submitted a response to the motion, and Petitioner made its reply on August 6, 2018. Petitioner's motion was denied on August 16, 2018. A copy of the order on appeal is attached to this notice.

August 21, 2018

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General
S.C. Bar No. 103272
P.O. Box 11549
Columbia, S.C. 29211

By: 
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In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
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Leslie Todd Parvin, #349127 ..... Respondent,

v.

State of South Carolina, ... Petitioner.

PROOF OF SERVICE

I, Christian Saville, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorneys of record:

Dwight F. Drake, Esquire
Matt A. Abee, Esquire
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served this 21 day of August, 2018.

CHRISTIAN SAVILLE
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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Case No. 2017-CP-40-2220

Leslie Todd Parvin, #349127 ..... Respondent,

v.

State of South Carolina, ... Petitioner.

PROOF OF SERVICE

I, Christian Saville, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorneys of record:

Richard A. Harpootlian, Esquire
Christopher P. Kenney, Esquire
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I further certify that all parties required by Rule to be served have been served this 21 day of August, 2018.

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Leslie Todd Parvin (#349127), Applicant, vs. State of South Carolina, Respondent.	)))))))))	Civil Action No. 2017-CP-40-02220 **Order** **Granting Post-Conviction Relief**

Applicant Leslie Todd Parvin was indicted on two counts of murder related to the deaths of Edgar Lopez and Pablo Guzman-Gutierrez. Before, during, and after trial, Parvin unsuccessfully tried to exclude certain hearsay statements by Lopez that Parvin had solicited and paid Lopez for sex. Despite Parvin's objections to the testimony of two witnesses who heard Lopez's statements, the trial court admitted the statements. The Court of Appeals ruled that admitting the hearsay was error, but found the error harmless because Parvin's trial counsel failed to object when two investigators later testified about the same hearsay statements. *State v. Parvin*, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015). Parvin contends his trial counsel's failure to object to the investigators' hearsay testimony denied him the effective assistance of counsel guaranteed by the Sixth Amendment because, but-for trial counsel's failure to contemporaneously object, the Court of Appeals would have reversed his convictions.

The Court held a post-conviction relief (PCR) hearing on March 21, 2018. Assistant Attorneys General Jessica E. Kinard and Christian Saville appeared for the State. Richard Harpootlian and Christopher Kenney of Richard A. Harpootlian, PA, as well as Dwight F. Drake and Matthew A. Abee of Nelson Mullins Riley & Scarborough LLP appeared for Parvin. Having

reviewed the record and competing proposed orders filed by Parvin and the State, Parvin's application for PCR is **GRANTED** and his convictions are **VACATED**.

Standard of Review

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Rutland v. State*, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016) (citing U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 683 (1984)). Under *Strickland*, a PCR applicant can establish a claim for ineffective assistance of counsel by proving: (1) counsel failed to render reasonably effective assistance under prevailing professional norms and (2) the deficient performance prejudiced the applicant's case. *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland*, 466 U.S. at 687), abrogated in part by *Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 840 n.2 (2018), reh'g denied (Mar. 29, 2018).

Under the effective-assistance prong, trial counsel's assistance is measured by "an objective standard of reasonableness." *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). Under the prejudice prong, an applicant must show a "reasonable probability" that but for counsel's errors, the result of the trial would have been different. *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *Id.* at 603, 602 S.E.2d at 740–41; *Strickland*, 466 U.S. at 687–94. An applicant bears the burden of proving both prongs. *Porter*, 368 S.C. at 383, 629 S.E.2d at 356.

Findings of Fact

A circuit court hearing an application for PCR must resolve any factual dispute necessary to decide the application. *See* S.C. Code Ann. § 17-27-70; *Leamon v. State*, 363 S.C. 432, 434, 611

S.E.2d 494, 495 (2005). To do so, the Court must weigh the credibility of witnesses and determine the weight to give the evidence presented. *See Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). The Court's decision must be supported by probative evidence. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (PCR court's findings will be upheld "if there is any evidence of probative value sufficient to support them.").

