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S.C. SUPREME COURT

State of South Carolina
In the Supreme Court

Certiorari to Richland County
Court of Common Pleas
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2017-CP-40-02220
Appellate Case No. 2018-001540

LESLIE TODD PARVIN, #349127,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

RESPONDENT'S RETURN TO THE STATE'S PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF THE ISSUES

The Constitutional right to effective assistance of counsel requires trial counsel to object contemporaneously to inadmissible hearsay testimony on a contested, central issue. When the failure to object raises a reasonable probability the result of the proceedings would have been different without counsel's error, post-conviction relief is required.

The questions presented are:

1. Whether, on PCR, the State may propose alternative theories of admissibility of hearsay testimony on a contested, central issue without raising those theories in its Return to a PCR application, including:
   a. whether a statement against the penal interest of another individual, but not the declarant, can satisfy Rule 804(b)(3), SCRE; and
   b. whether *res gestae* remains an exception to the hearsay rule despite precedent to the contrary from the South Carolina Court of Appeals and when the State expressly abandoned its argument that the testimony was admissible under Rule 404(b), SCRE.
2. Whether a criminal defendant is entitled to PCR where trial counsel concedes a contested, central issue by a failing to object contemporaneously to hearsay testimony and that hearsay forms the sole basis of the State's theory of the case.

COUNTERSTATEMENT OF THE CASE

In July 2010, Respondent Leslie Todd Parvin was out looking for scrap metal in Richland County. (App. at 1115–16.) On his way home, he stopped to speak to several individuals in the front yard of their home, thinking that they might be able to give him leads on scrap metal. (App. at 1122–23.) Those individuals included Edgar Lopez and Pablo Guzman-Gutierrez. (App. at 1220–26.) After the men spoke for a time over several beers, Parvin and Lopez drove to the gas station to buy more beer before returning to the house. (App. at 1131–32; 1135–37.)

While at the gas station, Parvin remained in the car and Lopez entered the store to use money Parvin had given him to buy beer. (App. at 1136.) Inside the store, Lopez encountered a friend, Adan Soto, who would later testify that "[Lopez] said the American [Parvin] had given him $200 to buy beer because he wanted to have sex with him." (App. at 333.) Separately, Lopez encountered another friend, Marlin Avila, who would later testify that "[Lopez] said that the American had given him money to buy beer and he said the American had given him $200 to have sex." (App. at 341.) Lopez's blood alcohol content would later be determined to be .379—nearly five times the legal limit—shortly after making these statements to Soto and Avila. (App. at 505; 962.) Both Soto and Avila confirmed that Lopez was drunk when they talked at the gas station. (App. at 336; 341.)

Parvin and Lopez eventually returned to the group with the beer they purchased. (App. at 1137–38.) The size of the group dwindled, leaving only Parvin, Lopez, and Guzman-Gutierrez. (App. at 1145–46.) It was then that Parvin's interactions with the two men escalated because Lopez refused to allow Parvin to leave without paying more

money. (App. at 1143–47; 1149.) When Parvin refused, Lopez became visibly upset and threatened Parvin and his family. (App. at 1149–50.) Parvin still tried to leave, but Guzman-Gutierrez blocked the exit from the yard, making physical contact in the process. (App. at 1147; 1151.) When Guzman-Gutierrez tried to obtain control of the pistol Parvin was carrying, Parvin saw Lopez reach for something in the shed in the yard. (App. at 1151.) Fearful for his life, Parvin used his gun and military training to protect himself, shooting and killing both Lopez and Guzman-Gutierrez. (App. at 1151–53.)[1]

Parvin would later admit he left the scene, moved his family into a hotel for fear of their safety, and then left for Texas. (App. at 1153–57.) Parvin has never argued that leaving the state was the right decision, but explained he fled first out of fear, and second because he was not sure what to do. (App. at 1157.) It is uncontested he returned to South Carolina, even with full knowledge that he would be arrested. (App. at 1163.) Parvin was arrested in Columbia on August 19, 2010, without incident. (App. at 1164.)

