THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2018-001540
Lower Court Case No. 2017-CP-40-2220

LESLIE TODD PARVIN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

I. Whether the PCR court erred in finding Parvin was prejudiced by the admission of certain instances of "hearsay" testimony where they were in no way dispositive because, regardless, extensive testimony and evidence presented at trial revealed he shot two unarmed victims to death, where one victim was shot three times in the back, where Parvin then fled the scene, moved his family into a hotel, fled to Louisiana and Texas, destroyed his firearm, had his van crushed, did not return to South Carolina until two weeks later after he changed his appearance, where his family lied to the police about his whereabouts, where at no point did Parvin attempt to contact the police, and where no evidence other than Parvin's own self-serving and illogical testimony conceivably supported his self-defense theory.

II. Whether the PCR court erred in finding Parvin's convictions would have been reversed had Trial Counsel objected to certain instances of "hearsay" testimony indicating Parvin solicited sex from the murder victim where, despite the Court of Appeals' finding the testimony was not admissible as a present sense impression, there were unaddressed additional sustaining grounds under which the testimony was admissible.

A. Whether notwithstanding the Court of Appeals' finding the testimony did constitute a present sense impression, the testimony at issue in which the murder victim declarant stated Parvin paid him to have sex was admissible as a statement against penal interest under Rule 804(b)(3), SCRE.

B. Whether the testimony was also admissible, as properly found by the trial court, as part of the *res gestae* of the case.

STATEMENT OF THE CASE

In February 2011, the Richland County Grand Jury indicted Leslie Todd Parvin for two counts of murder (2011-GS-40-0897; -0898). Fielding Pringle, Jennifer Davis, and Luke Shealey, Esquires, represented Parvin. Assistant Solicitors Nicole M. Simpson, Kathryn "Luck" Campbell, and Meghan Walker prosecuted the case. Parvin proceeded to a jury trial before the Honorable Clifton Newman and was found guilty of both counts on December 21, 2011. On December 28, 2011, Judge Newman sentenced Parvin to concurrent terms of imprisonment for thirty-five years for each charge.

Dwight F. Drake, Esquire, and Michael J. Anzelmo, Esquire, perfected an appeal on Parvin's behalf. On appeal, Parvin argued the trial court committed reversible error by admitting a hearsay statement of victim Lopez ("Lopez") and alleged the statement constituted the heart of the State's case. The statement Parvin argued to be inadmissible hearsay was made to two acquaintances in the gas station that an American had given him $200 to have sex with him. The State argued even if the trial court erred in admitting the statement as a present sense impression pursuant to Rule 803(1), SCRE, the trial court also properly admitted the statement under *res gestae*, and notwithstanding, the statement was admissible as a statement against penal interest pursuant to Rule 804(b)(3), SCRE. The South Carolina Court of Appeals heard the case on February 5, 2014, and affirmed Parvin's convictions in an opinion filed on July 30, 2014. State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015). In the opinion, the Court of Appeals found the trial court erred in admitting the testimony as a present sense impression, but the testimony was harmless in light of other evidence later admitted without objection. The court noted Trial Counsel did not object to testimony by investigators which referred to the victim's statement that Parvin had paid him to have sex. The court also noted there were several other occurrences at

trial which rendered the error harmless, including the fact potential jurors were forewarned the trial might involve "allegations of homosexuality ... and/or sex for money."

Both the State and Parvin filed petitions for rehearing. On December 11, 2014, after careful consideration, the Court of Appeals granted Parvin's petition in part and ordered additional arguments on the issue "whether the Court misapprehended or overlooked rules of error preservation in finding the admission of the victim's hearsay statement constituted harmless error." The State's petition for rehearing was denied. After the oral arguments, the Court of Appeals again affirmed Parvin's convictions and sentences. The Court withdrew, substituted, and refiled its opinion on June 10, 2015. Parvin subsequently filed a petition for rehearing and suggestion for rehearing *en banc* on June 25, 2015. The Court of Appeals denied the petition on October 8, 2015. Parvin then filed a petition for writ of certiorari to the South Carolina Supreme Court on November 16, 2015. In his petition for writ of certiorari, Parvin raised the following arguments:

I. The Court of Appeals erred in affirming the trial court on the basis of harmless error because the admission of the erroneous evidence related directly to the central issue of the case and allowed the State to frame its entire case to the jury.
II. The Court of Appeals improperly applied our rules of error preservation to require Parvin to continue to object to the same evidence repeatedly after the trial court's prior ruling on the admissibility of that evidence.
III. The Court of Appeals erred in using statements made in voir dire and during the State's opening statement as evidence as support for its harmless error holding.
IV. The Court of Appeals erred in relying on cross-examination to support its harmless error finding.