The Court has carefully reviewed the record. That review has included an examination of the full transcript from the December 12–21, 2011 trial, live testimony taken during the PCR hearing, and the Court of Appeals' opinion on rehearing in Parvin's direct appeal.[1] Having made such a review, the Court makes the following factual findings.

A. The State's Theory and Parvin's Defense

To understand Parvin's PCR application, it is necessary first to understand the theories the State and Parvin tried to the jury. It is undisputed that Parvin noticed Lopez and Guzman-Gutierrez drinking in the front yard of a house near Parvin's neighborhood. Parvin stopped and introduced himself, and the group drank together along with others who came and went throughout the evening. When the beer was finished, Parvin and Lopez went to a gas station, bought beer, and returned to the same house. Eventually, Parvin would shoot Lopez and Guzman-Gutierrez, and would then be indicted on two counts of murder by the Richland County Grand Jury (2011-GS-40-897 and -898).

As the Court of Appeals explained, the State tried the case under the theory that Parvin solicited Lopez for sex and, when Lopez refused to have sex with him, Parvin killed Lopez and Guzman-Gutierrez in retaliation. *Parvin*, 413 S.C. at 499, 777 S.E.2d at 1. The State based this

[1] The full trial transcript of the trial and the Court of Appeals' opinion in *State v. Parvin*, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015) were admitted into evidence without objection at the PCR Hearing. (PCR Hr'g. Tr. 13:4–12, Mar. 21, 2018.)

theory on statements Lopez made at the gas station before his death to two separate witnesses: Adan Soto and Marlin Avila. Both testified that Lopez said Parvin paid Lopez money for sex. (Trial Tr. 303:10–304:16; 312:13–25.) In its opening and closing statements to the jury, the State argued Parvin was a closeted homosexual veteran who led a secret double life. (Trial Tr. 239:21–240:24; 242:20–244:17; 1667:17–68:7.) In one life, he was a military hero, a veteran, and a devoted family man; in the other life, he solicited and paid unknown men for sex. (*Id.*)

Parvin disputed the State's sex-for-money claims and defended on the grounds of self-defense. (Trial Tr. 263:1–2; 264:3–12; 1070:13–72:14; 1121:19–24; 1123:10–13; 1124:18–21; 1144:8–21; 1623:15–24.) Parvin testified he was out looking for scrap metal, stopped for beer, and was headed home when he stopped to speak to Lopez and Guzman-Gutierrez about salvage. (Trial Tr. 1091:22–97:24) After the men spoke for a time, Parvin and Lopez drove to the gas station to buy more beer, then returned to the house. (Trial Tr. 1102:21–03:7; 1106:18–08:21). Parvin testified his interactions with Lopez and Guzman-Gutierrez escalated when Lopez refused to allow Parvin to leave without paying more money. (Trial Tr. 1114:18–18:5; 1120:2–13.) When Parvin refused, Lopez became visibly upset and threatened Parvin and his family. (Trial Tr. 1120:14–21:24.) Parvin still tried to leave, but Guzman-Gutierrez blocked the exit from the yard, making physical contact in the process. (Trial Tr. 1118:3–5; 1122:6–12.) When Guzman-Gutierrez tried to obtain control of the pistol Parvin was carrying, Parvin saw Lopez reach for something in the shed in the yard. (Trial Tr. 1122:7–18.) Fearful for his life, Parvin used his gun and military training to protect himself shooting both Lopez and Guzman-Gutierrez. (Trial Tr. 1122:19–24:21.)[2] Because of Parvin's testimony, the trial court charged the jury on self-defense. (Trial Tr. 1691:19–95:17.)

[2] Parvin had served a distinguished 20-year military career, including five tours of duty, and the Bronze Star. (Trial Tr. 1063:1–65:24; 1071:11–18; 1076:1–1077:6.)

