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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-002115

KELVIN JACKSON, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. Did the PCR court properly find Petitioner failed to satisfy his burden of proving Trial Counsel was ineffective for allegedly placing Petitioner's character in issue where Trial Counsel strategically used this evidence to rebut the State's evidence against Petitioner, where the testimony at issue was elicited in the course of proper cross-examination, and where there is no likelihood of prejudice in light of the strong circumstantial evidence and Petitioner's inconsistent statements to law enforcement?

II. Did the PCR court improperly use overwhelming evidence of guilt as a "categorical bar" to a finding of prejudice but rather undertook a proper issue-by-issue consideration of prejudice from alleged deficient conduct in light of properly admitted evidence, and notwithstanding, Petitioner nevertheless has failed to satisfy his burden of proving prejudice from any alleged error?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. During its July 2011 term, the Beaufort County Grand Jury indicted Petitioner for murder (2011-GS-07-1329). Virgin Johnson, Jr., Esquire ("Trial Counsel"), and Korey L. Williams, Esquire, represented Petitioner at trial. Sean P. Thornton, Esquire, and Hunter P. Swanson, Esquire, prosecuted the case. On July 29, 2013, Petitioner proceeded to a jury trial before the Honorable Maite Murphy, who presided with the Honorable Carmen T. Mullen. The jury found Petitioner guilty as indicted. On August 2, 2013, Judge Murphy sentenced Petitioner to imprisonment for forty-five years for murder.

Petitioner filed a notice of appeal. Appellate Defender David Alexander ("Appellate Counsel") perfected the appeal. Appellate Counsel argued writings seized from Petitioner's jail cell were admitted in violation of his due process rights. App. p. 831. On November 12, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Jackson, Op. No. 2015-UP-512 (Ct. App. 2015). The remittitur was issued on May 6, 2016.

On February 12, 2016, Petitioner filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on February 15, 2017, before the Honorable R. Scott Sprouse. Petitioner was present at the hearing and represented by James K. Falk, Esquire ("PCR Counsel"). Assistant Attorney General Ruston W. Neely represented the State. Judge Sprouse denied and dismissed the application with prejudice by an order of dismissal signed September 14, 2017, and filed September 22, 2017. Petitioner filed a notice of appeal on September 14, 2017, and a petition for writ of certiorari on June 4, 2018. This return follows.

STATEMENT OF THE FACTS

Petitioner was convicted of murder after he killed the mother of two of his children

("Victim"), dumped her body in the Broad River, and fled to a motel in Walterboro. App. p. 245, l. 19; p. 407, ll. 10-16; p. 538, ll. 4-11; p. 577, l. 5. Numerous witnesses testified Victim was afraid of Petitioner and Petitioner had physically abused her throughout their "on-again-off-again" relationship. App. p. 246, l. 2; p. 248, ll. 21-25; p. 251, l. 17; p. p. 273, ll. 10-12; p. 281, l. 18; p. 293, ll. 14-21; p. 306, l. 7; p. 343, ll. 3-8. In fact, Victim kicked Petitioner out of her house four months prior to the murder due to his abuse. App. p. 246, ll. 7-15; App. pp. 304-305.

On the last day of Victim's life, May 25, 2011, Victim informed Petitioner she was removing him from her insurance plan. App. p. 468, ll. 10-15. The day prior, Victim closed her joint bank account Petitioner was associated with and opened an individual account, the only method by which the bank allows for the removal of a person from a joint bank account. App. p. 366, l. 10 – p. 369, l. 4. Victim also collected $300 in cash that was owed to her by a friend the day before her disappearance. App. p. 308, ll. 12-19; p. 518, ll. 4-19. Notably, no cash was found in Victim's purse following her disappearance, and Petitioner paid cash for gas late the night of Victim's disappearance despite purportedly having no money earlier that day. App. p. 315, ll. 15-18; p. 379, ll. 10-12; p. 530, ll. 13-20.

Petitioner visited Victim's house late the night of her disappearance but parked in an area known as "the Bottom," where no one would be able to see his car parked at Victim's house. App. p. 470, ll. 20-24; p. 477, ll. 4-10; p. 488, l. 23 – p. 489, l. 3. Naturally, the State's theory was Petitioner parked his vehicle there to avoid being incriminated in the eventual murder of Victim. App. p. 724, ll. 1-5; p. 751, ll. 21-25. However, Trial Counsel attempted to dispel this notion by explaining Petitioner parked in the remote location to avoid being seen by his suspicious girlfriend. App. p. 489; p. 533; p. 777. Petitioner was also spotted walking toward Victim's house by multiple witnesses. App. p. 522, ll. 1-25. Victim spoke to her mother on the

phone around 1:30am while Petitioner was at her house. App. p. 165, ll. 1-5; p. 475, ll. 14-16; p. 477, ll. 18-22. Victim was not heard from or seen by any witnesses again. A pillow was later recovered from Victim's bedroom with Victim's blood and Petitioner's DNA. App. pp. 592-594.