A. Parvin's Criminal Trial

Parvin's case went to trial in December 2011. As the Court of Appeals explained, the State tried the case under the theory that Parvin solicited Lopez for sex and, when Lopez refused to have sex with him, Parvin killed Lopez and Guzman-Gutierrez in retaliation. (App. at 1948.) The State based this theory solely on the hearsay statements Lopez made to Soto and Avila at the gas station before the shooting. (App. at 961–62.) In its opening statement and closing argument to the jury, the State argued Parvin was a

[1] Parvin had a distinguished 20-year military career, serving five tours of duty. (App. at 1092–94; 1099; 1105–06.) He is a Bronze Star recipient. (App. at 1105.)

closeted homosexual veteran who led a secret double life. (App. at 268–69; 271–73; 1727–28.) In one life, the State argued, he was a military hero, a veteran, and a devoted family man; in the other, he solicited and paid strangers for sex. (*Id.*)

Parvin disputed the State's sex-for-money claims and defended on self-defense grounds. (App. at 292–93; 1099–1101; 1150–53; 1144; 1653.) Parvin admitted shooting Lopez and Guzman-Gutierrez but explained he only did so after they threatened him and told him they were armed. (App. at 1150–53.) Because of Parvin's testimony, the trial court charged the jury on self-defense with the State's consent. (App. at 1546; 1721–25.)

1. Trial Counsel's Objections to the Hearsay Statements

Knowing the State intended to proceed on the theory that he solicited Lopez for sex, Parvin moved *in limine* to exclude the statements Lopez made at the gas station as "other crimes, wrongs, or acts" under Rule 404, SCRE, and as hearsay under Rule 802, SCRE. (App. at 130–40.) Parvin argued the State's theory was based solely on witnesses testifying to the statements Lopez made to Soto and Avila at the gas station about Parvin's alleged payment for sex. (App. at 130–31.) In response, the State explained it was not "trying to enter anything under 404(b)," but was relying on "*res gestae* or present sense impression exception to the hearsay rule." (App. at 136.) Parvin specifically objected to the statements as inadmissible hearsay to which the present sense impression exception did not apply. (App. at 139.) As for *res gestae*, Parvin's trial counsel explained that he "understood the doctrine of *res gestae*, but it doesn't override or take out of play the Rules of Evidence . . . ." (App. at 138.)

The next day, the trial court denied the pretrial motion. (App. at 207–08.) The trial court ruled the Lopez statements (1) were admissible under the *res gestae* theory, (2) constituted an exception to the hearsay rule, and (3) were probative to Parvin's motive. (App. at 208.) During trial, the trial court clarified its decision and stated that in admitting the testimonies under the *res gestae* theory, the testimonies "did not involve other crimes, but may have suggested some bad acts." (App. at 423–24.)

Parvin renewed his objection to the hearsay statements at trial. When Soto was asked what Lopez said at the gas station, Parvin objected. (App. at 332.) The trial court overruled the objection and Soto testified to the hearsay statements. (App. at 332–33.) When Avila was asked what Lopez told him, Parvin again objected and was overruled, (App. at 341), allowing Avila to testify to the hearsay statements, (App. at 341).

At the end of trial that day, the trial court revisited its ruling on Parvin's motion *in limine* to exclude the hearsay statements, which the trial court called the "*res gestae* evidence." (App. at 423–24.) The trial court noted that it had conducted a probative-value-versus-prejudicial-effect balancing of the *res gestae* evidence and decided it was admissible. (App. at 424.) Though the trial court cited no specific rule, this balancing mirrors that required under 404(b), SCRE. *See State v. Garner*, 304 S.C. 220, 221–22, 403 S.E.2d 631, 632 (1991) ("Even if this evidence is admissible under [*State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)], however, its probative value must outweigh the danger of its undue prejudicial effect.").

2. Trial Counsel's Failure to Object to the Hearsay Statements

The State later presented Investigator William Gonzales and Investigator Brien Gwyn. (App. 723–49 (Gonzalez); 902–85 (Gwyn).) Both testified to what Soto and Avila told them about Lopez's statements. Investigator Gonzalez testified:

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

(App. at 743.) Trial counsel failed to object to this hearsay testimony.

The second investigator testified from his report on direct to the same statements that Lopez made to the witnesses: "Both in their statement advised us that according to [Lopez]'s conversation with [Soto and Avila] in the store or at the store, [Lopez] was solicited for sex by the individual he was at the store with [Parvin]." (App. at 919.) Trial counsel again failed to object.

