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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO OCONEE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2017-000159

MICHAEL LAMAR COUCH, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I. Did the post-conviction relief court err in finding trial counsel was not ineffective in abandoning self-defense in closing argument where (1) his decision in doing so was based on a reasonable trial strategy, (2) he discussed this change in strategy with Petitioner prior to making his closing argument and (3) the strategic decision was made due to no evidence being presented that would support a theory of self-defense?

II. Did the post-conviction relief court err in finding trial counsel was not ineffective in failing to object to the admission of the recording of the 911 call on grounds it was not authenticated when the recording was properly authenticated by the 911 technician and Petitioner was not prejudiced by the introduction of the recording as there was no testimony offered specifically identifying Petitioner as the voice in the background?

STATEMENT OF THE CASE

Summary of Procedural History

During its May 2011 term, the Oconee County Grand Jury indicted Petitioner for attempted murder (2011-GS-37-00391), criminal domestic violence of a high and aggravated nature (CDVHAN) (2011-GS-37-00403), and possession of a weapon during the commission of a violent crime (2011-GS-37-00404). App. 477-82. Edward Delane Rosemond, Esquire, represented Petitioner on these charges. App. 1. Assistant Solicitor Balir L. Stoudemire, of the Tenth Circuit Solicitor's Office, prosecuted the case. App. 1. On October 17-19, 2011, Petitioner proceeded to trial before the Honorable Alexander S. Macaulay and a jury. App. 1. Following deliberations, the jury convicted Petitioner of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) and also convicted Petitioner as indicted for CDVHAN and the weapons charge. App. 359. Judge Macaulay sentenced Petitioner to a term of imprisonment of twenty years, provided upon the service of fifteen years, the balance would be suspended to five years' probation for ABHAN, ten years provided upon the service of five years, the balance would be suspended to five years' probation for CDVHAN, and five years for the weapons charge. App. 373-74. The sentences were to be served concurrently. App. 374.

Applicant filed a timely notice of appeal, and an appeal was perfected on his behalf by Appellate Defender David Alexander, of the South Carolina Commission on Indigent Defense—Division of Appellate Defense. Supp. App. 1. On appeal, Petitioner raised the following issues:

> 1. Whether the trial judge erred in admitting a written statement into evidence that contained confidential communications between a husband and wife where the wife asserted the spousal communications privilege and the statement was also inadmissible under Rule 613(b) of the South Carolina Rules of Evidence?

2. Whether the trial judge erred in failing to sever the cases involving each of the purported victims?

Supp. App. 3. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences by unpublished opinion. *State v. Couch*, Op. No. 2013-UP-313 (S.C. Ct. App. filed July 10, 2013). *See* Supp. App. 43-45. The remittitur was issued on August 16, 2013. Supp. App. 46.

Thereafter, Petitioner filed an application for post-conviction relief on July 29, 2014. *See* App. 377-83. Respondent filed its return on October 29, 2014. App. 384-89. Through his counsel, Petitioner amended his application on October 29, 2015. App. 390-91. An evidentiary hearing into the matter was convened on October 24, 2016, in the Oconee County Court of Common Pleas, before the Honorable Letitia H. Verdin. App. 392. Petitioner was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. App. 392. Senior Assistant Deputy Attorney General Johanna C. Valenzuela, of the South Carolina Attorney General's Office, represented Respondent. App. 392. At the hearing, Petitioner and trial counsel testified. App. 393. On December 28, 2016, Judge Verdin issued a written order denying relief, finding counsel provided effective assistance in this case. App. 466-76.

On January 27, 2017, Petitioner filed a notice of appeal, appealing the post-conviction relief court's denial of his application for post-conviction relief. Petitioner, through his counsel, initially filed a *Johnson*[1] Petition for Writ of Certiorari on October 6, 2017. This Court issued a written order on May 24, 2018, denying the motion to be relieved as counsel and instructing the parties to address the following questions:

[1] *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

1. Was trial counsel ineffective in abandoning self-defense and admitting [P]etitioner's guilty in his closing argument? [and]
2. Was trial counsel ineffective in failing to object to the admission fo the recording of the 911 call?

Petitioner filed his Petition for Writ of Certiorari on June 25, 2018. This Return follows.