Surveillance footage, financial records, and testimony revealed Petitioner next showed up at a Shell gas station in Hampton at 2:26am, where he attempted to use Victim's debit card. App. p. 357, ll. 21-23; p. 371, l. 16 – p. 372, l. 7. After the sale was declined, Petitioner paid for gas in cash, despite earlier that day having no money for gas. App. p. 379, ll. 10-12; p. 530, ll. 14-21.

Approximately two hours later, Petitioner rented a motel room at Palms Inn & Suites in Walterboro with cash under a fake name and driver's license number. App. p. 535, pp. 538-539.

"JS," a minor who was close with Victim's family, was dropped off at Victim's house the following morning between 5 and 6am, as was custom. App. p. 329, ll. 19-23. Victim was always there when JS arrived in the morning, until that morning. App. p. 330, ll. 8-11. Victim was absent, the other children were not woken up for school, and there was a note, which falsely purported to be written by Victim, left on the table. App. p. 257, l. 3; p. 310, ll. 14-25; p. 331, ll. 5-15. The note left for the children read, "I'll be right back. Get ready for school. Went with someone. Love you all guys." App. p. 312, ll. 19-22. A handwriting expert testified at trial it was her opinion Victim did not write the note and there was strong evidence Petitioner wrote the note. App. p. 716. Victim's daughter, who was familiar with Petitioner's handwriting, also testified the note looked like Petitioner's handwriting and not Victim's. App. p. 314, ll. 12-25. Minor J.S. testified the note was "nowhere close" to the notes Victim typically left and she could tell the note was not in Victim's handwriting. App. p. 332, ll. 1-10.

Victim's body was found on a bank of the Broad River four days after her late-night visit from Petitioner. App. p. 405, l. 20; p. 407, ll. 10-16. While the *cause* of death was undetermined

and Victim's body had clearly been exposed to various elements, the *manner* of death was determined to be homicide. App. p. 574, ll. 8-24. Dr. Tormos, who performed the autopsy, testified the results were consistent with strangulation or suffocation. App. p. 575, ll. 1-18.

Petitioner's account of events changed drastically as he was confronted with more and more evidence against him. App. p. 94, ll. 2-5; p. 360, ll. 21-25; p. 505, ll. 3-9; p. 768, l. 7. First, Petitioner denied being at Victim's home or even in in Hampton County the night of her disappearance altogether, telling law enforcement he was actually at his girlfriend's house in Fairfax, Allendale County that night. App. p. 356, l. 25 – p. 357, ll. 4-19. However, when law enforcement informed him they had surveillance footage of him at the Shell gas station in Hampton County that night, he then changed his story to say he drove from Fairfax to Hampton County to get gas before driving back to work in Columbia. App. p. 358, ll. 24-25. In this account, Petitioner told law enforcement he went to a strip club rather than his girlfriend's house. App. p. 471, ll. 7-13. Petitioner explained he took such a strange route because he "loves the ride." App. p. 470, l. 25 – p. 471, l. 6. Petitioner also told law enforcement during the first interview he had not seen Victim since weeks before Victim disappeared on May 25. App. p. 465, l. 19 – p. 466, l. 9. However, in a later third interview, once law enforcement informed him he had been spotted in proximity to Victim's home the night of the disappearance, Petitioner admitted he saw Victim that night, they "messed around," and she let him borrow her card to get gas. App. p. 467, ll. 2-18; p. 473, ll. 5-17. He also referred to the text message she sent him that day informing him she was removing him from the insurance plan. App. p. 468, ll. 10-15. In order to explain why he would have borrowed Victim's card when he was in fact able to pay cash for the gas and a motel room, Petitioner told law enforcement he asked her for the card just to see if she would give it to him. App. p. 98, l. 4. Petitioner's girlfriend confirmed she last saw

Petitioner the morning prior to Victim's disappearance, Petitioner did not spend the night with her, and she did not speak with him again until afternoon following Victim's disappearance. App. p. 530, l. 10 – p. 531, l. 9.

Trial Counsel made numerous pretrial motions to suppress evidence of prior bad acts at trial and submitted a memorandum to the trial court. This included a motion to suppress any evidence of credit card fraud, but was unsuccessful. App. p. 164, ll. 14-15; p. 350, l. 1 – p. 351, l. 22; p. 740, l. 15. Trial Counsel and Mr. Williams routinely objected to testimony that Victim was scared of Petitioner but were consistently overruled. App. p. 247, l. 2; p. 273, l. 24; p. 281, l. 20.