The State filed its return to petition for writ of certiorari on December 16, 2015. The Supreme Court denied Parvin's petition on September 9, 2016. The remittitur was returned to the lower court on September 14, 2016.

Parvin filed an application for post-conviction relief on April 12, 2017, in which he raised the following allegations:

1. "Ineffective Assistance of Counsel."
    a. "Trial Counsel provided ineffective representation at trial because Parvin's trial counsel failed to properly object to improper evidence introduced by the State at trial on the seminal issue at trial. As a result, Trial Counsel failed to preserve appellate arguments on the seminal issue for appeal. The Court of Appeals, and with the denial of certiorari by the Supreme Court, upheld Parvin's conviction and sentence because of the failure of Trial Counsel to properly object to the improper evidence."
    b. "Trial Counsel was also ineffective because Counsel failed to introduce evidence that Parvin suffered from post-traumatic stress disorder (PTSD) at trial."

The State submitted its return on September 24, 2017. An evidentiary hearing into the matter was convened on March, 21, 2018, at the Richland County Courthouse before the Honorable Brooks P. Goldsmith. Parvin was present at the hearing and was represented by Richard Harpootlian, Esquire, Christopher Kenney, Esquire, and Matt Abee, Esquire. The State was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office. At the hearing, Parvin expressly withdrew his allegation that Trial Counsel was ineffective for failing to introduce evidence he suffered from PTSD. In lieu of closing arguments, the parties were asked to submit proposed orders. An order granting PCR was filed on June 17, 2018. In the order, the PCR court found Trial Counsel was deficient for failing to object to hearsay testimony by the investigators, and but for this deficiency, Parvin's convictions would have been reversed and he would have received a new trial. The State subsequently filed a motion to reconsider pursuant to Rule 59(e), SCRCP, on July 9, 2018. Parvin filed a response in opposition to the State's motion on July 23, 2018. The State subsequently filed a reply on August 6, 2018. An order denying the State's motion to reconsider was filed on August 16, 2018. The State filed a notice of appeal on August 21, 2018. This petition follows.

STATEMENT OF THE FACTS

On July 30, 2010, Parvin, a twenty-year military veteran, shot and killed two victims Lopez and Gutierrez, in the front yard Lopez's Richland County residence with a .45 caliber

semi-automatic handgun. Lopez, who was only 5'4 and 140 pounds, was shot once in the face at close range and once in the abdomen, while Gutierrez, who was 6'1 and 196 pounds, was shot three times in the back and once in the chest. App. 524, 496-498, 501-502, 524, 512-513. Both Lopez and Gutierrez died on the scene unarmed. App. 489. Describing the incident, eyewitness and neighbor Roberto Gonzalez-Merrin explained Parvin pulled a gun from his back and shot Lopez before turning the gun on Gutierrez, who was attempting to flee the scene, and shooting him in the back. App. 414-415. Gonzalez-Merrin further testified Parvin was outside of the fence surrounding Lopez's front yard and was next to his vehicle, a two-tone green and grey Kia minivan, when he shot both Lopez and Gutierrez, both of whom were inside the fence. App. 413-415. Lopez and Gutierrez were unarmed when Parvin shot them. App. 416. Gonzalez-Merrin testified:

> I saw them be shot. [Parvin] pulled out a pistol from his side. He was going to shoot him and then he shoot the other guy. They had no arms – they had no arms in which to defend themselves. They were just drinking and having fun. App. 421.

Dimas Fernandez, who lived in the main residence on the property, testified that while he did not see the actual shooting, he observed Parvin, whom he saw was armed with a pistol, slam a chair, throw a beer and go outside of the fence around the property. App. 375-377. He then looked on as Lopez began to reach into his pocket and take out money extending it in Parvin's direction. App. 376. Shortly thereafter, Fernandez said he heard gunshots and then saw Parvin's van leaving the scene. App. 377.

Following the shooting, Parvin calmly walked to his minivan and fled the scene, unlike "the kind of person who looked like he had just killed two people." App. 414, 416, 418-419, 421, 1153-1154. He then returned home, destroyed the gun used in the incident, put his family up in a motel for the evening, changed his appearance and drove his minivan to Louisiana where he

"holed up" in a motel room. App. 1180, 1184-1185, 967, 1182-1183, 1045. Next, Parvin asked his father to drive down to Louisiana to join him and once he knew his father was coming, sold his minivan for scrap on August 5, 2010. App. 1151, 1155-1157, 693-695, 942. After selling his minivan for scrap, Parvin and his father stayed in Louisiana to "figure out what the heck to do." App. 1158. They then continued to Texas where Parvin visited with his in-laws. App. 942, 1158. On August 15, 2010, over two weeks after the murders, Parvin and his father returned to Columbia. App. 1158-1159. Despite knowing authorities were looking for him, Parvin admitted he never attempted to contact police about the shooting. App. 1159. Likewise, Parvin's family never attempted to contact police about the shooting. App. 1014.