Summary of Facts Adduced at Trial

On February 15-16, 2011, Petitioner and Sommer Grant, his common-law wife, stayed the night at the home of their friend Garry McCall. App. 91, 92. Each person gave his own version of the events that occurred that night, but the result of each version was that McCall was cut with a knife across his face by Petitioner, Grant was hit by Petitioner, and the Walhalla Police Department arrived on the scene and arrested Petitioner. App. 169, 171, 174, 182, 198.

Pretrial, Petitioner moved to sever the case into two trials: one for each victim. App. 36-39. Specifically, he argued trying the cases together would confuse the jury. App. 38. Further, he asserted the evidence he would need to present to establish self-defense to the attempted murder charge could lead to a conviction on the other charges. App. 39. After a thorough discussion and arguments from both sides, the trial court denied the motion, stating:

> Having so considered the motion, the Court does find that the charges can be tried together because they arise [out] of the single chain of circumstances, are proved by the same evidence, and are of the same general nature, and that no real right of the Defendant has been prejudiced in the sense that he will still have the self-defense charge against the McCall indictment, and they would be introducing the knife . . . in the Sommer [Grant] indictment.

App. 59.

Prior to calling Sommer Grant to testify, the State informed the trial court Grant wished to assert a privilege. App. 88. The trial court allowed Grant to testify *in camera* to determine

whether any privilege applied. App. 90. Grant testified she and Petitioner were in a common-law marriage and had lived together. App. 91. She further testified she told people she and Petitioner were married, held herself out as being married to him, and considered herself married. App. 104, 105. The State questioned Grant regarding her written statement to police following the incident. App. 99-103. Grant acknowledged the statement was written in her handwriting. App. 99, 100, 101. She admitted to giving the statement but testified she did not remember what she wrote in the statement. App. 101, 102, 103. When the State gave Grant the opportunity to explain or deny the content of her statement, Petitioner objected that "[e]xplain or deny is not in the elements of recorded recollection." App. 102. The trial judge opined the State was trying to introduce extrinsic evidence under Rule 613(b), SCRE, and the State confirmed this was its intention. App. 102, 103. After the *in camera* testimony, the trial judge denied the spousal privilege being applicable to this case and required Grant to testify. App. 107. Further, the trial court ruled if Grant denied what was in the statement or could not recollect what she wrote in the statement, it would be admissible under Rule 613(b), SCRE, as extrinsic evidence. App. 107, 108.

Grant then testified before the jury regarding the events that took place on February 15-16, 2011. App. 110-28. The State introduced Grant's statement and she recalled giving the statement but was not sure if she recalled the contents of the statement. App. 114. At that point, the State moved to admit the statement under Rule 613(b), SCRE. App. 114. Petitioner objected, arguing Rule 613(b) did not apply and because Grant had not denied the statement, it would not come in as a recorded recollection either. App. 114, 115.) The trial court overruled the objection, stating Rule 613(b) applies to inconsistent prior statements and, under *State v.*

Miller, 262 S.C. 369, 204 S.E.2d 738 (1974), inability to remember. App. 115. Grant read a portion of her statement, which included the following:

> I said, ["]No, I'm calling my grandma.["] [Petitioner] said, ["]No, you won't have time," picked up a knife and started punching me, Sommer Grant. Then I, Sommer Grant, went to the kitchen to try and get away. [Petitioner] followed me, got me, punching me in the face and stomach and back, broke a coffee glass pot over my face or my forehead. Made me - - see made - - okay - - the living room and started beating me again.

App. 125. She testified she did not really remember what happened that night and that she had taken four or five Lortabs for a hurt arm. App. 116, 126, 127.

Garry McCall testified Petitioner came to his house on February 15, 2011. App. 129. He stated he and Petitioner drank and talked in McCall's living room and at some point during the night, Grant joined them. App. 130, 131, 132. McCall testified Petitioner fell asleep and then woke up and started beating Grant. App. 133. McCall reported Petitioner "was hitting her in the face and back of the head, on top of the head, and then he drug [sic] her across the living room towards me, and I stood up next to the kitchen door, and he was kicking her in the head and stomping." App. 133, 134. McCall also recounted Petitioner's "cussing" at Grant and accusing her and McCall of "being together." App. 133. When McCall told Petitioner not to do that in his house, Petitioner swung his hand with a knife in it and cut McCall in the face. App. 134, 136. McCall testified he ran out the door after being cut because he was afraid for his life. App. 136, 137.

