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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY

J. Mark Hayes, II, PCR Judge
J. Derhman Cole, PCR Judge

JEREMY JEROME KNIGHT,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001474

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED FOR CERTIORARI

Petitioner's Issue Presented

Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution when he elicited improper opinion testimony from a police officer that the deceased's death was the result of murder and that Petitioner was the perpetrator because the testimony invaded the province of the jury, opined on the ultimate issue presented, and went to the heart of the issue before the jury – Petitioner's state of mind?

Respondent's Counter-Statement of Issue Presented

Did the PCR court properly find that Petitioner's trial counsel was not constitutionally ineffective for failing to object or moving to strike testimony from an investigating police officer regarding interrogation techniques that referred to the crime as "murder" in light of the strong evidence that Petitioner was guilty of murder?

STATEMENT OF THE CASE

Jeremy Jerome Knight (hereinafter “Petitioner”) is presently confined in the South Carolina Department of Corrections. Petitioner was indicted at the April 2002 term of the Spartanburg County Grand Jury for the murder of Miranda Aull. (02-GS-42-1201). He was represented by Karen Quimby, Esquire, and Michael Bartosh, Esquire.¹ (App. 1). On July 8-10, 2002, Petitioner proceeded to a jury trial before the Honorable J. Derham Cole. *Id.* The State was represented by Solicitor Trey Gowdy, III, and Assistant Solicitor Susan Olmert. *Id.* The jury convicted Petitioner of murder and Judge Cole sentenced him to life imprisonment. (App. 378, 22 – App. 379, 5).

A timely Notice of Appeal was filed on Petitioner’s behalf and an appeal was perfected. Petitioner was represented by Chief Appellate Defender Joseph L. Savitz, III of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. (App. 381). Petitioner argued on appeal that the judge erred in refusing to instruct the jury on voluntary manslaughter, since “there was evidence that Knight had accidentally strangled Aull after she attacked him.” (App. 384) The South Carolina Court of Appeals affirmed Petitioner’s conviction and sentence, stating that “no facts exist indicating Knight and Aull were fighting.” *State v. Knight*, Op. No.2004-UP-105 (S.C. Ct. App. Filed February 18, 2004); (App. 395). “Rather, the evidence indicates Knight attempted to physically and verbally restrain Aull, while she attempted to defend herself.” *Id.* The remittitur was sent down on March 5, 2004. (App. 391 – App. 395).

Petitioner then filed an application for post-conviction relief on February 23, 2005. (App. 396 – App. 401). The State made its Return to the application on July 22, 2005, requesting an evidentiary hearing. (App. 402 – App. 406). The evidentiary hearing was held on September 18, 2006 before the Honorable Doyet A. Early, III. (App. 407). Petitioner was represented by counsel,

¹ Now deceased.

C. Kevin Miller. Respondent was represented by S. Prentiss Counts and Paula Magargle of the South Carolina Attorney General's Office. *Id.* Following the end of testimony at the hearing, the record was left open to allow for the deposition of appellate counsel. (App. 434, 12-14).

Petitioner's appointed counsel was disbarred from the practice of law in South Carolina on March 7, 2012. See *In the Matter of C. Kevin Miller*, Appellate Case No. 2013-002345, filed January 2, 2014. On August 22, 2018, Judge Early issued an order relieving Miller and appointing new counsel to represent Petitioner based on Miller's disbarment. Thereafter, Susannah Ross, Esquire, was appointed to represent Petitioner. On January 28, 2019, Petitioner moved for a *de novo* evidentiary hearing to be held. This motion was granted on February 24, 2019. Petitioner filed an amended application for post-conviction relief on May 7, 2019. (App. 437 – App. 438). Petitioner raised allegations of ineffective assistance of trial counsel, appellate counsel, and requested a new trial in his amended application. (App. 437-38; 546).