Testimony at Issue

When Trial Counsel was cross-examining Joyce Loadholt, Victim's friend from work who reported her missing, Loadholt had been testifying about Victim and Petitioner's troubled relationship. Over Trial Counsel's objection, Loadholt had testified about Victim coming to work with bruises and Victim being scared of Petitioner. App. p. 246, l. 21 – p. 247, l. 5; p. 249, ll. 7-20. During cross-examination, Trial Counsel asked the following:

> Q To your knowledge, had [Victim] or [Petitioner] ever been arrested for a domestic violence with each other?
> A Not to my knowledge, no.
> Q To your knowledge, no officer ever came in and took either one of them to jail for fighting with each other.
> A No, not that I know of.
> Q And you are real close, right?
> A She ain't told me she never been to jail.
> Q Had Petitioner gone to jail, she would have told you that, too; wouldn't she?
> A When he did go to jail, she did tell me.
> Q And you talked about that. Okay. That was for child support; wasn't it, for the other woman?
> A It was for child support and for forgery check. App. p. 268

The context reveals this was an effort by Trial Counsel to bring attention to the fact Petitioner was never arrested for domestic violence. When Loadholt volunteered the information

that Petitioner had been to jail, although not for domestic violence, Trial Counsel attempted to save face by noting the arrest was merely for failure to pay child support with a different woman, not something involving domestic violence with Victim.

Petitioner also cross-examined SLED Agent Richard Johnson:

> Q Okay. All right. Agent Johnson, let me ask you this. The first time you talked to [Petitioner], he was in the Hampton jail. Is that correct?
> A That's correct.
> Q And he was charged with fraudulent transaction. Is that correct?
> A I think that was the charge. I wasn't certain of it.
> Q That's right.
> A But he was charged with something.
> Q That's right. And he was charged with the fraudulent transaction, and you went in, and you talked with him. Is that correct?
> A That's correct.
> Q Okay. And on the first transaction, exactly what you said happened. He told you he wasn't there. Is that correct?
> A That's correct.
> Q That's correct All right. After you went the second time, you had done a bunch of investigation. Is that correct?
>
> [portions omitted from this return for brevity]
>
> Q And the second time. Right. And the second time, you really, really confronted him about the facts. Is that correct?
> A That's correct.
> Q Okay. And matter of fact, in the second time you talked with him, you went so far as to say, I believe you gave me ninety-nine-and-a-half percent are true. I just want to make sure I got the whole hundred percent. Is that correct?
> A That's correct ...
> Q But even after that you were questioning him some more. And the second time, he repeated the same thing over and over again. Is that correct?
> A Yes.
> Q Okay. He never – all before he lied, but on the second, the one he wrote the statement, --
> A Um-hmm.
> Q -- He never budged from the fact that he didn't kill her. Is that correct?

A Yes, not from the fact he didn't kill her.
Q That's right. That's right. He talked about – he told you about the card. He told you he was there. He told you they messed around. He told you he was the house. But he never changed from the fact he didn't kill her. App. pp. 481-484.

This exchange came about after Agent Johnson testified about the changes in Petitioner's story provided to law enforcement. The context of this dialogue reveals this exchange was an effort by Trial Counsel to address the fact that Petitioner's story had changed as more and more evidence was presented to him. Moreover, it was an effort by Trial Counsel to highlight the fact Petitioner remained consistent that he did not kill Victim. Of course, evidence of Petitioner's use of the card was already admitted over Trial Counsel's objection at this point. App. pp. 350-351.

Petitioner also takes issue with Trial Counsel not objecting to testimony from SLED witness, who responded to the scene to process a vehicle, that the crime scene unit found "some DSS paperwork with [Petitioner's] name on it," which was notice of a child support lien which purported to show Petitioner owed Victim, and Petitioner's driver's license. App. p. 455, ll. 3-22; pp. 456-457. The license and paperwork evidenced Petitioner's ownership of the car.

During his closing argument, Trial Counsel confronted the evidence against Petitioner by arguing he was "playing with two women" rather than murder. This argument was not merely tailored to Petitioner's own inconsistent statements, but more importantly provide an explanation as to why Petitioner snuck around the way he did and subsequently lied about the circumstances.

RELEVANT PCR HEARING TESTIMONY

Petitioner and Trial Counsel testified at the PCR hearing convened on February 15, 2017. The PCR court found Petitioner's testimony lacked credibility. App. p. 1001. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

Petitioner

Petitioner testified he felt it was "completely ineffective assistance of counsel" for Trial Counsel to label him as a "womanizer" and acknowledge that Petitioner lied to police in Trial Counsel's closing argument. App. p. 955, ll. 1-8. Petitioner testified he was concerned when the jury heard some of his prior arrest records, and he believed Trial Counsel mischaracterized his personality or reputation before the jury. App. p. 955, ll. 9-17. According to Petitioner, he did not discuss the strategy for the closing argument with Trial Counsel. App. p. 955, ll. 18-22.

Trial Counsel

Trial Counsel, testifying at the PCR hearing over four years after the trial, did not recall the witnesses who testified Victim had shown up to work with bruises, but did recall objecting to that sort of testimony because it would be prejudicial. App. p. 932, ll. 7-13. As to the child support, Trial Counsel explained, "I don't remember about the child support. That was in 2012 or '13." App. p. 932, ll. 14-20. When referred to the section of the trial transcript where Loadholt testified to Petitioner's failure to pay child support, Trial Counsel testified it appeared something happened in the trial which he did not object to, opined it was not really relevant to the case, and suggested it may have otherwise been dealt with at a different time in the transcript. App. p. 933, ll. 2-25. Trial Counsel testified the defense wanted to preserve the last argument as he viewed this as this was a very circumstantial case. App. p. 937, l. 21 – p. 938, l. 2.