B. Trial Counsel's Objections to the Hearsay Testimony

Because the State intended to proceed on the theory that Parvin had solicited Lopez for sex, Parvin moved *in limine* to exclude any testimony of other bad acts. *Parvin*, 413 S.C. at 499, 777 S.E.2d at 1. Parvin argued the State's theory was based on witnesses who would testify to the statements Lopez made to Soto and Avila at the gas station about Parvin's alleged payment for sex. (Trial Tr. 101–11.) Parvin specifically objected to the statements as inadmissible hearsay to which the present sense impression exception did not apply. (Trial Tr. 106:18–22.) The trial court denied the pretrial motion. (Trial Tr. 179:3–9.) The trial court ruled the Lopez statements (1) were admissible under the *rès gestae* theory, (2) constituted an exception to the hearsay rule, and (3) were probative to Parvin's motive. (Trial Tr. 179:3–9.) During trial, the trial court clarified its decision and stated that in admitting the testimonies under the *res gestae* theory, the testimonies "did not involve other crimes, but may have suggested some bad acts." *Parvin*, 413 S.C. at 500, 777 S.E.2d at 2.

Parvin renewed his objection to these statements at trial. When Soto testified that "[Lopez] said the American [Parvin] had given him $200 to buy beer because he wanted to have sex with him" (Trial Tr. 304:15–16), Parvin objected and was overruled, (Trial Tr. 303:15–17). When Avila also testified that "[Lopez] said that the American had given him money to buy beer and he said the American had given him $200 to have sex," (Trial Tr. 312:24–25), Parvin objected and was again overruled (Trial Tr. 312:21–24).

C. Trial Counsel's Failure to Object to the Hearsay Testimony

The State later presented Investigator William Gonzales and Investigator Brien Gwyn. (Trial Tr. 694–721 (Gonzalez); 873–956 (Gwyn).) Both testified that Soto and Avila told them about Lopez's statements. On cross, Investigator Gonzalez testified:

Q: And in your report you noted that [Avila] told you that . . . [Lopez] referred to the American as "the fuc**** American," and you put that in your report?
A: That's correct . . .
Q: And the next—I'm sorry. You were also involved in, as the solicitor stated, the arrest of—
A: Well, it—can I clarify one thing? It wasn't just "the fuc**** American." It was, "the fuc**** American[who] gave me $200 to have sex with him."

(Trial Tr. 714:12–25.) Trial counsel failed to object to this hearsay testimony.

The second investigator testified from his report on direct to the same statements that Lopez had made to the witnesses: "Both in their statement advised us that according to [Lopez]'s conversation with [Soto and Avila] in the store or at the store, [Lopez] was solicited for sex by the individual he was at the store with [Parvin]." (Trial Tr. 890:22–25.) Trial counsel again failed to object to this hearsay testimony.

D. Parvin's Conviction and Appeal

The jury convicted Parvin on two counts of murder and the trial court sentenced him to 35 years in prison. (Trial Tr. 1741:15–1742:11.) Parvin timely moved for a new trial based on the improper admission of the hearsay testimony, which was denied. Parvin's direct appeal was timely filed—he argued the trial court improperly admitted the Lopez statements as a present sense impression under Rule 803(1), SCRE. *Parvin*, 413 S.C. at 502–03, 777 S.E.2d at 4.

After issuing its initial opinion, the Court of Appeals granted rehearing to decide whether trial counsel's failure to object to the investigator's hearsay testimony rendered the trial court's error in admitting the hearsay harmless. *Parvin*, 413 S.C. at 505–06, 777 S.E.2d at 5. The State did not argue that the trial court's reliance on the present sense impression exception was correct on rehearing, nor did it challenge the Court of Appeals' holding that the exception did not apply. On rehearing the Court of Appeals again affirmed, explaining:

> [T]he admission of Soto's and Avila's testimonies was rendered harmless in light of the other evidence that was later admitted at trial without objection. The investigators' unobjected-to testimonies was other evidence that tended to support the substance of Soto's and Avila's testimonies—that Parvin offered Lopez $200 in exchange for sex. Because this other evidence became cumulative to Soto's and Avila's testimonies and was admitted without objection, we find the error in allowing Soto's and Avila's testimonies was rendered harmless.