The evidentiary hearing was held on May 14, 2019, at the Spartanburg County Courthouse before the Honorable J. Mark Hayes, II. (App. 439). Petitioner was represented by Susannah Ross, and Respondent was represented by Jacob A. Isenberg and Johnny James of the South Carolina Attorney General's Office. *Id.*

After hearing testimony from Petitioner, trial counsel Karen Quimby Hatcher, appellate counsel Joseph L. Savitz, and Solicitor Gowdy, the court concluded that Petitioner had not met his burden to prove ineffective assistance of counsel, stating that:

It would have been unusual for [trial counsel] to object to a question he elicited. Instead, a motion to strike along with a curative instruction would have been the more practical route. However this may have brought unnecessary attention to the testimony. The jury had the confession, recorded by Denton on behalf of [Petitioner], in evidence. The Assistant Solicitor only mentioned Denton in closing arguments to reiterate [Petitioner] understood his legal rights before signing the confession in evidence. Accordingly, Denton's importance to this case was merely to reflect the confession was voluntary. Therefore, this Court finds there is no

reasonable probability a jury would have doubted guilt if the singular opinion had been struck from the record.

(App. 562) (citations omitted) .

STATEMENT OF FACTS

On the night of February 25, 2002, Officers from the Spartanburg County Sheriff's Department went to a home in Chesnee, South Carolina, after receiving information that Petitioner was on the premises and was suspected of murder. (App. 203, 18 – App. 204, 9). Investigator Jason Yown arrested Petitioner, transported him to the Sheriff's Office, and Mirandized him. (App. 204, 20 – App. 10). Petitioner executed a waiver of his Miranda rights and agreed to answer questions. (App. 212). In a written statement Petitioner revealed that he had been at a party with Miranda Aull, Jerome Petty, and Bryant Cheeks the previous night. (App. 213, 23-25). The group drank alcohol, went to a "liquor house" in Pacolet, and returned to Jerome Petty's duplex later that night. (App. 213, 23 – App. 214, 8; App. 217, 9-11).

When they got back, Petitioner said, Miranda went with Petty into his bedroom, came out naked less than an hour later, and then went to Cheeks's bedroom. (App. 214, 9-14). Petitioner stated that he "knew they were having sex." (App. 214, 13). Petitioner began knocking on the bedroom door, hoping that Miranda would come out. (App. 213, 14-16). She never did. (App. 213, 16). Petitioner then fell asleep on the floor. (App. 214, 17-18).

When he awoke, Petitioner stated that he saw nobody around and climbed into bed with Miranda while she was "in and out of sleep." (App. 214, 18-21). He told her that "her actions did not look good that preceded her" and she became upset. (App. 214, 21-24) Miranda began to cuss at Petitioner, told him that "it was her life and she could do whatever she wanted," and then "came at [Petitioner] with her hand and scratched [Petitioner] in the eye." (App. 214, 24 – 215, 1). Petitioner then confessed that he got physical "in a defensive way" and tried to "get neutral control"

by holding her down on the bed with his forearm on her neck. (App. 215, 1-4). Miranda resisted, scratched Petitioner on the neck, and Petitioner again pushed her down with his forearm on her neck. (App. 215, 5-7). Petitioner held her down for a “couple of moments” until tears began to run down her cheeks. (App. 215, 7-10). Petitioner then left the scene, running into Jerome Petty’s mother on the way out, before going to a friend’s house. (App. 215, 10-13). When his friend was not home, Petitioner returned to Petty’s duplex, briefly spoke with Petty, and then left again. (App. 215, 13-16).

Spartanburg County Sheriff’s Investigator Steve Denton testified that he examined Miranda’s body at the morgue on February 26. (App. 241, 22-23). He noted bruising on both sides of her neck and broken blood vessels in her eyes. (App. 242, 2-21). He then testified that he had spoken with Investigator Yown after his interview with Petitioner the night before and had also reviewed Petitioner’s statements. (App. 243, 17-19).

Investigator Denton testified that after speaking with Yown and examining the body he Mirandized Petitioner once again and conducted a second interview. (App. 243, 13-14; App. 246, 5-13). Petitioner executed a second sworn written statement detailing what happened the night before (App. 246, 14 – App. 247, 6). In this statement, Petitioner confirmed that everything he told Detective Yown was true. (App. 250, 17-19). He stated that he “tried to conversate with Miranda Aull about things [Petitioner] felt she was doing that she didn’t need to do”, but Miranda “didn’t want to hear it” and “kept turning her back.” (App. 250, 19-22). Petitioner stated that he “couldn’t let it go” so he “tried to turn her around so she couldn’t turn her back again. (App. 250, 25 – App. 251, 5). Miranda “got physical back” and the “matter got out of hand.” (App. 251, 5-6). Petitioner stated that he choked her, first with one hand, then with two, when Miranda scratched his face. (App. 251, 6-8). Petitioner did this because he “felt disappointment, let down” and “wanted her to