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 179, 810 S.E.2d 836 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815

S.E.2d 433 (2018). The standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the PCR court's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR court properly found Petitioner failed to satisfy his burden of proving Trial Counsel was ineffective for allegedly placing Petitioner's character in issue where Trial Counsel strategically used this evidence to rebut the State's evidence against Petitioner, where the testimony at issue was elicited in the course of proper cross-examination, and where there is no likelihood of prejudice in light of the strong circumstantial evidence and Petitioner's inconsistent statements to law enforcement.

Petitioner argues Trial Counsel was ineffective for purportedly placing Petitioner's character in issue through the testimony he elicited on cross-examination and his comments during closing argument. Specifically, Petitioner alleges Trial Counsel was ineffective for characterizing Petitioner as a "womanizer" in his closing argument, eliciting information regarding Petitioner's unpaid child support on cross-examination. Petitioner also alleges Trial Counsel was ineffective for eliciting information that Petitioner was arrested for credit card fraud, this is despite the fact there was already ample testimony and evidence presented that Petitioner used Victim's card the night in question and even Petitioner admitted to using her card that night. As the PCR court properly found, Petitioner has failed to satisfy his burden of proving both deficiency and prejudice. Trial Counsel was not deficient because the testimony at issue was elicited in the course of reasonably tailored cross-examination, and Trial Counsel's closing argument clearly evidences a valid trial strategy of presenting Petitioner as an unfaithful boyfriend rather than a murderer to explain his suspicious behavior and inconsistent statements to police. Furthermore, Petitioner suffered no prejudice from the alleged deficiencies in light of the strong circumstantial evidence against him in relation to the information elicited by Trial Counsel, and Petitioner's credibility was minimal given his repeated lies to law enforcement without some justification for why he lied in the first place. Accordingly, the PCR court properly denied relief, and certiorari should be denied.

A. Counsel was not deficient nor was Petitioner prejudiced by his performance where Trial Counsel strategically used evidence of Petitioner's termed "womanizing" and unfaithful behaviors to explain the ample evidence that Petitioner hid from detection the night of the murder and repeatedly lied to police about his whereabouts, thereby providing a conceivable alternative explanation to the circumstantial evidence as opposed to murder.

Petitioner argues Trial Counsel was ineffective for purportedly placing Petitioner's character in issue through the testimony he elicited on cross-examination and his comments during closing argument. Specifically, Petitioner alleges Trial Counsel was ineffective for characterizing Petitioner as a "womanizer" in his closing argument, and eliciting information regarding Petitioner's unpaid child support on cross-examination as well as Petitioner's original apprehension for credit card fraud. However, Trial Counsel's performance was not deficient in this regard, nor was Petitioner conceivably prejudiced by Trial Counsel's performance. The record reveals Trial Counsel, in fact, strategically used this characterization of Petitioner as a "womanizer" to argue Petitioner only avoided detection around the time of the murder and lied about his whereabouts because he did not want his girlfriend to know he had been cheating on her with Victim, which conformed with Petitioner's final version of events provided to law enforcement. This was a reasonable strategic approach which allowed Trial Counsel to offer a much needed alternative explanation to an insurmountable amount of circumstantial evidence presented by the State against Petitioner.

Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. 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. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."

Strickland, 466 U.S. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. 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). Trial Counsel did not affirmatively articulate a strategic decision for this conduct, but he was not asked to at the PCR hearing. Furthermore, Trial Counsel did testify it was a strategic decision to have last argument, but testified he was unable to recall various elements of the case as it had been over three years since the trial occurred and he had not read the transcript. App. p. 932, ll. 10-20; p. 933, ll. 23-25; p. 944, l. 10. A strategic or tactical decision does not have to be articulated by counsel on the record for this Court to pass consider whether "in light of all the circumstances, the identified acts or omissions were outside the *wide* range of professionally competent assistance." Strickland, 466 U.S. at 690 (emphasis added). The record may show a clear basis for strategy in lieu of Trial Counsel's specific announcement of the strategy on the record. See Wood v. Allen, 588 U.S. 290 (2010) (affirming state PCR court's finding that counsel made a strategic decision not to inquire further into a petitioner's report about his mental deficiencies where the record supported that finding, despite counsel not articulating the strategy).

In this case, the theme of Trial Counsel's closing argument, given after the State's closing argument attacked Petitioner for his initial lies law enforcement about his whereabouts, reveals the use of Petitioner's unfaithfulness as a boyfriend, or a "womanizer," to confront the substantial circumstantial evidence against Petitioner. Near the beginning of Trial Counsel's closing argument, he argued, "Now, is Kelvin guilty of womanizing? Yes. Did Kelvin lie? I think in my opening I got up and said, look, there's no doubt that he lied. But the question is, who killed Victim?" App. p. 776, ll. 12-15. The State's case revealed Petitioner had parked his

car in a remote/hidden location near Victim's house the night she disappeared, and Trial Counsel was able to explain, "Kelvin was staying with Ms. Roberts [Petitoner's girlfriend]. The whole reason he parked his car and walked, because he was hiding his car so he wouldn't get caught … Did he lie about the car? Yes. But what does that have to do with killing Ms. Miller?" App. p. 777, ll. 6-13. Furthermore, Trial Counsel used this characterization to attack the physical evidence of Petitioner's DNA on Victim's pillow, "It's no doubt Kelvin's DNA was on it. He said they messed around. Is he guilty of womanizing, because the night before, he messed around with Ms. Roberts? Yes. But he's not charged with messing around." App. p. 777, ll. 14-23. Naturally, after much had been made about Petitioner lying about his whereabouts that night, it would only be reasonable for Trial Counsel to somehow address the matter in his closing. Trial Counsel was able to explain this as well:

> Kelvin should not have lied. But if he wasn't sneaking around, if he wasn't creeping, he wouldn't have had to lie. And he is here today, not because he murdered – you can't charge him with murdering Ms. Miller … He's here because he was playing two women, and he got caught in his own trap. App. pp. 779-780

Trial Counsel also argued to the jury evidence of Petitioner being a deadbeat dad or emotionally abusive was "smoke and mirrors" and told the jury the State was trying to move them emotionally because this was only a circumstantial case and there was no proof of murder. App. p. 288, ll. 2-9. Trial Counsel repeated the principle that the State had no proof of murder and therefore were just trying to paint Petitioner in a bad light, arguing, "Got enough [evidence] to say some – got some child support papers, like half of our country with this different value system. What does that have to do with murder, other than inciting how you feel?" App. p. 790.

Absent some sort of explanation, the State's tremendous circumstantial evidence of a guilty conscience against Petitioner would have gone unanswered. Again, the State presented

evidence Petitioner visited Victim's house late the night of her disappearance but parked in an area known as "the Bottom," where no one would be able to see his car parked at Victim's house. App. p. 470, ll. 20-24; p. 477, ll. 4-10; p. 488, l. 23 – p. 489, l. 3. Furthermore, such a theory was in keeping with the changing story Petitioner provided to law enforcement. First, Petitioner denied being at Victim's home the night of her disappearance altogether, telling law enforcement he was actually at his girlfriend's house in Fairfax, Allendale County that night. App. p. 356, l. 25 – p. 357, l. 4. In that first interview, Petitioner denied even being in Hampton County the night of the incident. App. p. 357, ll. 17-19. However, when law enforcement informed him they had surveillance footage of him at the Shell gas station in Hampton County that night, he then changed his story to say he drove from Fairfax to Hampton County to get gas before driving back to Columbia, where he worked. App. p. 358, ll. 24-25. In this account, Petitioner told law enforcement he did not actually go to his girlfriend's house in Fairfax, but rather went to a strip club that night. App. p. 471, ll. 7-13. Petitioner also finally confided in his third statement that he and Victim "messed around" at her house the night of her disappearance before she let him borrow her card to get gas. App. p. 467, ll. 2-18; p. 473, ll. 5-17.

Trial Counsel's closing argument was effective and reasonably tailored to conform, to the best of Trial Counsel's abilities, with Petitioner's version of events provided to law enforcement and address a substantial amount of the circumstantial evidence against Petitioner. It also afforded Trial Counsel the opportunity to suggest the State was trying to hide deficiencies in their murder case with their efforts to focus on Petitioner's character. Trial Counsel was not deficient, but rather innovative and thorough in his use of the testimony at issue to weaken the State's case. Notwithstanding, Petitioner cannot prove prejudice from this allegation as the very testimony at issue allowed for the "explaining away" of substantial evidence against Petitioner

and provided for a defense theory consistent with Petitioner's own version of events. Therefore, there is no reasonable probability the outcome of the proceedings would have otherwise been any different. The PCR court's ruling should therefore be affirmed and certiorari should be denied.

B. Trial Counsel was not deficient as the testimony at issue was elicited in the course of proper and reasonable cross-examination.

Petitioner alleges Trial Counsel was ineffective for undertaking cross-examination which allegedly placed Petitioner's character in issue. To the contrary, the PCR court properly denied relief where the testimony Petitioner challenges was elicited in the course of proper and reasonable cross-examination by Trial Counsel. The record reveals Trial Counsel's cross-examination of the witnesses was reasonable under prevailing professional norms. Cherry, 300 S.C. at 117, 386 S.E.2d at 625.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). Furthermore, a fair assessment of attorney performance requires that every effort be made to *eliminate the distorting effects of hindsight*, to reconstruct the circumstances of counsel's challenged conduct, and *to evaluate the conduct from counsel's perspective at the time*. Strickland, 466 U.S. at 679 (emphasis added).