Four days after his return to Columbia, Parvin was apprehended at his residence when authorities attempted to execute a search warrant on the premises. App. 937. Notably, in the time immediately before Parvin's apprehension, his wife, father and son all lied about his presence in the residence telling authorities Parvin was in Texas when police sought to execute the search warrant. App. 762, 934, 938-939.

It is not disputed Parvin was driving in his Kia van before the incident when he came upon the eventual victims drinking beer in Lopez's yard. According to Parvin's version of events, he was pursuing his hobby of collecting scrap metal and thought they looked like they worked in construction so he decided to speak and drink with them in hopes of learning where to find some scrap metal. App. 1884. The group eventually proceeded to a nearby Shell station to purchase more beer, at which point the statements at issue were made regarding Parvin paying the men for sex, and the group then returned to Lopez's home where the shooting occurred. It was Parvin's contention at trial that he fatally shot the unarmed Lopez and the unarmed Gutierrez, whom he shot in the back while Gutierrez was attempting to flee, in self-defense.

Voir Dire and Defense Counsel's Motion in Limine Regarding Lopez's Statements

In voir dire, the trial court, at the request of defense counsel, told the jury pool "an allegation may be made in this case regarding some allegation of homosexuality or sex for money – and/or sex for money." App. 66, 77. Continuing, the trial court asked whether these allegations would adversely affect any potential juror's ability to be fair and impartial. App. 66-67. No member of the jury pool indicated such an allegation would affect their duty to be fair and impartial. App. 66-67.

Defense counsel also made a motion in limine in an effort to, "exclude reference to other crimes, wrongs, acts; specifically any reference to the defendant being at the incident location for gay or homosexual sex." App. 130. In particular, defense counsel explained the State would likely present evidence that: (1) Parvin encountered Lopez and Gutierrez at Lopez's residence, then gave Lopez a ride to a nearby Shell gas station and stayed in the car while Lopez told two acquaintances, Adan Soto and his wife, Marlin Avila that Parvin gave him $200 in exchange for sex; and (2) prior to going to the gas station, Jose Monroy, another acquaintance of Lopez, heard Lopez tell Gutierrez that Parvin was gay. App. 130-133. As such, defense counsel argued evidence of Lopez's statements was improper character evidence citing to Rule 404(b), SCRE. App. 132-133.

In response, the State, citing State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) and State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) argued the statements were admissible as, "res gestae or [the] present sense impression exception to the hearsay rule." App. 136. The State then explained its timeline for its present sense impression argument:

> The parts he left out about the time line . . . is basically the defendant goes over to the victim[']s house. They are sitting out in the yard drinking beer. At some point . . . there is a reference to how the defendant is going to spend the night with Edgar and is going to sleep in the room, so Pablo has to be outside. It's that

> reference[,] at that point[,] that [Parvin is] homosexual. . . [T]he victim and the defendant get into the defendant's car. They then go to the gas station where the second exchange occurs . . .[with] two different witnesses . . .who [are] somewhat clear and convincing, hear Mr. Lopez talking about his present sense impression that the American has given him $200 in exchange for sex and whether or not he's going to go through with it. Then what happens is they immediately go back and start drinking beer again and within just a short time period, Your Honor, at that point there [are] loud voices heard. They can't hear exactly what's being said, but you then see, and it comes from the fact that Lopez says he's not going to have sex with him, he's just going to drink his beer. At that point[,] a different witness sees him pull into his—the victim pull into his pocket and hand what appears to be money to the defendant. At that point[,] there is some more arguing going on, at which point the defendant then pulls out a gun and shoots them.

App. 136-137.

After giving its version of the timeline, the State maintained its purpose for introducing the homosexual aspect of the case was not to impugn Parvin's character, but to explain why Parvin "became enraged" and shot the victim "at close range." App. 137. Continuing, the State argued that because the information essentially explained what happened on the day in question, it would come in under Adams as *res gestae*. App. 138. The State then opined Lopez's statements were also admissible under Simpson as a present sense impression. App. 136-137. Shifting back to its res gestae argument, the State highlighted, "[t]his is an ongoing chain of events that occur and lead up to the actual murder itself. We aren't talking about things that happened even hours before the murder, or even an hour before the murder, or days before the murder. We are talking about close in time." App. 138.

Replying to the State's argument, defense counsel disputed the State's assertions regarding the application of *res gestae* and the present sense impression hearsay exception. App. 138. The State then suggested Lopez's statements were also admissible under Rule 803(3), SCRE as evidence of the declarant's then existing state of mind. App. 137-138.