Parvin, 413 S.C. at 507, 777 S.E.2d at 6. Parvin timely petitioned for certiorari, which was denied on September 9, 2016.

E. Parvin's PCR Hearing

Parvin filed his PCR application on April 12, 2017. Parvin argues the seminal issue on appeal was whether the trial court erred in admitting the Lopez statements as present sense impressions, such that his trial counsel was ineffective when they failed to properly preserve the argument on appeal by making contemporaneous objections to the investigators' hearsay statements.[3] (PCR Application.) Parvin argues that had trial counsel objected to the investigators' testimony, the Court of Appeals could not have affirmed under the harmless error doctrine, but would have reversed his conviction and remanded for a new trial. (*Id.*)

To support his claim, Parvin called his former trial counsels and an expert witness to testify. Parvin's lead trial counsel admitted she was deficient in failing to object to the investigators' hearsay testimony. (PCR Hr'g. Tr. 34:8–13; 36:2–5; 39:17–19.) Trial counsel knew this testimony "was a problem, and also thought it was inadmissible." (PCR Hr'g. Tr. 27:4–5.) Aside from the Lopez hearsay statements, Parvin's trial counsel were unaware of any evidence or history that corroborated the State's theory that Parvin led a secret life soliciting sex from other men, and

[3] At the PCR Hearing, Parvin waived a second, unrelated ground for post-conviction relief about trial counsel's failure to introduce evidence that Parvin suffered from post-traumatic stress disorder (PTSD) from his military service. (PCR Hr'g. Tr. 9:23–25.)

presented more than a dozen character witnesses to testify based on their knowledge of Parvin's family life and 20 years of enlisted military service. (PCR Hr'g. Tr. 15:6–17:21.) Notwithstanding the importance Parvin's trial counsels ascribed to excluding and disputing the Lopez hearsay statements (PCR Hr'g. Tr. 39:8–16), trial co-counsel could not explain the failure to object to the investigators' testimony (PCR Hr'g. Tr. 19:5–20:6), and lead counsel confirmed that allowing the hearsay was not a part of any trial strategy (PCR Hr'g. Tr. 39:1–7). Further, Parvin's expert testified it was well understood by the criminal defense bar that a contemporaneous objection was necessary to preserve the issue on appeal.[4]

Though the State did not call any witnesses, it did cross-examine Parvin's lead trial counsel. (PCR Hr'g. Tr. 40–48.) Most of the cross-examination centered on other evidence presented at trial concerning Parvin leaving for Texas for two weeks following the incident and whether solicitation of sex for money would be a crime standing alone. (*Id.*) The State also cross-examined lead trial counsel on the trial court's grounds for admitting the hearsay statements, suggesting the trial court ruled the statements admissible under a *res gestae* theory or under Rule 403, SCRE. (PCR Hr'g. Tr. 45:21–47:21.) Trial counsel agreed there were several grounds discussed by the trial court as grounds to admit the hearsay statements. (PCR Hr'g. Tr. 47:17–21.)

[4] Jack Swerling, Esquire, a well-known criminal defense practitioner of 44 years who has defended many homicide cases, testified that trial counsel's performance fell below the applicable standard of care because a contemporaneous objection was required. (PCR Hr'g. Tr. 52:2–53:10; 59:14–23; 60:12–61:18; 62:6–11.) The Court found Mr. Swerling qualified (PCR Hr'g. Tr. 58:15–17) and his opinion relevant to what objectively reasonable counsel should have known in those circumstances, without infringing the Court's province to decide the ultimate legal issue. *See* Rule 704, SCRE; *see also Green*, 351 S.C. at 198, 569 S.E.2d at 325 (holding a lawyer-expert's opinion offering "no factual evidence" constituted inadmissible legal conclusion); *but see Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014) (collecting cases for the proposition that a legal malpractice claimant "must rely on expert testimony" to establish breach of the standard of care), abrogated by *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