hear what [he] had to say.” (App. 251, 8-9). When Petitioner let her go he stated that “she took a deep breath” as she was “gasping for air”, but he soon “realized she was not breathing.” (App. 251, 10-13). Petitioner stated that he covered Miranda’s body up to her head, and left to go to a friend’s house shortly after she died. (App. 251, 15-19). When the friend was not home he returned to Petty’s duplex and stuck his head in the bedroom door to “see if she was still dead.” (App. 252, 1-2). He then left to spend time with friends, and ultimately went to his girlfriend’s house in Chesnee, where he was apprehended. (App. 252, 3-20).

During cross-examination, one of Petitioner’s attorneys, Michael Bartosh, had the following exchange Investigator Denton:

- Q: Did you read [Petitioner’s sworn statement, confessing to killing Miranda Aull, given to Investigator Yown a day prior]?
- A: Sure, I did.
- Q: Okay. And you felt it wasn’t enough.
- A: I felt if it was the truth, it was plenty enough. I don’t know how you quantitate that—enough.
- Q: Well, you didn’t think that it was sufficient that it was a confession that he had strangled Miranda Aull?
- A: Again, I am not sure what your question is. As far as looking at the statement and looking at the body and seeing the inconsistencies, is when I certainly had a problem.
- Q: Seeing they didn’t go far enough?
- A: I am not characterizing it—I’m not sure what you are asking.
- Q: Well, what is it that you wanted him to tell you?
- A: The truth.
- Q: Well, what did you believe the truth to be?
- A: Only he knew that.
- Q: Well, what did you think it was?
- A: I don’t have an opinion on what the truth is. I wasn’t there and didn’t commit the murder. Only the person that did could tell me that, and he did.

(App. 256, 7-25). Bryant Cheeks testified that he lived at the duplex with Jerome Petty on the night of February 24, 2002. (App. 115, 6-8). Cheeks confirmed that they had been having a “little get-together” with Petitioner, Miranda, and other friends that evening. (App. 115, 9 – App. 116, 8). The partygoers were drinking and using drugs. (App. 117, 1-18). At Petitioner’s

suggestion the group went to another party in Pacolet where more alcohol and marijuana was consumed. (App. 119, 2-21). The group returned to the duplex at about 2:30 or 3:00 a.m. (App. 120, 1-3). Miranda had sex with Cheeks in his bedroom while Petitioner sat on the couch in the living room. (App. 120, 7-19). Petitioner began knocking on the bedroom door, asking “little questions,” such as how to work the television. (App. 122, 11 – App. 123, 1).

When Cheeks woke up at 7:30 a.m., his brother, Michael Cheeks, was there to pick him up for work and Miranda was already awake combing her hair. (App. 123, 16-25). Cheeks told Miranda that he was going to work but would bring her something to eat when he got off around 3:00 that afternoon. (App. 125, 2-5). She told him she was going to spend her morning at her grandmother’s house, but would return later that evening. (App. 125, 10-12). Cheeks left Miranda in his bedroom and shut the door. (App. 127, 15-19).

Petitioner was lying in the living room and Cheeks attempted to wake him on his way out. (App. 125, 17 – App. 126, 4). Petitioner claimed he was still too drunk to go home and asked if he could stay in the house. (App. 124, 11-13). Cheeks testified that he felt all right, and thought that Petitioner probably could have also been all right to leave. (App. 125, 21-24). Cheeks noted that Petitioner was wearing a wooden beaded necklace. (App. 126, 7-10).

After work, Cheeks and his brother went and picked up Jerome Petty at his mother’s house, just up the street from Petty’s duplex. (App. 128, 2-24). Cheeks testified that when they arrived at the duplex he entered his bedroom and found Miranda’s cold, lifeless body in his bed. (App. 129, 1-20). Cheeks yelled for his brother and Petty ran back up the street to his mother’s house to call the police. (App. 129, 24 – App. 130, 9). Petitioner was no longer in the apartment. (App. 130, 10-12).