After hearing argument on the issue, the trial court declined to rule immediately stating, "well you all have had the benefit of time to research and file motions and cite cases. . . and I'll take the benefit of time to think about it before ruling." App. 140. The issue regarding the admissibility of the statements subsequently came up in additional argument on a collateral matter, but again, the trial court declined to rule. App. 160-174. The following day, prior to opening statements, the trial court ruled Lopez's statements at the Shell station were admissible under *res gestae* and as an exception to the hearsay rule, but failed to rule as to whether Lopez's statement made at the scene of the shooting—that Parvin was homosexual—was admissible. App. 208. Defense counsel renewed its objection to the introduction of the statements made by Lopez to Avila and Soto in the Shell station at trial. App. 332, 341. The trial court, who merely overruled the objection without further argument clarified its ruling later in the day explaining, "the statements of the deceased at the gas station" were *res gestae* and further found the probative value of such evidence outweighed its prejudicial effect. App. 423-425.

State's Case & "Sex for Money" Theory

At trial, the State presented testimony from Monroy, who was drinking with Parvin, Lopez and Gutierrez in the time leading up to the incident. App 315-316. Specifically, Monroy testified he joined Lopez, Gutierrez and Parvin for a Modelo beer outside of Lopez's residence when he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with him that evening. App. 316. The State also presented testimony from Soto and Avila from the Shell station. App. 331-346. Soto who is married to Avila, and was at the Shell station that evening with their six-year old son, said Lopez approached him outside the Shell station and was going to buy a case of beer when he said, "[Parvin] had given him $200 to buy beer because he wanted to have sex with him." App. 334-336. According to Soto, Lopez then showed him the $200 Parvin

had given him. App. 340. Avila added that Lopez had initially approached her because he was aware Avila sold perfume and wanted to see if she had any to sell because, "he needed some." App. 341.

Similarly, the State also elicited testimony from Investigator Brien Gwyn. On direct examination, Gwyn testified that Soto and Avila advised him, both orally and in writing 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." App. 919. Gwyn confirmed the store was "the place where [Lopez was] telling [Avila] about this sex for money." App. 961.

The State also presented testimony from eyewitnesses Gonzalez-Merrin and Dimas Fernandez. Gonzalez-Merrin, who was painting his porch across the street, testified that in the moments leading up to the shooting, he heard Parvin raise his voice and then point a gun at Lopez, who extended his hand towards Parvin just before he was shot. App. 415-416. Continuing, Gonzales-Merrin said Parvin next turned the gun on Gutierrez, who was attempting to flee the scene, and shot him in the back. App. 413-416. Gonzalez-Merrin said Parvin was outside of the fence surrounding Lopez's front yard and was next to his vehicle, a two-tone green and grey Kia minivan, when he shot both Lopez and Gutierrrez, both of whom were inside the fence. App. 415-417. Gonzalez-Merrin confirmed that neither Lopez nor Gutierrez were armed. App. 416. As he explained, "They have a beer. They didn't have any arms to defend themselves." App. 416. In fact, this was corroborated by beer cans found at the scene along with an apparent impact point. App. 589.

Similarly, Fernandez, who lived in the main residence on the property, testified that while he did not see the actual shooting, he observed Parvin, whom he saw was armed with a pistol, slam a chair, throw a beer and go outside of the fence. App. 376. He then looked on as Lopez

extended money in Parvin's direction. App. 376. Shortly thereafter, Fernandez said he heard gunshots and actually passed Parvin in his minivan as he was leaving the scene. App. 377. Neither Fernandez nor Gonzalez-Merrin, nor any other witness aside from Parvin testified to any aggression or provocation on the part of the victims.

The State further offered evidence showing Parvin fled the scene in the aftermath of the murders, disposed of evidence and evaded capture leading up to his apprehension. App. 416-421, 423. In particular, authorities explained they were never able to recover the gun used in the shootings, and further learned Parvin changed his appearance and fled to Louisiana where he sold his minivan for scrap. App. 942, 1157, 694-695, 944. They also learned Parvin continued to Texas where he visited with his in-laws before returning to Columbia. App. 934-944. Despite knowing authorities were looking for him, Parvin's family never attempted to contact police about the shooting, instead lying about his whereabouts even when his apprehension became imminent. App. 944, 1014, 934-937, 752.

Parvin's Defense Theory

Parvin, whose DNA and fingerprints were left at the scene, took the stand and consistent with defense counsel's assertions in its opening argument, claimed he was acting in self-defense when he shot and killed Lopez and Gutierrez. In his testimony, Parvin claimed he was "attacked" and "had to fight [his] way out of the yard." App. 1088.