First, Trial Counsel's cross-examination of Victim's friend and coworker occurred after Loadholt, over Trial Counsel's objection, had just testified about Victim coming to work with bruises and being afraid of Petitioner. App. p. 246, l. 21; p. 249, l. 17. In fact, Loadholt testified on direct that there was a police officer referred to as "Captain" who often responded to domestic incidents at the home. App. p. 255, l. 10. Naturally, this testimony prompted an effort by Trial Counsel to bring attention to the fact Petitioner was never arrested for domestic violence. Furthermore, when Loadholt would only testify Petitioner had not been to jail for domestic

violence "to her knowledge," it is apparent that Trial Counsel was attempting to highlight her close relationship with Victim and suggest Petitioner must not have been arrested for domestic violence if this person who is supposedly so close to Victim never heard about it. When Loadholt volunteered information regarding Petitioner's irrelevant arrest for child support, Trial Counsel reasonably endeavored to save face by noting the arrest was merely for failure to pay child support with a different woman, rather than something involving domestic violence with Victim. Trial Counsel was not deficient for confronting this witness on cross-examination in light of her earlier testimony, over Trial Counsel's objection, regarding Petitioner's previous physical abuse of Victim and encounters with law enforcement therefrom. In hindsight, the distorting effects of which ought to be removed from analysis of the conduct, this came at the minor cost of revealing Petitioner had failed to pay child support to a different woman when Loadholt volunteered that irrelevant information. Regardless, it was only reasonable to confront Loadholt's testimony and make it clear Petitioner was *not* arrested for any sort of domestic violence.

Trial Counsel's cross-examination of Agent Johnson in which he elicited information that Petitioner was interviewed while in custody for the financial transaction fraud was likewise reasonable. This exchange occurred after Johnson had just testified about the changes and inconsistencies in Petitioner's story provided to law enforcement. The context of this dialogue reveals this exchange was an effort by Trial Counsel to address the inconvenient fact that Petitioner's story had changed over time. Trial Counsel reasonably brought attention to the fact these statements were given while Petitioner was in custody, an inherently coercive and anxiety-inducing environment. First, Petitioner stated in his own written statement, which was admitted a trial, he was "locked up" for identity fraud. App. p. 644, ll. 19-23. Of course, evidence regarding Petitioner's use of Victim's card had already been admitted over Trial Counsel's objection at this

point. App. p. 350, l. 1 – p. 351, l. 22. Furthermore, there would have been little doubt to the jury at this time that Petitioner had already been in custody as there was already testimony regarding his statements and Miranda warnings. It was no mystery Petitioner had been caught attempting to use Victim's credit card, as evidenced by the fact Petitioner was there for trial in the first place. Moreover, the cross-examination was an obvious effort by Trial Counsel to highlight the fact that while Petitioner's story may have changed under stressful circumstances, Petitioner remained consistent that he did not kill Victim. Trial Counsel was not deficient for this reasonable and strategic of cross-examination of Agent Johnson in which Trial Counsel reasonably confronted the unhelpful inconsistent statements Petitioner had given and the nature of the circumstances surrounding those statements.

This was a case of tremendous circumstantial evidence and strong witnesses for the State in which any cross-examination was virtually guaranteed to elicit some arguably unflattering information about Petitioner. Nevertheless, it was only reasonable for Trial Counsel to confront these inconvenient circumstances by calling into doubt the knowledge and reliability of Victim's friend Loadholt as well as the officer who took the statements from Petitioner, Agent Johnson. Therefore, the PCR court properly found Petitioner failed to satisfy his burden of proving ineffective assistance of counsel as Trial Counsel was not deficient and Petitioner was in no way prejudiced by the alleged deficiencies. Accordingly, the PCR court's finding should be affirmed and certiorari should be denied.

C. Petitioner was not prejudiced by the testimony in light of much stronger circumstantial evidence indicating Petitioner's guilt and Petitioner's credibility was already thoroughly discounted by proof Petitioner repeatedly lied throughout the investigation.

Notwithstanding the fact Trial Counsel's representation was effective and reasonable, and

Petitioner's failure to carry his burden of proving otherwise, there is no evidence to support a finding Petitioner was prejudiced by any of these alleged deficiencies. Given the tremendous amount of evidence which was far more significant than the mere aspersions on Petitioner's faithfulness in relationships, there is no reasonable probability the result of the proceedings would have been different had Trial Counsel acted any differently. Accordingly, the PCR court properly found Petitioner has failed to satisfy his burden of establishing prejudice.

This was a case of tremendous circumstantial evidence implicating Petitioner for murder. Victim's blood and Petitioner's DNA were found on Victim's pillow when Victim's house was searched following her disappearance. App. p. 592, l. 23; p. 594, l. 8. Witnesses and Petitioner confirmed Petitioner visited Victim's house late the night of her disappearance but parked in an area known as "the Bottom," where no one would be able to see his car parked at Victim's house. App. p. 470, ll. 20-24; p. 477, ll. 4-10; p. 488, l. 23 – p. 489, l. 3. In the following early morning hours, after which Victim was never seen until her body was recovered in the Broad River, surveillance footage as well as the Shell station employee's testimony and Petitioner's eventual admission reveals Petitioner unsuccessfully attempted to use Victim's credit card at the Hampton gas station before paying cash. App. pp. 378-381; p. 473, ll. 5-17. Petitioner then paid cash to check into the Palm Inn in Walterboro in the early morning hours under a fake name and fake driver's license number. App. p. 538, l. 4 – p. 539, l. 17. That morning, Victim's children and her neighbor found a handwritten note falsely purporting to be written by Victim, but apparent to her children and neighbor that it was not in her handwriting, and was "nowhere close" to the notes usually left by Petitioner. App. p. 314, ll. 12-21; p. 332; ll. 4-9. In fact, Victim's daughter recognized the handwriting as Petitioner's handwriting because he used to sign her permission forms before he was kicked out of the house for being abusive. App. p. 314,