STANDARD OF REVIEW

The standard of review in post-conviction relief cases depends on the specific issue before the reviewing court. The appellate court will defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "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." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Strickland*, 466 U.S. at 689. In assessing counsel's

performance, counsel's decisions must be evaluated at the time in which they were made and "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances,

the identified acts or omissions were outside *the wide range* of professional competent assistance" required of a criminal defense attorney." *Id.* at 690 (emphasis added).

ARGUMENT

I. The post-conviction relief court properly found trial counsel was not ineffective in abandoning self-defense in closing argument where (1) his decision in doing so was based on a reasonable trial strategy, (2) he discussed this change in strategy with Petitioner prior to making his closing argument and (3) the strategic decision was made due to no evidence being presented that would support a theory of self-defense.

Petitioner asserts trial counsel was ineffective in abandoning self-defense and instead admitting Petitioner's guilt during closing argument. Furthermore, to the extent this decision was intentional, Petitioner contends trial counsel failed to communicate his change in strategy to Petitioner. In denying Petitioner's allegation his trial counsel was ineffective for abandoning self-defense during closing argument, the post-conviction relief court found Applicant had failed to prove trial counsel was deficient or any resulting prejudice. Specifically, the post-conviction relief court found trial counsel had employed a valid trial strategy based on the remote possibility a theory of self-defense would be successful. In so ruling, the post-conviction relief court cited trial counsel's testimony, in which he stated he and Petitioner had discussed what he would argue during closing argument beforehand. The post-conviction relief court properly found trial counsel was not ineffective for abandoning self-defense in his closing argument as he employed a reasonable trial strategy in doing so. This Court should deny certiorari.

Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Moreover, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant

in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In fact, *Strickland* requires extreme deference to counsel's strategic judgments that are adequately investigated. Indeed, *Strickland* proscribes "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." *Strickland*, 466 U.S. at 690-91.

In order to establish a defense of self-defense, the defendant must: (1) be without fault in bringing on the difficulty; (2) have been in actual imminent danger of losing his life or sustaining serious bodily injury; (3) show that a reasonably prudent person of ordinary firmness and courage would have entertain the belief he was actually in imminent danger and the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or death, if the defense is based upon a defendant's belief of imminent danger; and (4) have had no other probable means of avoiding the danger. *State v. Slater*, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007). A defendant "who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary." *State v. Jackson*, 384 S.C. 29, 36, 681 S.E.2d 17, 20-21 (Ct. App. 2009).

At the evidentiary hearing, trial counsel testified to his reasoning behind changing his strategy from self-defense to a lesser-included offense. Trial counsel testified although Petitioner was adamant about presenting self-defense and that was their initial strategy, trial counsel could tell during trial they were not going to be successful with a theory of self-defense. App. 444, 454. He explained Petitioner told him he had been drinking and he woke up, in McCall's home, to see Grant kissing McCall. App. 454. Trial counsel explained, based on the facts given by Petitioner, it would have been "very hard to align with a self-defense strategy." App. 454. He testified based on the evidence that had been presented, the atmosphere in the courtroom, and the looks on the jurors' faces, their theory of self-defense "was not going well for [them]." App. 444. Based on this, trial counsel decided to change their strategy and argue for a lesser-included offense, a strategy he explained to Petitioner before making his closing argument. App. 446, 450. In light of the evidence presented at trial and after discussing his change in strategy with Petitioner, trial counsel made a reasonable strategic decision in abandoning self-defense in his closing argument and arguing for a lesser-included offense.