Elaborating, Parvin explained that after he and Lopez returned from the Shell station, he met "two guys" who he determined were Monroy and his friend, Alfredo Vidal. App. 1138. Parvin said he then, "did the meet and greet" and shook hands with both individuals, after which, the group began to talk with Lopez serving as their translator. App. 1138-1139. Over the course of the conversation, Parvin said Lopez, by failing to translate what Gutierrez, Monroy and Vidal

were saying, excluded him from the conversation which made him feel, "mad" and "[l]ike an outsider." App. 1144. As a result, Parvin claimed he attempted to leave and began walking towards his car when Lopez and Gutierrez followed him, kept him from leaving, asked for more money and purportedly told him, "you are not leaving." App. 1146. Parvin further testified Gutierrez was guarding the gate to the fence at this time and claimed Lopez and Gutierrez told him they knew where his house and family were and "they would go there" which Parvin said, prompted him to ask Lopez for the change from their previous beer run. App. 1147-1148. After this exchange, Parvin, a twenty-year military veteran, testified he was "petrified" and claimed Lopez said "they had guns too" which led him to run towards the gate standing between Lopez's residence and his minivan, but, when he did, Gutierrez fought him and attempted to take his weapon. App. 1141. Parvin claimed it was after this struggle that he pushed Gutierrez away and began firing. App. 1151-1152. After eyewitnesses had already testified Parvin calmly walked to his getaway van, Parvin told the jury he walked to his minivan and drove off after the shooting. App. 1153-1154.

RELEVANT PCR HEARING TESTIMONY

At the evidentiary hearing, Parvin called Fielding Pringle, Esquire ("Trial Counsel Pringle"), and Jennifer Davis ("Trial Counsel Davis"), Esquire, to testify. Parvin also called Jack B. Swerling, Esquire, as an expert witness in trial strategy, over the State's objection.

Trial Counsel Pringle's testimony

Trial Counsel Pringle testified that Ms. Davis served as lead counsel in this case. Trial Counsel Pringle recalled she handled a large portion of Parvin's character presentation at trial, which included a character defense and numerous character witnesses from Parvin's extensive military record. Despite the considerable amount of character evidence presented by the defense,

she opined the testimony regarding Parvin soliciting sex from Lopez was more impactful in light of the character evidence presented by the defense. It was her opinion the solicitation for sex theory was the State's motive. Trial Counsel Pringle testified the defense did object when two witnesses from the gas station where this conversation allegedly took place testified about the statement, but not during the later testimony of two police officers who investigated the case. She recalled Judge Newman ruling the statement admissible at a pretrial hearing.

Trial Counsel Davis's testimony

Trial Counsel Davis recounted Parvin's version of the facts in this case which alleged Parvin was engaging in his hobby of searching for scrap metal on the day of the incident when he came upon gentlemen in a neighborhood drinking beer. After exchanging waves and pleasantries, Parvin got out of the car to talk with them. Lopez asked Parvin to go to the store for some more beer where he allegedly asked Parvin for beer money and Parvin obliged. The men then returned to where they first met. According to Parvin, only Lopez and he spoke English, so Lopez had been translating for Parvin and the other gentlemen. Parvin claimed to feel something was amiss and tried to leave when Lopez stopped translating but supposedly told Parvin he could not leave. Parvin alleged he saw a separate victim reach for a gun and another gentleman reach into a shed-like building where he thought there may be weapons. Parvin shot them, alleging he felt they were attempting to rob him.

Trial Counsel Davis recalled the testimony of witnesses Avila and Soto, who were at the gas station where Lopez purchased the beer. They both testified at trial that Lopez said something to the effect that an American was going to pay him $200 to have sex with him. Trial Counsel Davis testified she felt that testimony was a problem and inadmissible, and noted she made contemporaneous objections to the statement during their testimony, which were

overruled. Her discussions with familial and military acquaintances of Parvin, who was married with children, unsurprisingly did not replicate claims of homosexuality. Trial Counsel Davis acknowledged she did not object during the cross-examination of Investigator Gonzales when Gonzales testified, "It was, quote, 'the [expletive] American gave me $200 to have sex with him." Ms. Davis in hindsight testified she should have objected at that time and later when Investigator Gwyn testified that Avila and Soto indicated in their statements to him that Lopez had told them he was solicited for sex by the individual he was at the store with. Trial Counsel Davis claimed she was ineffective for not objecting and noted her statement in which she asked on cross-examination if the only evidence against Parvin was a sex for money claim in the words of a man with .379 blood alcohol content. Trial Counsel Davis asserted there was no trial strategy for not objecting to the statements and the defense was trying to keep the statements out. She explained there was a pretrial motion argued by co-counsel Shealey to keep these statements out, but the motion was denied. It was Trial Counsel Davis's opinion the sex-for-money theory formed the motive as alleged by the State.