B. Parvin's Conviction and Appeal

The jury convicted Parvin on two counts of murder, and the trial court sentenced him to 35 years in prison. (App. at 1771–72.) After unsuccessfully moving for a new trial based on the improper admission of the hearsay testimony, (App. at 1811–18; 1828), Parvin appealed, arguing the trial court improperly admitted the Lopez statements as a present sense impression under Rule 803(1), SCRE, (App. at 1951). The Court of Appeals agreed the trial court erred in allowing Soto and Avila to testify about the Lopez

statements because the statements were not a present sense impression under Rule 803(1) and thus inadmissible hearsay. (App. at 1886–87; 1951–52.)

After affirming on harmless error grounds, (App. at 1887–88), the Court of Appeals granted rehearing to decide whether it misapprehended or overlooked error preservation rules in finding the admission of the Lopez hearsay statements were harmless error, (App. at 1954). On rehearing the Court of Appeals again affirmed, explaining:

> The investigators' unobjected-to testimonies was other evidence that tended to support the substance of Soto's and Avila's testimonies—that Parvin offered Lopez $200 in exchange for sex. Because this other evidence became cumulative to Soto's and Avila's testimonies and was admitted without objection, we find the error in allowing Soto's and Avila's testimonies was rendered harmless.

(App. at 1955.) Parvin timely petitioned for certiorari, (App. at 1972), which was denied on September 9, 2016, (App. at 2028).

C. Parvin's PCR Application and Hearing

Parvin filed his PCR application on April 12, 2017. (App. at 2032.) As noted by the Court of Appeals. Parvin's motive was the central, contested issue of the case. (*See* App. at 1948.) Parvin argued his trial counsel's failure to object to the only evidence supporting the State's explanation of his motive—the hearsay statements—constituted ineffective assistance of counsel. (App. at 2034.)[2] Parvin argued that, had trial counsel timely objected to the hearsay testimony, the Court of Appeals would have reversed his conviction and remanded for a new trial. (*Id.*)

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[2] Parvin waived an unrelated ground for post-conviction relief regarding the failure to introduce evidence that he suffered from post-traumatic stress disorder. (App. at 2054.)

To support his claim, Parvin first called his lead trial counsel, who admitted she was deficient in failing to object to the hearsay testimony despite knowing this testimony "was a problem, and also thought it was inadmissible." (App. at 2072; 2079; 2081; 2084.) Parvin's lead counsel and remaining counsel confirmed that allowing the hearsay was not a part of any trial strategy. (App. at 2084; 2064–65.) The State did not call any witnesses in response. (App. at 2109–10.)

At the end of the hearing, the PCR Court ordered the parties to file proposed orders instead of closing argument. (App. at 2111.) In its proposed order, the State argued *res gestae*, (App. at 2121–22), overwhelming evidence of guilt, (App. at 2123–24), and, for the first time, that the hearsay statements were also admissible as statements against penal interest under Rule 804(b)(3), (App. at 2121–23).

D. The PCR Court's Order

On June 27, 2018, the PCR Court granted Parvin's PCR application. (App. at 2126–40.) After finding the State's criminal case had been based on its sex-for-money theory, the PCR Court found that Parvin's trial counsel was deficient in failing to object to the hearsay statements made by the two investigators. (*Id.*) The Court then concluded the deficient performance prejudiced Parvin: "Thus, trial counsel's error is the but-for cause of Parvin's failure to have his conviction reversed on appeal." (App. at 2138.)

The State moved for reconsideration. (App. at 2141.) After Parvin opposed the motion, (App. at 2148), the PCR Court denied the State's motion (App. at 2162). The State filed its notice of appeal on August 23, 2018, and its Petition for Certiorari four months later.

SUMMARY OF THE ARGUMENT

At his criminal trial, Parvin's trial counsel failed to object to two witnesses who offered hearsay testimony, despite knowing the testimony was inadmissible and detrimental to Parvin. It is undisputed there was no strategic basis for failing to object. It is undisputed the Court of Appeals ruled the hearsay statements inadmissible under the hearsay exception offered by the State at trial. It is undisputed that the hearsay testimony was the sole basis for the motive the State would present to the jury to support its murder charges and rebut Parvin's claim of self-defense.