Yet, as Parvin correctly pointed out on redirect, lead trial counsel was not involved in the direct appeal where the State confirmed that "it was not attempting to enter the Lopez statements pursuant to 404(b)." (PCR Hr'g. Tr. 48:20–49:7 (quoting *Parvin*, 413 S.C. at 500, 777 S.E.2d at 2).) Put differently, the record here indicates the State's sole theory of admissibility for the hearsay statements is under Rule 803(1), SCRE—a theory the Court of Appeals rejected as legal error. *Parvin*, 413 S.C. at 504, 777 S.E.2d at 4 ("We find the trial court erred in ruling the Lopez statements were admissible . . . .").

At the end of the hearing, the Court ordered the parties to submit competing proposed orders after receiving the transcript. Those orders were submitted by the parties and carefully reviewed by the Court.

Conclusions of Law

Parvin has met both prongs under *Strickland* here. First, trial counsel's performance was deficient by failing to object—after having objected before trial, during the testimony of two witnesses, and after trial—to the hearsay testimony given by the State's investigators. Second, as evidenced by the Court of Appeals' opinion, the hearsay statements were central to the State's theory at trial and should not have been admitted. As a result, Parvin has proven that but for trial counsel's failure to timely object to the introduction of the hearsay statements by the investigators, his conviction would have been reversed for a new trial without the hearsay statements. As a result, Parvin's petition must be granted.

I. Trial counsel was deficient in failing to object to the investigators' hearsay testimony.

Petitioner asserts that trial counsel rendered ineffective assistance by failing to object to inadmissible hearsay testimony given by the State's investigators. The Court agrees and holds trial counsel's failure to object was objectively unreasonable under prevailing professional norms.

Not only must counsel make a timely objection to exclude evidence, *see* Rule 103(a)(1), SCRE, but counsel must consistently object to the evidence they seek to exclude, *see Parr v. Gaines*, 309 S.C. 477, 481–82, 424 S.E.2d 515, 518–19 (Ct. App. 1992). That did not happen here. While Parvin's trial counsel made contemporaneous objections to Soto's and Avila's testimony that preserved the hearsay objections raised before trial, (Trial Tr. 304:15–16; 312:24–25), that work was rendered meaningless when trial counsel failed to object to the testimony given by the State's investigators. Because trial counsel objected to Soto's and Avila's testimony, they were clearly aware the testimony was problematic for Parvin's defense and improper under the rules of evidence. *See Holman v. State*, 381 S.C. 491, 493, 674 S.E.2d 171, 172 (2009) (granting post-conviction relief for trial counsel's failure to object to "clearly inadmissible evidence"). Moreover, the uncontradicted testimony of lead trial counsel, co-counsel (PCR Hr'g Tr. 19:25–20:6), and an independent expert witness establish that an objectively reasonable trial practitioner should have known a contemporaneous objection to the investigators' testimony was necessary to preserve the hearsay objection. Thus, trial counsel's oversight constitutes ineffective assistance.

Precedent supports this conclusion. Failure to make a timely objection to preserve an issue for appeal is routinely held as ineffective assistance unless trial counsel can point to a valid trial strategy for failing to object. *See, e.g., Stone v. State*, 419 S.C. 370, 798 S.E.2d 561, 570 (2017) (rejecting various explanations by trial counsel as failing "to articulate any valid strategic reason for not objecting to important victim impact testimony the trial court had the discretion to exclude."); *Holman v. State*, 381 S.C. 491, 492–93, 674 S.E.2d 171, 172 (2009) (trial counsel's failure to object to "clearly inadmissible evidence" was "troubling" and constituted ineffective assistance); *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996) (granting PCR where counsel objected to testimony, but not to improper argument regarding the same testimony); *Vail v. State*,

402 S.C. 77, 88–89, 738 S.E.2d 503, 509 (Ct. App. 2013) (admission of inadmissible evidence elsewhere was not a legitimate reason not to object).