Trial Counsel Davis was also questioned about Parvin's behavior following the incident, which included Parvin dismantling his firearm, moving his family into a hotel, cutting his hair, eventually driving to Texas, and selling his van for scrap before returning to South Carolina with his father approximately two weeks following the date of the incident. Furthermore, Trial Counsel Davis conceded there was never any testimony that Parvin contacted the police.

Trial Counsel Davis acknowledged there were multiple grounds on which the trial court found the testimony at issue admissible, which included not only a present sense impression exception to hearsay but also as *res gestae* and its probative value outweighed its potential prejudicial impact. Trial Counsel Davis also testified there was discussion pre-trial about the

possibility this testimony could have shown the solicitation of prostitution which could constitute a prior bad act.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (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; 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland 466 U.S. at 687. "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). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. 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 that 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. 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. Strickland, 466 U.S. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. The PCR court erred in finding Parvin was prejudiced by the admission of certain instances of "hearsay" testimony where they were not dispositive because, regardless, extensive testimony and evidence presented at trial revealed he shot two unarmed victims to death, where one victim was shot three times in the back, where Parvin then fled the scene, moved his family into a hotel, fled to Louisiana and Texas, destroyed his firearm, had his van crushed, did not return to South Carolina until two weeks later after he changed his appearance, where his family lied to the police about his whereabouts, where at no point did Parvin attempt to contact the police, and where no evidence other than Parvin's own self-serving and illogical testimony conceivably supported his self-defense theory.

The PCR court erred when it granted post-conviction relief based on its ruling that Trial Counsel was ineffective for failing to object to instances of hearsay testimony indicating Parvin had paid the victims for sex and that the Court of Appeals would have reversed his convictions had the issues been preserved. By contrast, in light of ample independent evidence proving Parvin's guilty of two counts of murder and refuting his claim of self-defense, the record conclusively demonstrates Parvin suffered no prejudice from the lack of objections as there is no reasonable probability the result of the proceedings would have been different. Accordingly, the PCR court's finding must be reversed.

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, 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, at 117-18, 386 S.E.2d at 625. This Court need not first determine whether Trial Counsel's performance was deficient before examining the lack of 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. at 670. In Smalls, this Court held the specific impact of counsel's alleged errors must be balanced against the strength of the State's case. 422 S.C. at 188.

In this case, regardless of the admissibility of the testimony that Parvin paid the victims for sex, the testimony was in no way dispositive in the proceedings. In light of evidence wholly independent from these alleged errors, the jury's only reasonable conclusion would have been to find Parvin guilty of two counts of murder. Regardless of whether Parvin paid the victims for sex or not, the State's case did not rest on Parvin's sexual proclivities, but rather Parvin's sexual preferences were a footnote to the well-established fact Parvin shot two unarmed individuals, with one of them being shot three times in the back, before fleeing from the State and evading police detection.

There was ample evidence to support Parvin's convictions for both murders and contradict a claim of self-defense absent the testimony at issue. Parvin was identified by multiple witnesses as having been with the victims throughout the day and his DNA placed him at the scene, so Parvin unsurprisingly did not dispute his presence at the scene. At trial, Gonzales-Merrin, who was painting a porch across the street, testified he heard Parvin raise his voice and point a gun at Lopez, who was unarmed, and shot him from outside the fence while Lopez was inside the fence. App. 414, 416. Gonzales-Merrin further testified Guzman-Guiterrez raised his hands and Parvin shot him two or three times. App. 415. Again, Gonzales-Merrin testified both victims were unarmed, "They ha[d] a beer. They didn't have any arms to defend themselves." App. 416. This was also evidenced by a beer can found at the scene with an apparent impact point. App. 589. Gonzales-Merrin reaffirmed, "They had no arms – they had no arms in which to

defend themselves. They were just drinking and having fun." App. 421. Another eyewitness, Dimas Fernandez, testified he saw Parvin throw a chair and his beer down before walking outside the fence at the residence. App. 375. According to Fernandez, Lopez then pulled some money from his pockets and held his hand out with money before the shots were fired. App. 375-376. The autopsy revealed Guzman-Guiterrez died after being shot three times in the back. App. 511-521.

There was also ample evidence of flight and guilty conscience exhibited by Parvin. The jury heard eyewitness testimony Parvin fled the scene in the aftermath of the shooting in his green Kia van. App. 416-423, 1155-1156. Parvin destroyed the murder weapon. App. 1157-1158. Parvin also moved his family into a hotel room that evening. App. 1010. Parvin then fled to Louisiana and Texas after the shooting and had the green Kia van crushed in Louisiana. App. 941-942. Furthermore, as Trial Counsel Davis acknowledged at the PCR hearing, Parvin did not return to South Carolina until two weeks after the incident after he made affirmative efforts to change his appearance. App. 9-10, 324, 938, 2087. Parvin at no time contacted the police. In fact, his family lied about his whereabouts knowing the police were looking for him. App. 760-763, 1512. Furthermore, Parvin's wife lied to law enforcement and told them the van had been sold, rather than crushed. App. 761. Clearly, Parvin's behavior following the incident, not to mention the actual testimony and physical evidence at the crime scene, reveal the shootings were anything but acts of self-defense.