The State's alternative evidentiary arguments on PCR for admission of the hearsay statements offer the State no support. First, the statements made by the declarant confirm that they were not against his penal interest. At best, they were against Parvin's penal interest, which is insufficient under Rule 804(b)(3), SCRE. Second, the State's argument for applying *res gestae* as an exception to the hearsay rule misunderstands the current state of the law. Though *res gestae* might serve as a valid basis to admit evidence over an objection under Rule 404(b), SCRE, it is no longer a valid basis to admit statements over a hearsay objection under Rule 802, SCRE.

Because the linchpin of its case—the hearsay—is inadmissible, the State now seeks to convince the Court that sufficient evidence for a conviction exists. However, the record confirms that the State's case rested on its sex-for-money theory of motive, which relied solely on the hearsay statements. Regardless of the other evidence asserted by the State, this improper evidence prejudiced Parvin and requires post-conviction relief.

Under South Carolina law, post-conviction relief is not reviewed on appeal, but by a writ of certiorari issued by the appellate courts. S.C. Code Ann. § 17-27-100. Unlike a mandatory appeal, section 17-27-100 "clearly makes appellate review under the Act discretionary with this Court." *Knight v. State*, 284 S.C. 138, 140, 325 S.E.2d 535, 537 (1985); *Ellison v. State*, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009). In other contexts, court rules explain that a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR.

The Court should not exercise its discretion to grant the writ here. The case presents no novel questions of law; the PCR Court's ruling is not in conflict with precedent of this Court; no special grounds exist for the writ to be issued. Therefore, the Court should deny the State's Petition for Writ of Certiorari.

ARGUMENT

I. The State's alternative sustaining grounds for admissibility of the hearsay statements are legally flawed.

Although the State is the Petitioner in this Court, it offers an "additional sustaining ground" argument as a basis for granting its Petition. It claims trial counsel's deficient performance is of no import because alternative grounds—Rule 804(b)(3) and *res gestae*—would have still led to the admission of the hearsay testimony at Parvin's criminal trial. These arguments are not properly before the Court and are legally incorrect.

A. The State has waived its evidentiary arguments.

The State waived its alternative evidentiary arguments by failing to raise them in its return to Parvin's PCR application. The South Carolina Rules of Civil Procedure,

applicable to this case under Rule 71.1(a), SCRCP, require every defense "in law or fact . . . shall be asserted in the responsive pleading . . . ." Rule 12(b), SCRCP. This rule should come as no surprise to the State, especially given that in *its* Return to Parvin's PCR Application, the State warned Parvin "must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application . . . will be opposed by the State . . . . All claims should be made well in advance of the evidentiary hearing." (App. at 2043.) Though the State's Return notes that Parvin's claims "are without merit," (App. at 2042), the State did not raise its alternative evidentiary arguments until after the PCR hearing. As a result, the State have waived these evidentiary arguments.

Thus, the Court should deny the State's Petition because its "alternative sustaining grounds" are not properly before the Court.

B. Rule 804(b)(3) does not apply to the hearsay statements because they are not against the declarant's penal interest.

Even if its alternative evidentiary arguments are preserved for review, the Court should not grant the State's Petition because Rule 804(b)(3), SCRE, does not apply here.

In *State v. Fuller*, this Court held that South Carolina courts must interpret the rule allowing statements against penal interest stringently. 337 S.C. 236, 245, 523 S.E.2d 168, 172 (1999). As our Court of Appeals recently reaffirmed, Rule 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *State v. Barnes*, 421 S.C. 47, 55, 804 S.E.2d 301, 306 (Ct. App. 2017) (quoting *Williamson v. United States*, 512 U.S. 594, 600–01 (1994)).

Instead, courts must apply the rule "very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory." *State v. Holmes*, 342 S.C. 113, 117, 536 S.E.2d 671, 673 (2000).

The State claims Lopez made two statements against his penal interest as an unavailable-declarant, so they are admissible under Rule 804(b)(3). Lopez allegedly made two statements against his penal interest. First, Soto testified (over objection) that Lopez said, "the American [Parvin] had given him $200 to buy beer because he wanted to have sex with him." (App. at 332-33.) Second, Avila testified (over objection) that Lopez said, "the American had given him money to buy beer and he said the American had given him $200 to have sex." (App. at 341.)[3] The State boldly asserts that these statements "were admissible as a statement clearly against penal interest," (Pet. at 22); however, the State's claim ignores *whose* penal interest the statements were made against—Rule 804(b)(3) only applies if the statements were against Lopez's, i.e., the declarant's, interest. *See Barnes*, 421 S.C. at 55, 804 S.E.2d at 306.