l. 22 – p. 315, l. 6. Moreover, a handwriting expert testified it was her opinion Victim did not write the note, and it was probable Petitioner wrote the note, which means there is strong evidence Petitioner wrote the note. App. p. 716, ll. 3-18. Investigators were able to include it would be possible to have been possible to leave the Shell gas station in Hampton and end up at the Palm Inn with time between to dump a body in the Broad River within the timeframe of Petitioner's appearance at the gas station and his arrival at the Palm Inn. App. p. 627, ll. 10-15.

There was also strong evidence of motive as there was ample testimony regarding habitual abuse of Victim by Petitioner. App. pp. 256-251; p. 306, ll. 7-10; pp. 340-341. There was testimony regarding Petitioner's jealousy toward Victim to the point her daughter had to help Victim hide things from Petitioner. App. p. 307, ll. 11-16. Furthermore, the day he visited, Victim had closed a joint bank account she shared with Petitioner to open an individual account and removed him from her insurance policy. App. pp. 366-369; p. 468, ll. 13-15.

Notwithstanding the tremendous evidence against Petitioner in this case, there is also no reasonable probability his credibility would have been perceived as any more legitimate absent the testimony at issue. First, Petitioner did not testify in this case. Regardless, Petitioner had no credibility to lose after his story of what happened surrounding the night of Victim's disappearance changed drastically multiple times, and Petitioner himself admitted to lying to police. App. p. 644, l. 19. First, Petitioner denied being at Victim's home the night of her disappearance altogether, telling law enforcement he was actually at his girlfriend's house in Allendale County that night. App. p. 356, l. 25 – p. 357, l. 4. In that first interview, Petitioner denied even being in Hampton County the night of the incident. App. p. 357, ll. 17-19. However, when law enforcement informed him they had surveillance footage of him at the Shell gas station in Hampton County that night, he then changed his story to say he drove from Fairfax to

Hampton County to get gas before driving back to Columbia, where he worked. App. p. 358, ll. 24-25. In this account, Petitioner told law enforcement he did not actually go to his girlfriend's house in Fairfax, but rather went to a strip club that night. App. p. 471, ll. 7-13. Petitioner explained he took such a route because he "loves the ride." App. p. 470, l. 25 – p. 471, l. 6. Petitioner also told law enforcement during the first interview he had not seen Victim since early May, weeks before Victim disappeared on May 25. App. p. 465, l. 19 – p. 466, l. 9. However, in a later third interview, once law enforcement informed him he had been spotted in proximity to Victim's home the night of the disappearance, Petitioner admitted he saw Victim that night, they "messed around," and she let him borrow her card to get gas. App. p. 467, ll. 2-18; p. 473, ll. 5-17. He also referred to the text message she sent him that day informing him she was removing him from the insurance plan. App. p. 468, ll. 10-15. In order to explain why he would have borrowed Victim's card when he was in fact able to pay cash for the gas and a motel room, Petitioner told law enforcement he asked her for the card just to see if she would give it to him. App. p. 98, l. 4. Petitioner's girlfriend confirmed she last saw Petitioner the morning of May 25, before Victim's disappearance, Petitioner did not spend the night with her, and she did not speak with him again until afternoon following Victim's disappearance. App. p. 530, l. 10 – p. 531, l. 9. Petitioner was neither consistent nor logically believable in this case, and frankly, the only conceivable route of rectifying his version of events was to suggest his suspicious behaviors were a result of being a "womanizing" unfaithful boyfriend, as Trial Counsel argued.

Clearly, the minor points that Petitioner apparently failed to pay another woman's child support or, as he himself admitted, was held in custody for financial charge fraud paled in importance compared to the abundant, independent evidence implicating Petitioner in this crime and rendering his changing version of events not credible. Therefore, the PCR court properly

found Petitioner has failed to satisfy his burden of proving prejudice in this case. Accordingly, the PCR court's ruling should be affirmed and certiorari should be denied.

II. The PCR court did not improperly use overwhelming evidence of guilt as a "categorical bar" to a finding of prejudice but rather undertook a proper issue-by-issue consideration of prejudice from alleged deficient conduct in light of properly admitted evidence, and notwithstanding, Petitioner nevertheless has failed to satisfy his burden of proving prejudice from Trial Counsel's representation.