The testimony presented at trial supports the fact trial counsel's strategy was reasonable. Grant testified Petitioner picked up a knife and started punching her. App. 125. She further testified she never saw McCall holding that knife. App. 126. McCall testified Petitioner woke up and started beating Grant and also accused Grant of being with McCall. App. 133-34, 158. He further testified when he told Petitioner he could not be "doing that" in his house, Petitioner turned and cut him in the face. App. 134, 136, 161. McCall denied ever picking up the knife and telling Petitioner to stop and also denied holding the knife against Petitioner. App. 149, 162. McCall further denied ever "com[ing] at" Petitioner and denied Petitioner taking a knife away

from him. App. 149. Furthermore, Petitioner's blood was found on the **handle** of the knife. App. 234. Additionally, although Petitioner had an injury to his right index finger and to one of his knuckles on his left hand, these injuries were **not** consistent with defensive wounds. App. 256-57, 274-75, 280-81. Indeed, the injury to Petitioner's index finger was most likely caused by **Petitioner having a knife in his hand and his fingers slipping.** App. 275, 281. Furthermore, the injury to Petitioner's knuckle was consistent with Petitioner punching something and the scratch to his arm was simply that—a scratch, not a laceration. App. 274, 279. Petitioner did not testify at trial.

Taken in the light most favorable to Petitioner, the above testimony does not establish a defense of self-defense. In particular, the evidence indicates Petitioner initiated the fight between him and Grant and also between him and McCall. Moreover, there is no indication Petitioner was in imminent fear of death or serious bodily injury, particularly in light of the fact there was no indication, other than Petitioner's self-serving statement[2], McCall had a weapon. In fact, the medical testimony refutes Petitioner's statement McCall cut him in two places. Accordingly, the testimony presented at trial does not sufficiently establish a defense of self-defense. Trial counsel's decision not to pursue this defense was a valid strategy.

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[2] In his statement to law enforcement, Petitioner stated:

> Went to sleep around 12 midnight, woke up around three to go to the bathroom and caught Sommer and Bugger kissing. I yelled at Bugger, turned, surprised, and pulled his knife and told me that he would hurt me if I tried anything. Well, he came at me with a knife and cut me in two places and kicked me. It happened so fast, I didn't have time to call the law. I got the knife out of his hands while we were tussling. He was cut on his cheek. I acted in self-defense and was not trying to kill this man."

App. 261.

In conclusion, the post-conviction relief court properly found trial counsel was not ineffective for abandoning his theory of self-defense during closing argument. Trial counsel made a valid strategic decision in changing his trial strategy based on the evidence presented and the atmosphere in the courtroom. He explained his change in strategy to Petitioner prior to making his closing argument. The strategy was reasonable when the evidence presented at trial does not support a theory of self-defense.

II. The post-conviction relief court properly found trial counsel was not ineffective in failing to object to the admission of the recording of the 911 call on grounds it was not authenticated because the recording was properly authenticated by the 911 technician and because Petitioner was not prejudiced by the introduction of the recording as there was no testimony offered specifically identifying Petitioner as the voice in the background.

Petitioner asserts trial counsel was ineffective for failing to object to the admission of a 911 recording of the fight that occurred between Petitioner and Grant on February 16, 2011. Specifically, Petitioner asserts trial counsel should have objected to the admissibility of this recording under Rules 901(b)(5) and 901(b)(6) of the South Carolina Rules of Evidence because the recording was not authenticated. Petitioner contends "since the tape was inadmissible and unauthenticated, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness." PWC 13. In denying Petitioner's allegation his trial counsel was ineffective for failing to object to the recording of the 911 call, the post-conviction relief court found Applicant had failed to prove trial counsel was deficient or any resulting prejudice. In so ruling, the post-conviction relief court cited trial counsel's testimony, in which he stated he saw no way to challenge the recording's admissibility. The post-conviction relief court properly found trial counsel was not ineffective for failing to object to the recording of the 911 call as the recording was properly authenticated for admission. This Court should deny certiorari.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. Evidence can be authenticated in a variety of ways, and Rule 901(b), SCRE, merely provides a non-exhaustive list by which evidence can be