[3] Investigators Gonzales and Gwyn's recounting the language used by Soto and Avila is immaterial to the analysis because those statements would be hearsay within hearsay. *See* Rule 805, SCRE; *see also* State v. King, 422 S.C. 47, 66-67, 810 S.E.2d 18, 28 (2017) (rejecting "investigative" hearsay). Because there is no exception for Lopez's statements to Soto and Avila—and no exception for the statements from Soto and Avila to the investigators—the hearsay rule requires the statements be excluded. Even so, Investigator Gwyn's testimony also confirms that "[Lopez] was solicited for sex by the individual he was at the store with [Parvin]," (App. at 919), not the reverse as would be required under Rule 804(b)(3).

Here, neither statement subjects Lopez to criminal liability.[4] The statements were offered to establish that Parvin, a third-party to the conversations, solicited Lopez for sex or gave him money. (App. at 332–33; 341.) Nothing in the record suggests Lopez solicited the money for sex. Nothing suggests he accepted the money for sex. Indeed, under the State's own theory, the opposite is true—Lopez would *not* agree to have sex with Parvin, which is why (according to the State) Parvin killed him. (App. at 269 (arguing in opening statements that it was "Parvin who propositioned [Lopez] for sex . . . gave him money for sex").) Thus, neither statement to Avila or Soto fits into the "very narrow[]" set of statements falling under Rule 804(b)(3). *Holmes*, 342 S.C. at 117, 536 S.E.2d at 673.

Rule 804(b)(3)'s application "entails a searching examination of both content and context." *Barnes*, 421 S.C. at 55, 804 S.E.2d at 306. Here, however, the trial court never conducted such an inquiry because the State failed to raise Rule 804(b)(3) at Parvin's trial or in its Return to his PCR Application. Had such an inquiry been conducted, the exception would have likely been held inapplicable because the hearsay statements tended to implicate only Parvin, not the declarant, Lopez. *Cf. State v. Young*, 420 S.C. 608, 619, 803 S.E.2d 888, 894 (Ct. App. 2017) ("Once a declarant begins shifting blame to another, there is a corresponding shift away from the admissibility requirements of the rule."). The statements are also unreliable given Lopez's roughly .379 blood-alcohol concentration shortly after making them, (App. at 505), and Soto's varying versions of the

[4] Likewise, Parvin does not concede that the allegations would even subject him to criminal liability. This is consistent with the trial court's explanation that the hearsay statements "did not involve other crimes, but may have suggested some bad acts." (App. at 423–24.). The State has not challenged that ruling.

statement and surrounding events, (App. at 336). *See Kinloch*, 338 S.C. at 389, 526 S.E.2d at 707 ("Here, we cannot say Milligan's alleged statement to Robinson has such clearly corroborating circumstances as to warrant its admission. . . . The fact that the alleged declarant had been smoking crack cocaine clearly reflects adversely on both Milligan's trustworthiness, and the trustworthiness of whether the statement was, in fact, made.").[5]

Because Rule 804(b)(3) does not apply to a statement against the penal interest of someone other than the declarant, the PCR Court was correct in rejecting the State's last-minute attempt to apply Rule 804(b)(3) to the statements. The Court should deny the State's Petition on this basis.

C. The State's claim that the hearsay statements are part of the *res gestae* ignores current evidence jurisprudence and was abandoned.

The rule against hearsay and the rule prohibiting the introduction of "other crimes, wrongs, or acts" are different. *Compare* Rule 802, SCRE, *with* Rule 404(b), SCRE. They are subject to different exceptions. *Compare* Rules 803 and 804, SCRE, *with* Rule 404(b), SCRE. A common law exception to Rule 404(b)'s exclusion exists when the other act forms an integral part of the crime charged—when it is part of the *res gestae* of the crime. This exception, however, is no longer an exception to the hearsay rule. The State's argument

[5] A searching inquiry would have also concluded the statements were unreliable. Some courts have interpreted other federal or state versions of Rule 804(b)(3) to require corroboration in criminal cases where the statement is offered to inculpate the defendant. *See United States v. Harty*, 930 F.2d 1257, 1263 (7th Cir. 1991) (cited approvingly by *State v. Kinloch*, 338 S.C. 385, 389, 526 S.E.2d 705, 707 (2000)). The Court should interpret Rule 804(b)(3) to require corroboration, which the State cannot show here.

that "the testimony at issue furnishes part of the context of the crime" ignores this distinction. (Pet. at 24.)