Jerome Petty testified that the group of friends had been drinking, using cocaine, and smoking marijuana while partying at the duplex. (App. 139, 25 – App. 140, 11). The drinking and drug use continued when they went to the party in Pacolet. (App. 141, 8-12). Petty testified that when they returned to his duplex he went to sleep because he was tired and intoxicated. (App. 141, 15 – App. 142, 2). He woke up the next morning to his mother asking if he had been in a fight with anyone. (App. 142, 9-12). Petty explained that his mother came to pick him up that morning to go car shopping with his father. (App. 142, 14-15). Bryant Cheeks had already left and Petitioner was in the yard putting a speaker box in the trunk of his car when Petty left the house. (App. 142, 19-22; App. 143, 6-9). Petitioner told Petty that he was leaving but would “be right back” and asked Petty to leave the back door unlocked. (App. 143, 13-15; App. 145, 20-24). Petty verified that Petitioner was wearing a wooden necklace at the time. (App. 146, 2-5). Petty testified that he did not see Miranda in the house that morning, but noted that the door to Bryant Cheeks’s bedroom was closed. (App. 142, 24 – App. 143, 3).

After car shopping with his father, Petty went to his mother’s house and watched movies until Bryant and Michael Cheeks picked him up and they all returned to the duplex. (App. 143, 23 – App. 144, 15). Petty and Michael were in the kitchen getting something to drink when they heard Bryant yell for them to come to his bedroom because Miranda looked to be dead in his bed. (App. 144, 17-20).

Brenda Petty, Jerome Petty’s mother, testified that on the morning of February 25, 2002, she went to her son’s duplex and found the front door ajar. (App. 154, 13-20). She went to her son’s bedroom to wake him up so he could go car shopping with his father. (App. 153, 18-21; App. 154, 23-24). As she walked past Bryant Cheeks’s open bedroom door she looked in the room and saw Petitioner laying spread eagle on the bed. (App. 156, 6-12). While she was speaking to her

son in his bedroom, she testified that Petitioner came out of Cheeks's bedroom, slammed the door shut, and went outside. (App. 157, 8-10).

When she went outside shortly afterwards, Petitioner was on the porch and asked her for a cigarette. (App. 157, 11-15). As she was giving him a cigarette, she noted that he had fresh, bloody scratches on his face. (App. 157, 15; App. 158, 7-11). Ms. Petty testified that Petitioner then got in his car and drove off, after pulling dangling speaker wires in through the door of his car. (App. 157, 22 – App. 158, 2). Concerned about this encounter, she went back inside to ask Jerome if he had been in a fight with Petitioner, which he denied. (App. 158, 3-5). Ms. Petty left again, but noted that Petitioner had pulled his car back into the yard and was knocking on the front door. (App. 158, 16-24).

The State also presented evidence at trial that Petitioner's DNA was found under Miranda's fingernails as well as photos showing small wooden beads in her hand, on the bed, and a broken necklace lying near her on the bedroom floor (App. 232, 22 – App. 234, 23; App. 186, 16 – App. 187, 10; App. 191, 13 – App. 192, 6).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts give “great deference to the post-conviction relief court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 813 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRPC; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must

conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish trial counsel provided constitutionally ineffective assistance of counsel by failing to object or move to strike testimony elicited on cross-examination from an investigating officer who briefly referred to the crime as “murder” while explaining his particular interrogation techniques, where there is no reasonable probability the jury would have acquitted Petitioner of murder but for this testimony in light of the strong evidence establishing Petitioner was guilty of murder, including but not limited to his confession.

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief because he received ineffective assistance of counsel. Specifically, Petitioner argues that his trial counsel elicited statements that invaded the province of the jury, opined on the ultimate issue presented, and went to the heart of the issue before the jury—Petitioner’s state of mind, and subsequently failed to object to these statements. Petitioner claims that trial counsel’s failure to object to the witness’s response to his own line of questioning amounts to a violation of his Sixth and Fourteenth Amendment rights to effective assistance of counsel and therefore warrants a new trial. This argument is without merit.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to

determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687, 104 S.Ct. at 2064. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 669, 2056; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). 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. Judicial scrutiny of trial counsel's performance must be highly deferential, and 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 689, 104 S.Ct. at 2065.

Trial counsel is required during any trial to make split-second decisions on many subjects, including whether to object to testimony. *Stone v. State*, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017). Trial counsel may employ a strategy of not objecting—even when there is a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration. *Id.* See *Watson v. State*, 370 S.C. 68, 72-73, 634 S.E.2d 642, 644 (2006) (overruled on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836).