Petitioner also alleges, for the first time, the PCR court erred by using "overwhelming evidence" as a categorical bar to relief where, as Petitioner alleges, the State failed to present conclusive proof of guilt. However, the Order of Dismissal reveals the PCR court properly concluded Petitioner was not prejudiced Trial Counsel's alleged deficiencies after undertaking an appropriate issue-by-issue analysis. The PCR court specifically found Petitioner failed to prove he was prejudiced Trial Counsel's arguments against the introduction of evidence purportedly placing Petitioner's character in issue. App. p. 1004. This reveals the PCR court did not apply overwhelming evidence as a "categorical bar," and the PCR court also undertook a separate prejudice analysis as to each separate allegation raised by Petitioner. The PCR court did not rely on overwhelming evidence alone to dispose of the prejudice issue as to any specific allegations. Notwithstanding, Petitioner cannot establish prejudice from the alleged misapplication of overwhelming evidence as the fact remains Trial Counsel was not deficient and the testimony at issue regarding Petitioner's child support, financial transaction fraud, and unfaithfulness as a boyfriend paled in comparison to the significance of the aforementioned tremendous amount of wholly independent evidence against Petitioner.

Notwithstanding the propriety of the PCR court's Order of Dismissal, no reasonable review of the record could lead to the conclusion that Petitioner would not have been convicted absent Trial Counsel's alleged deficiencies regarding his character. If the overall strength of

properly admitted evidence of Petitioner's guilt does not overcome the individual impact of each instance of Trial Counsel's specific performance, then there is a reasonable probability the outcome of the proceedings would have been different. Thompson v. State, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (citing Smalls v. State, 442 S.C. 174, 180, 810 S.E.2d 836, 839 (2018)). As previously noted, the alleged deficiencies were *especially* devoid of prejudice in light of the evidence against Petitioner in this case. There was an abundant amount of evidence presented at trial to show Petitioner suspiciously parked in a remote location when he visited Victim in the late hours of the night of her disappearance. Again, this was the same day she cancelled their joint bank account and removed Petitioner from her insurance policy. Victim was never seen again. Petitioner was caught attempting to use her credit card at the Shell station in Hampton before paying in cash, cash he apparently told his girlfriend he did not have earlier that day. Then, approximately two hours later, Petitioner checked rented a motel room in Walterboro with cash, a fake name, and a fake driver's license number. Victim was found days later in the Broad River, where it would have been entirely possible for Petitioner to dump her body within the timeframe provided. Victim's blood and Petitioner's DNA were found on her pillow. Petitioner later gave multiple inconsistent statements to law enforcement in which his story changed drastically, and finally in his third statement conceding he was at Victim's house the night of her disappearance but only being there to "mess around." Petitioner even admitted he was in custody for financial transaction fraud in one of his written statements which was admitted at trial and has not been challenged. Then, multiple witnesses, including a handwriting expert, testified the note purporting to be written by Victim was in Petitioner's handwriting.

Not only was the testimony and evidence at issue a very minor point compared to the substantial amount of evidence implicating Petitioner, but the testimony at issue is what actually

allowed Petitioner to present an alternate explanation for the ample evidence against him – that he was actually only "sneaking around" and lying because he was cheating on his girlfriend rather than committing and covering up a murder. Moreover, there was never any dispute Petitioner was a liar. He admitted to lying to law enforcement in his own statements to law enforcement. Petitioner had no credibility to lose, did not testify, and again, his dishonest behavior toward the police and his relationships in general was what provided for an alternative explanation to the State's evidence in the first place. Therefore, when considering the independent evidence against Petitioner in light of the evidence Petitioner alleges should not have been admitted, this case is decisively devoid of prejudice as there is no reasonable probability the outcome of the proceedings would have been different.

There is ample probative evidence to support the PCR court's finding that Petitioner has not met his burden of proving ineffective assistance of counsel, and certiorari should be denied.

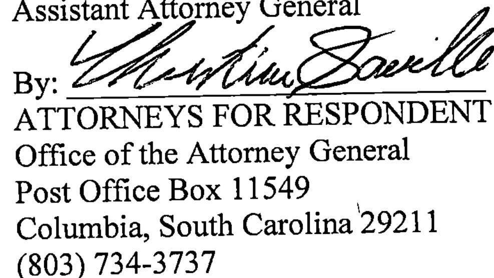
CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General



By: ______________________
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11/19, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-002115

KELVIN JACKSON, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

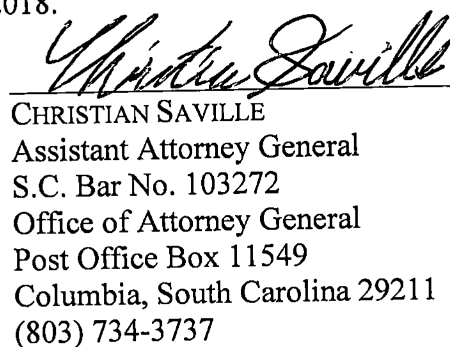
PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same via interagency mail to:

Joanna K. Delany
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 19 day of November, 2018.



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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
NOV 19 2018
S.C. SUPREME COURT

November 19, 2018

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

Re: **Kelvin Jackson v. State of South Carolina**
Appellate Case No. 2017-002115
Lower Court Case No. 2016-CP-07-0399

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville
Assistant Attorney General
SC Bar No. 103272

CS/cc
Enclosures

cc: Joanna K. Delany, Esquire (2 copies)