The *res gestae* doctrine once applied to two different rules of exclusion: (1) *Res gestae* "an exception to the rule against hearsay, essentially a combination of the present sense impression and excited utterance exceptions now found in Rules 803(1) and (2);" and (2) "*res gestae* meant the evidence was part of the body of the crime . . . which . . . is equivalent to arguing the evidence is not an 'other' act under Rule 404(b), but rather is integral to the crime or event." *State v. Gilmore*, 396 S.C. 72, 82 n.9, 719 S.E.2d 688, 694 n.9 (Ct. App. 2011). While South Carolina "courts have continued to use the term [*res gestae*] to describe details of a crime or event which are not to be excluded . . . under Rule 404(b)," the term has no modern application to the Rule against hearsay. *Id.* Put simply, *res gestae* "is no longer used to describe a hearsay exception." *Id.*; *see also State v. Burdette*, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999) ("The hearsay exceptions of present sense impression and excited utterance have replaced the *res gestae* hearsay exception in South Carolina law."); *Young*, 420 S.C. at 620, 803 S.E.2d at 894 ("There is no *res gestae* rider to Rule 804(b)(3).").

Before trial, Parvin moved to exclude the hearsay testimony on two distinct evidentiary grounds under Rule 802 and Rule 404. (App. at 130–40.) Parvin's counsel also objected to the testimony on these same grounds during trial. (App. at 332; 341.) Though the trial court stated the hearsay statements "were a part of the *res gestae*," (Pet. at 23–24), this ruling misunderstands the distinction between the hearsay rule and Rule 404(b) because the trial court meant either:

(1) it was rejecting Parvin's Rule 404(b) objection because the substance of the allegations were an integral part of the crime charged; or

(2) it was rejecting Parvin's hearsay objection by misapplying the outdated *res gestae* exception to the hearsay rule.

(App. at 208; 423-24; 1949.) In the first case, the ruling is independent of the hearsay objection and is irrelevant here; in the second, the ruling is legally incorrect and cannot serve as an alternate sustaining ground. Either way, the State's argument that *res gestae* somehow serves as an alternative basis for admitting the hearsay statement Parvin sought to exclude is incorrect. Thus, the Court should deny its Petition on that basis.

In any event, the State has expressly abandoned the argument. (App. at 136 ("We aren't trying to enter anything under 404(b)."); App. at 1949 ("The State, however, asserted it was not attempting to enter the Lopez statements pursuant to Rule 404(b), SCRE.").) And rightly so, considering an exception to Rule 404's exclusion of the potential bad act evidence is irrelevant to the hearsay analysis. Put differently, the State's sole avenue for seeking the admissibility of the hearsay statements on appeal was under a *hearsay* exception—a theory the Court of Appeals rejected as legal error. (App. at 1952.)

* * *

Parvin challenges the hearsay testimony on hearsay grounds. The State, as the party offering the hearsay testimony, has the burden of establishing a *hearsay* exception to admit the testimony. It is not enough for the State to raise Rule 804(b)(3) because it does not apply. Nor is it enough to argue *res gestae*—an exception to the other bad acts

exclusion under Rule 404(b)—to overcome the hearsay objection. The PCR Court correctly rejected this argument and this Court should too.

II. The PCR Court's finding that the State's theory hinged on the hearsay testimony, thus prejudicing Parvin, is supported by the record and the Court of Appeals' Opinion.

As its first ground for seeking certiorari from this Court, the State argues that the effect of failing to object to the hearsay statements is outweighed by the strength of the State's case, relying on *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The record does not support this argument.

In *Smalls*, the Court explained that the overwhelming evidence doctrine is more than a mere balancing test:

> [F]or the evidence to be "overwhelming" such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability . . . the factfinder would have had a reasonable doubt" cannot possibly be met.

422 S.C. at 191, 810 S.E.2d at 845. The evidence the State contends contributes "overwhelming" weight to a conviction must be balanced against trial counsel's deficiency. *Id.* When the evidence is tainted by trial counsel's error, it must be excluded from the facts purportedly weighing in favor of the conviction. *See id.* at 194–95, 810 S.E.2d at 846–47; *see also Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018).