authenticated. *See* Rule 901(b), SCRE. In particular, evidence can be authenticated or identified through "testimony that a matter is what it is claimed to be." Rule 901(b)(1), SCRE. In order to authenticate a recording of a 911 call, the State is not required to establish the 911 operator, who took the victim's call, identified the victim as the caller. *State v. Thompson*, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017), *cert. granted* (Mar. 7, 2018). Rather, a 911 call is authenticated when the testimony presented indicates how the calls are recorded, for what period of time they are stored, by whom they are maintained, and that the recording offered is an accurate representation of the 911 call. *Id.* at 399-400, 803 S.E.2d at 51. Moreover, other jurisdictions have held it is unnecessary for a witness to specifically identify a caller's voice. *See Rodriguez-Nova v. State*, 763 S.E.2d 698, 701 (Ga. 2014) ("[A]n audio recording can be authenticated by the testimony of one party to the recorded conversation."); *State v. Williams*, 150 P.3d 111, 118 (Wash. App. 2007) ("A sound recording, in particular, need not be authenticated by a witness with person knowledge of the events recorded. Rather, the trial court may consider **any** information sufficient to support the *prima facie* showing that the evidence is authentic.") (emphasis added).

Here, Jeremy Kerr testified he is an operator and supervisor in the 911 telecommunications department of the Oconee County Sheriff's Office. App. 80. He testified he took a 911 call from a cellphone at approximately three or three-thirty in the morning on February 16, 2011. App. 81-82. He further testified although he could not get anyone on the other line to respond, he could hear a lot of screaming in the background. App. 82. Because he was unable to get anyone to respond, Kerr then retrieved a GPS location for the cellphone, which transmitted a location of **eight to thirteen feet** from South Laurel Street. App. 82. Moreover,

Officer Matthew Patterson, of the Walhalla Police Department, testified he was dispatched to South Laurel Street at approximately three-thirty in the morning on February 16, 2011, in reference to an ongoing verbal altercation. App. 169. He further testified when he arrived to the area, he could hear the altercation coming from the residence of which he was directly in front. App. 170-71. Kerr also testified every 911 call is recorded, and the recording begins as soon as 911 is dialed. App. 84. He testified the recording of this call from February 16th was recorded and he had listened to the recording prior to trial, indicating he had done so by initialing the CD of the recording. App. 84-85. Kerr further testified the recording was a fair and accurate representation of the call he took on February 16th, and it did not appear to have been altered in any way. App. 85.

The testimony above clearly authenticates the 911 recording, thereby meeting the authentication requirement as a condition precedent to admissibility. In particular, the 911 operator testified to the date and time of the call, what he heard on the call, and how he obtained a location of that call. He further provided testimony about the recordings of 911 calls generally and also testified the recording offered at trial was a fair and accurate representation of the call he took. Moreover, the officer dispatched to the location testified he could hear the verbal altercation from the roadway right in front of the incident location. Based on the foregoing, the 911 call was properly authenticated and there was no arguable basis to object to its admissibility on Rule 901 grounds.

Furthermore, to the extent Petitioner maintains the 911 call was not properly authenticated for admission, he could not have suffered any prejudice from its admission. No testimony was ever offered at trial specifically identifying Petitioner as the person hitting Grant

in the recording. Moreover, Grant testified Petitioner accused her of getting up without his permission, and an altercation between them ensued. App. 117, 118. She further testified Petitioner hit her that evening. App. 117. In addition to Grant's testimony, her statement to law enforcement detailing the abuse was also admitted into evidence. App. 114-15. In that statement, Grant specifically stated Petitioner picked up and knife and started punching her. App. 125. Therefore, it is unlikely the result of the proceeding would have been any different had trial counsel objected to this 911 recording and had it been excluded from trial.

In conclusion, the post-conviction relief court properly found trial counsel was not ineffective for failing to object to the recording of the 911 call, because the recording was properly authenticated and Petitioner suffered no prejudice from the introduction of the recording, as he was never specifically identified as the person hitting Grant in the call.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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By: _____
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October 24, 2018.

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Appellate Case No. 2017-000159

MICHAEL LAMAR COUCH, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Kelly Oppenheimer, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
South Carolina Commission on Indigent Defense—Office of Appellate Defense,
Post Office Box 11433
Columbia, South Carolina 29211-1433

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

This 24th day of October, 2018.

KELLY OPPENHEIMER
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October 24, 2018

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

RE: Michael L. Couch v. State of South Carolina
Appellate Case No.: 2017-000159

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Kelly Oppenheimer
Assistant Attorney General
S.C. Bar # 103245

KO/jaj
Enclosures

cc: Taylor D. Gillam, Esquire
Victim Advocacy Division