Absent the testimony at issue, there is no reasonable probability twenty year military veteran Parvin's self-defense theory would have prevailed in light of tremendous conflicting evidence and testimony. Self-defense requires a defendant to meet each of four separate elements to be justified in using deadly force:

(1) The defendant was without fault in bringing on the difficulty;
(2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
(3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonably prudent man or ordinary firmness and courage would have entertained the same belief ...; and
(4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

The evidence at trial did not suggest the victims in this case wielded weapons, but rather beer and money. The first element of self-defense is conclusively refuted by the testimony presented at trial. First, eyewitness Gonzales-Merrin repeatedly asserted the victims were not armed. App. 416, 421. In fact, Gonzales-Merrin elaborated, "They had no arms in which to defend themselves. They were just drinking and having fun." App. 421. Furthermore, additional eyewitness Fernandez described Parvin as the instigator who escalated a once-peaceful situation. Fernandez testified he saw Parvin throw his beer down and throw a chair before walking outside the fence of the residence. App. 375. Fernandez then saw Lopez extend money toward Parvin, at which point Parvin fired the shots. App. 375-376. Parvin's claim he was in fear that he was being robbed is simply not credible or supported by any evidence other than his own self-serving testimony, even absent the testimony at issue. The evidence presented at trial showed it was not the victims who appeared to be robbing Parvin, but rather it was Parvin who shot Lopez to death as Lopez extended money toward Parvin. Parvin's sexuality or proclivity to solicit sex has nothing to do with his nonviable nature of his self-defense claim in light of tremendous evidence he was guilty of murder.

Parvin has asserted he suffered prejudice because the State would not have been able to provide a motive absent the "sex-for-money" theory supported by the testimony at issue. Respectfully, this reliance on motive is misplaced. The State is not required to prove motive. In

South Carolina, "Murder" is the unlawful killing of any person with malice aforethought, either express or implied. S.C. Code § 16-3-10. The State was not required to prove Parvin's motivation for shooting unarmed Lopez while he held a beer and money in his hands. The State was not required to prove Parvin's motivation for shooting unarmed Guzman-Guiterrez three times in the back. Rather, even without the testimony at issue, the evidence proved why Parvin changed his appearance, fled to Louisiana and Texas, destroyed his weapon and his van, and had his family lie to the police – because he was guilty of two counts of murder.

Therefore, given the weight and nature of evidence in this case, there is no reasonable probability the result of the proceedings would have been different even if the hearsay testimony at issue would have been excluded. Accordingly, Parvin has failed to meet his burden of proving prejudice from any alleged deficiency, and PCR court's ruling should be reversed.

II. The PCR court erred in finding Parvin's convictions would have been reversed had Trial Counsel objected to certain instances of "hearsay" testimony indicating Parvin solicited sex from the murder victim where, despite the Court of Appeals' finding the testimony was not admissible as a present sense impression, there were unaddressed additional sustaining grounds under which the testimony was admissible.

The PCR court granted post-conviction relief based on its ruling that Parvin was prejudiced by Trial Counsel's lack of objection to the two instances of testimony regarding the victim's statement about Parvin paying him for sex, and in doing so, the PCR court relied on the Court of Appeals opinion which found the trial court erred in admitting the statement as a present sense impression. However, there were additional sustaining grounds which were not addressed by the Court of Appeals on which the Court of Appeals could have affirmed Parvin's conviction because the testimony was admissible under more rules of evidence than just Rule 803(1), SCRE, for present sense impressions. In fact, the testimony was admissible as a statement clearly

against penal interest pursuant to Rule 804(b)(3), SCRE, and under the theory of *res gestae*. Therefore, even if Trial Counsel had objected to all instances of testimony regarding the statement at issue, there is no reasonable probability the result of the proceedings would have been different. Accordingly, the PCR court's finding must be reversed.

A. Notwithstanding the Court of Appeals' finding the testimony was improperly admitted as a present sense impression, the testimony at issue in which the murder victim declarant stated Parvin paid him to have sex was admissible as a statement against penal interest under Rule 804(b)(3), SCRE.

While the Court of Appeals ruled on Parvin's sole appellate argument which asserted error under Rule 803(1), SCRE, the statements were still admissible under numerous other theories. First, the testimony at issue would have also been admissible under Rule 804(b)(3), SCRE, as a statement against penal interest.