In its findings, the PCR Court found that the State "tried the case under the theory that Parvin solicited Lopez for sex and, when Lopez refused to have sex with him, Parvin

killed Lopez and Guzman-Gutierrez in retaliation." (App. at 2128.) The PCR Court based this finding on the trial transcript, specifically the hearsay statements Lopez allegedly made at the gas station. (App. at 2128–29.) In so doing, the PCR Court explained that "it is uncontroverted that the State's entire theory of motive rested on Lopez's refusal to have sex with Parvin. . . . Without the hearsay testimony . . . the only record explanation for the killings is the one Parvin offered on the stand that he acted in self-defense." (App. at 2137.) This is a far cry from the State's argument now that its 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 . . . ." (Pet. at 18.)[6]

Despite the State's argument, the PCR Court's finding is correct. From its opening statement to its closing argument, the State argued to the jury that Parvin murdered Lopez and Guzman-Gutierrez because Lopez refused his paid sexual advances:

> Parvin who propositioned [Lopez] for sex . . . gave him money for sex, and even bought him beer and continued to drink; the Leslie Parvin, though, who, after they drank a few, but denied him the sex that he thought he was going to get; the Leslie Parvin who perhaps felt he had been played for a fool, pulled a gun from his waistband and shot two unarmed men.

(App. at 269.) The State even went so far as to suggest that Parvin led two lives, one in which he was a military hero, (App. at 1092; 1105), and one in which he paid strangers

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[6] The State ignores that its argument is an attack on the PCR Court's finding that the State's case at trial was based on the sex-for-money theory, which was based only on the inadmissible hearsay. (App. at 961–62.) The State sidesteps this finding because it knows that this Court must give it deference. *See Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (upholding factual findings if there is any probative evidence to support them); *cf. Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.").

for sex, (App. 268-69). The Court of Appeals recognized this, explaining that the hearsay statement "permeated the entire trial." (App. at 1955.)[7] The sole basis for this theory was the hearsay offered by the State. (App. at 961-62.)

No other explanation for Parvin's actions that evening was offered at trial, except by Parvin who consistently explained that he acted in self-defense. (App. at 961-62.) The State argues that there "was ample evidence to . . . contradict a claim of self-defense absent the testimony at issue." (Pet. at 18.) But as the State knows, it must do more than just contradict self-defense—it must disprove it as a part of its burden. *See State v. Taylor*, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) ("[T]his Court has placed great emphasis on the importance of a defendant's right to assert self-defense when there is 'any evidence' to support it, and has taken pains to make sure the burden to disprove self-defense remains on the State."); *see also Thompson*, 423 S.C. at 248, 814 S.E.2d at 493-94 (reversing PCR court's reliance on the "absence of contradictory testimony" as part of its basis for concluding there was overwhelming evidence of guilt because it improperly shifted the burden to the defendant).

Parvin's actions to protect his family by moving them to a hotel, his travel to Texas, and the State's reliance on the testimony of a neighbor do not support the State's overwhelming evidence of guilt argument. Indeed, each of these facts relied upon by the State bolster Parvin's self-defense explanation rather than implicating him as the State

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[7] That the trial court questioned potential jurors about any bias in *voir dire* is irrelevant. *Voir dire* is not evidence, so it cannot establish guilt, much less can it be overwhelming evidence of guilt. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (relying only on evidence for harmless error).

suggests. First, before the shooting, one of the victims threatened Parvin that they had guns, knew where his family was, and would come to his house. (App. at 1150.) As a result, Parvin left the scene and immediately focused on getting his wife out of his house and safely into a hotel. (App. at 1155.) Though he left the State, his motivation for doing so was first out of fear, and then out of uncertainty about what to do next. He then voluntarily returned to South Carolina knowing that he would be arrested.

Second, the State's reliance on a neighbor who witnessed the shooting from across the street is insufficient evidence of guilt given that Parvin does not dispute he shot Lopez and Guzman-Gutierrez in self-defense. (Pet. at 18–19.) Though the State argued throughout trial that Parvin fired because of the unconsummated sex-for-money deal, the eye-witness can no more corroborate that theory than he can corroborate that Parvin acted in self-defense. The witness may have testified to *what* he saw, he did not (and cannot) testify to *why* Parvin fired.