Additionally, when trial counsel acknowledges there was no strategy motivating a failure to object, the presumption of adequate representation on that basis disappears. *See Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). As trial counsel candidly admitted, there was no strategy here even though Parvin's trial team harbored real concern about the unfairly prejudicial effect of the hearsay statements. (PCR Hr'g. Tr. 39:4–16.) This necessarily means that the failure to object did not aid Parvin's defense; to the contrary, the State repeatedly cited this evidence as motive for the killings and the Court of Appeals cited the investigators' testimony as grounds to affirm his convictions. *Parvin*, 413 S.C. at 507, 777 S.E.2d at 6 (because the investigator's hearsay "was admitted without objection, we find the error in allowing Soto's and Avila's testimonies was rendered harmless.").

The Court thus holds trial counsel was deficient under the first prong of *Strickland* in failing to object to the admission of the hearsay statements presented to the jury by the State's investigators.

II. As the only evidence supporting the State's theory of the case, Parvin was prejudiced by trial counsel's failure to object.

To satisfy the prejudice prong of *Strickland*, a PCR applicant must establish a "reasonable probability" that the outcome of the trial would have been different had trial counsel not committed the deficiencies outlined above. *See Rutland*, 415 S.C. at 577, 785 S.E.2d at 353. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* (citing *Strickland*, 466 U.S. at 694).

A. Parvin was prejudiced by trial counsel's failure to object.

Parvin argues but for trial counsel's failure to object, his convictions would have been reversed and he would have received a new trial without repeated hearsay testimony and argument claiming the shootings arose from his purported effort to solicit sex for money. The Court agrees.

As an initial matter, it is uncontroverted that the State's entire theory of motive rested on Lopez's refusal to have sex with Parvin. The Court of Appeals reached this conclusion, noting the State's case hinged on its cash-for-sex theory. *Parvin*, 413 S.C. at 499, 777 S.E.2d at 1. Based on this Court's review of the trial record, that theory was repeatedly cited by the State during opening and closing arguments. *Cf. Parvin*, 413 S.C. at 508, 777 S.E.2d at 6 (noting the sex-for-money theory "permeated the entire trial."). Without the hearsay testimony from Soto, Avila, and the investigators concerning Parvin's solicitation of Lopez, the only record explanation for the killings is the one Parvin offered on the stand that he acted in self-defense. While this Court takes no view as to whether a jury would have credited Parvin's testimony in the absence of the Lopez hearsay statements, the jury would have considered a dramatically different version of what occurred that night had the State been barred from returning time and again to its cash-for-sex theory.

The record is clear that the trial court erred in admitting the hearsay statements and, had trial counsel objected to the investigators' testimony, Parvin's appeal would have resulted in a reversal and new trial. "Without an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion." *Stone*, 419 S.C. at 370, 798 S.E.2d at 569–70. More to the point here, assuming the trial court adhered to its earlier rulings allowing the Lopez hearsay statements, the failure to object foreclosed the possibility of appellate relief by negating the substantive, evidentiary debate Parvin won on technical, procedural grounds (i.e., issue

preservation). Thus, trial counsel's error is the but-for cause of Parvin's failure to have his conviction reversed on appeal. *See Parvin*, 413 S.C. at 505, 777 S.E.2d at 4.

These considerations are sufficient to undermine this Court's confidence in the trial result. Accordingly, the Court holds that Parvin was prejudiced by trial counsel's failure to interpose timely objections.