Rules 804(a)(4) and 804(b)(3) of the South Carolina Rules of Evidence provide an exception to the hearsay rule if a declarant is unavailable due to death. Osterneck v. Osterneck, 374 S.C. 573, 579-80, 649 S.E.2d 127, 131 (Ct. App. 2007). This hearsay exception permits admission of a statement if the statement, "at the time of its making ... tended to subject the declarant to civil or criminal liability ... [such] that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE. This rule is based on "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." State v. Prioleau, 339 S.C. 605, 611, 529 S.E.2d 561, 564 (Ct. App. 2000) (quoting Williamson v. U.S., 512 U.S. 594, 599 (1994). Therefore, the question is whether a reasonable person in Lopez's position would have made the statement that he was being paid $200 to have sex with Parvin if it was not in fact true. See Williamson, 512 U.S. at 603-04. This

statement by Lopez is clearly inculpatory and against his penal interest as it constitutes an admission to prostitution. It is not reasonable to assume Lopez would implicate himself in prostitution to individuals both inside and outside the convenience store and even show witness Avila the $200 he received from Parvin if Lopez did not believe his own statement to be indeed true. App. 339. In fact, when Soto was asked at trial if he felt the statement from Lopez was "just talk," Soto testified, "Well, he showed me the money. He had $200 in his hand." App. 339. The statements at issue here fall comfortably under the purview of Rule 804(b)(3), SCRE, refuting Parvin's allegation of ineffective assistance of counsel for lack of objection to the testimony, as the testimony was nevertheless admissible and the conviction would have been rightfully affirmed on this additional ground. Accordingly, the PCR court's ruling should be reversed.

B. The testimony was also admissible, as properly found by the trial court, as part of the *res gestae* of the case.

While the Court of Appeals ruled on Parvin's sole appellate argument which asserted error under Rule 803(1), SCRE, the testimony was also admissible under the *res gestae* theory. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)), the Court observed:

> "One of the acceptable bases for the admissibility of evidence of other crimes arises when such evidence 'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its 'environment' that its proof is appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the 'res gestae.'

During the pretrial hearing on Trial Counsel's motion to exclude the statements, the State expressly argued the statements were admissible under *res gestae* and cited to Adams. After hearing the motion, the trial judge properly found they were "admissible as part of the res gestae *and* as an exception to the hearsay rule *and* to explain the nature of what's going on in relation to

... could be probative on the issue of motive" (emphasis added). App. 208. Moreover, the trial judge later supplemented his ruling as follows:

> "The first thing is, just regarding the ruling earlier about the statements of the deceased at the gas station as being part of the res gestae ... [t]he res gestae did not involve other crimes, but may have suggested some bad acts ... I have considered the probative value versus the prejudicial effect of allowing the evidence, the res gestae evidence, and I find the probative value outweighs any prejudicial effect. So that supplements my ruling on that issue.

It is therefore clear the trial judge properly admitted the evidence not only under the present sense impression exception to hearsay, but also under a *res gestae* theory. As the State argued at trial, the information the investigators as well as Avila and Soto testified about at trial explained what happened during the chain of events in question, and was relevant to how Parvin "became enraged" and shot the victims when he was refused sex. App. 137. Furthermore, the statement is intertwined with the numerous instances of testimony that the victims and Parvin were involved in a cash transaction the day of the incident. Soto from the convenience store testified Lopez showed him $200 in cash he had received from Parvin. App. 339. It was Parvin's own contention he had given them beer money and, despite the fact it was the victims attempting to give Parvin money when he shot them, he repeatedly claimed they were trying to demand more money from him. App. 1117. Investigator Gwyn also learned from his investigation Parvin had given Lopez money at some point. App. 965. Major James Smith testified eyewitness Gonzales-Merrin testified he saw the victims attempt to hand Parvin money before they were shot. App. 991. Indeed, eyewitness Fernandez also testified he looked on as Lopez began to reach into his pocket and take out money extending it in Parvin's direction before the shots rang out. App. 376-377. Clearly the cash transaction was intertwined with the chain of events leading to the murders. The testimony at issue furnishes part of the context of the crime, and was therefore admissible under *res gestae*.

The Court of Appeals' ruling on Parvin's sole appellate argument, that the testimony did not constitute a present sense impression, therefore, is not dispositive and does not address the fact this testimony admissible on additional grounds. Accordingly, Parvin has failed to satisfy his burden of proving he is entitled to relief on his claim of ineffective assistance of counsel, and the PCR court's ruling should be reversed.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to grant certiorari, dispense with further briefing, and correct this error by reversing the PCR court's ruling granting post-conviction relief. In the alternative, the State requests this Court to grant certiorari and allow the opportunity to fully brief the issue.

Respectfully submitted,

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December 27, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2018-001540
Lower Court Case No. 2017-CP-40-2220

LESLIE TODD PARVIN, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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