Based on the perceived factual support of its "overwhelming evidence of guilt" argument, the State asks the Court to apply *Smalls*, claiming that in *Smalls*, the Court "held the specific impact of counsel's alleged errors must be balanced against the strength of the State's case." (Pet. at 18.) Not so. *Smalls* explains that the Court must not only weigh the prejudice against the State's case, but must include some "conclusive" evidence. 422 S.C. at 189–91, 810 S.E.2d at 844–45. And as the Court explained more recently in *Thompson*, the Court may consider only "*properly admitted* evidence of a PCR applicant's guilt" for this balancing. 423 S.C. at 245, 814 S.E.2d at 492.

When that balancing is done here, there remains a reasonable probability that, but for trial counsel's failure to object, Parvin's trial and direct appeal would have reached a different result; the balancing requires the same outcome as in *Thompson*. There, the Court analyzed the hearsay testimony of a victim's mother, explaining that although "Mother's testimony may support the conclusion that Victim was sexually abused, Mother's testimony does not support the conclusion that Petitioner was the perpetrator." *Thompson*, 423 S.C. at 248, 814 S.E.2d at 493. Similarly, the neighbor's testimony that he witnessed the shooting may confirm that Parvin shot Lopez and Guzman-Gutierrez, but that testimony does not establish that Parvin was not acting in self-defense. Thus, it is insufficiently conclusive to categorically preclude a finding of prejudice. *Smalls*, 422 S.C. at 189–91, 810 S.E.2d at 844–45

In any event, the PCR Court considered each of these facts, balanced them against trial counsel's deficient performance, and still found that the hearsay statements formed the basis of the State's presentation of the case to the jury. As a result, Parvin was prejudiced when his trial counsel failed to object to the only evidence supporting the State's theory, which then caused his hearsay objections to be unpreserved for appeal. (App. at 961–62.) That prejudice requires denial of the State's Petition for Certiorari.

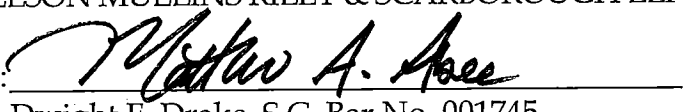
CONCLUSION

In reviewing trial counsel's assistance following a PCR application, "every effort [must] be made to eliminate the distorting effects of hindsight . . . ." *Buckson v. State*, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (2018) (quoting *Strickland*, 466 U.S. at 689). If a court's review of counsel's assistance cannot be distorted with the benefit of hindsight, then it

also should not be distorted when it reviews new evidentiary arguments raised by the State. Nor should the State receive the benefit of hindsight by asking the Court to ignore the theory of the case it originally presented to the jury simply by invoking conclusory phrases like "ample evidence" and "overwhelming evidence of guilt." This is especially true when, as here, the State asks the Court to ignore the PCR Court's rejection of its new evidentiary arguments, and where the PCR Court properly balanced the weight of the State's case against the prejudice caused to Parvin.

Therefore, the Court should deny the State's Petition for Certiorari.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Columbia, South Carolina
March 25, 2019

State of South Carolina
In the Supreme Court

Certiorari to Richland County
Court of Common Pleas
The Honorable Brooks P. Goldsmith, Circuit Court Judge

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

LESLIE TODD PARVIN, #349127, *Respondent,*

v.

STATE OF SOUTH CAROLINA, *Petitioner.*

PROOF OF SERVICE

Respondent's Counsel certifies that he has served Respondent's Return to the Petition for Certiorari on the following counsel by mail on the date set forth below:

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March 25, 2019

Hand Delivered
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 2921

RE: Leslie Todd Parvin #349128 v. State of South Carolina
Civil Action No. 2017-CP-40-02220
Our File No. 33999/00708
Appellate Case No. 2018-001540

Dear Mr. Shearouse:

Enclosed in the above-referenced matter, please find an original and seven copies of Respondent's Return to the State's Petition for Certiorari. Please return a clocked-in copy to our courier.

Respectfully,

Matthew A. Abee

MAA:krs
Enclosures
cc: Lindsey McCallister, Esquire
Hon. Richard A. Harpootlian, Esquire
Christopher P. Kenney, Esquire