B. The State's alternative theories of admissibility raised at the PCR hearing do not undermine the prejudice to Parvin.

Though the State suggests counsel's error was not prejudicial because of the alternative grounds for admitting the hearsay statements (PCR Hr'g. Tr. 45:21–47:21), it relies on a misapplication of the rules of evidence. Parvin objected to the admission of any evidence he paid for sex as a prior bad act. (Trial Tr. 101.) The only evidence of that prior bad act were statements by Soto and Avila concerning what Lopez told them at the gas station. Parvin objected to the introduction of those statements because they were hearsay. (Trial Tr. 160:18–22.) The State countered the statements were admissible under the present sense impression exception; however, it relied on antiquated language (*res gestae*) to support its argument. (Trial Tr. 107:7–10.) However, the term *res gestae* "is no longer used to describe a hearsay exception." *State v. Gilmore*, 396 S.C. 72, 82 n.9, 719 S.E.2d 688, 694 n.9 (Ct. App. 2011). "Under the Rules of Evidence, which do not use the term [*res gestae*], arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an 'other' act under Rule 404(b), but rather is integral to the crime or event." *Id.* The State made clear that it was not "trying to enter anything under 404(b)." (*Id.*) This distinction is critical to understanding the prejudice caused to Parvin here.

The State is mistaken to suggest that Rules 403 or 404(b) could offer alternative grounds to justify admission of the Lopez statements. *Cf. Parvin*, 413 S.C. at 500, 777 S.E.2d at 2 (noting the trial court "clarified its decision" by stating the Lopez statements "may have suggested some

bad acts" and that the statements' "probative value of the evidence outweighed the prejudicial effect."). Generally, these are rules of *exclusion*, not inclusion. *See* Rule 403 ("Although relevant, evidence may be excluded ...") & 404(b) ("Evidence of other crimes, wrongs, or acts is *not* admissible ..." (emphasis added)), SCRE; *see also State v. Spears*, 403 S.C. 247, 252, 742 S.E.2d 878, 880–81 (Ct. App. 2013) (discussing rules in conjunction with one another). Thus, had the disputed evidence been otherwise admissible, it might still have been kept out under Rule 403 or 404(b). However, where the Court of Appeals has held the Lopez hearsay statements are inadmissible, Rules 403 and 404(b) are not a means to admit inadmissible evidence.[5] Thus, these alternative grounds are not a basis for avoiding the prejudice caused to Parvin by trial counsel's failure to object.

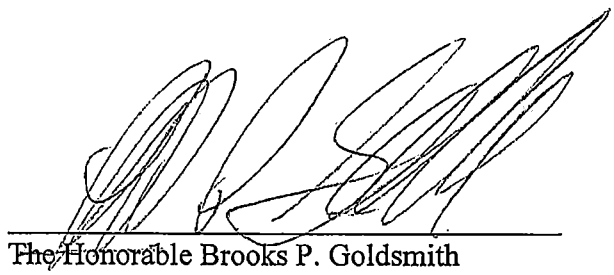
Conclusion

The Constitution's right to counsel protects the fundamental right to a fair trial "in which evidence is subject to adversarial testing[.]" *Strickland*, 466 U.S. at 684 (citing U.S. CONST. amend. VI). The Sixth Amendment right to counsel requires the *effective* assistance of counsel because it is counsel's skill and knowledge that equips a defendant to meet and defend the state's claims. *Id.* When a defendant is denied effective assistance, the constitutional right to counsel is infringed. Here, trial counsel erred when she failed to object to the investigators' hearsay testimony without a valid trial strategy. The consequence of that error was significant as the otherwise-inadmissible testimony was substantively and procedurally prejudicial to Parvin's defense.

[5] While Rule 404(b) permits the introduction of evidence to show motive, identity, common scheme, absence of mistake, or intent, it is evidence of *other* crimes, wrongs, or acts that can be used for that purpose.

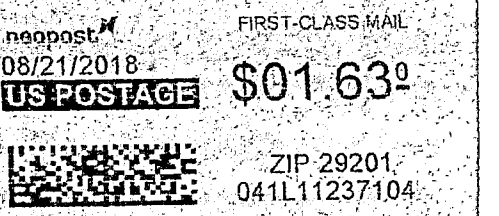
This case presents the type of error PCR is intended to identify and correct. For these reasons, Parvin's application for post-conviction relief is **GRANTED** and his convictions are **VACATED.**

AND IT IS SO ORDERED.



The Honorable Brooks P. Goldsmith
Circuit Court Judge

June 25, 2018
Lancaster, South Carolina.



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