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Strickland*, 466 U.S. at 691-92, 104 S.Ct. at 2066-67. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance

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 reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2067. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to deprive the defendant of a fair trial.” *Id.* at 687, at 2064.

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Id.* at 696, at 2069. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697, at 2069. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*”

Murder is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. 16-3-10. Long ago this Court approved of a jury instruction defining “malice” as:

A wicked condition of the heart. It is a wicked purpose. It is a performed purpose to do a wrongful act, without sufficient legal provocation; and in this case it would be an indication to do a wrongful act which resulted in the death of this man, without sufficient legal provocation, or just excuse, or legal excuse.

State v. Gallman, 79 S.C. 229, 60 S.E. 682, 686 (1908); *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669, 671 (1941); *State v. Judge*, 208 S.C. 497, 505, 38 S.E.2d 715, 719 (1946). “In its legal sense, as it is employed in the description of murder, [‘malice’] does not of necessity import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and

safety of others.” *Heyward*, 197 S.C. 371, 15 S.E.2d 669, at 671; *Judge*, 208 S.C. at 505, 38 S.E.2d at 719. Evidence that the pressure on a strangulation victim’s neck was “intense enough, or lasted long enough, to causes hemorrhages in the whites of both of her eyes” and bruises to her neck has been found to be sufficient to support a finding of malice. See *State v. Ballington*, 346 S.C. 262, 272, 551 S.E.2d 280, 285 (S.C. Ct. App. 2001) (overruled on other grounds, See *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)).

The trial transcript in this case demonstrates that Officer Denton’s statements were only used for very limited purposes. There is no reasonable probability that Petitioner’s trial counsel’s failure to object to the testimony would have resulted in a different trial outcome. Petitioner voluntarily gave two sworn statements to Investigators Jason Yown and Steve Denton in consecutive days where he confessed to the crime. Petitioner’s DNA was found underneath the deceased victim’s fingernails. Petitioner confessed in his written statements that the victim had scratched him in the face while he was strangling her. The jury also heard testimony from four witnesses who placed Petitioner at the scene of the crime, wearing a wooden bead necklace, the morning Miranda Aull was killed. Jerome Petty stated that Petitioner had been left alone at the scene the morning the crime was committed. Brenda Petty testified that she saw Petitioner lying in the bed where Miranda Aull’s body was found with fresh scratches on his face. This was likely just moments after she had been killed. Finally, one of the first investigators to process the crime scene found wooden beads and a broken necklace in Miranda Aull’s hands, underneath her body, and on the floor by the bed where she had been strangled to death.

In his closing argument, Solicitor Gowdy used Officer Denton’s testimony only to highlight the voluntariness of Petitioner’s second confession and to describe his actions and whereabouts after the killing of Miranda Aull, rather than to show Petitioner’s state of mind at the

time the crime was committed. (App. 341, 9-16; App. 342, 17-23). Likewise, Petitioner's trial counsel only mentioned Officer Denton's testimony to attack the confession and the circumstances under which it was given. (App. 348, 13-22).

The limited use of Officer Denton's testimony distinguishes it from Petitioner's supporting authorities. Unlike a case where an officer testified to the location of a body thereby suggesting that a killing could not have been self-defense, the testimony here was not related to the appearance of the scene, his expertise, or any exculpatory defense that could have been raised. *See State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001). This testimony is also unlike a case where a forensic pathologist or coroner determined the manner of a person's death based on anecdotes or opinions provided by police officers. *See State v. Commander*, 396 S.C. 254, 721 S.E.2d 413 (2011); *See also State v. Westmoreland*, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017). Unlike those cases where improper statements on an ultimate issue were used to show a defendant's state of mind, Officer Denton's entire testimony was largely used only to show that Petitioner voluntarily confessed.

Petitioner recognizes that the abundance of evidence present at trial narrowed the jury's decision down to a sole determination of whether he acted with malice. However, Petitioner's assertion that malice was only shown by Officer Denton's use of the word "murder" or the phrase "he did [it]" is without merit. A jury could find malice in Petitioner's statements that he forced her into a fight for her life because he was "upset" with her, that he "felt disappointment, let down" and "wanted her to hear what [he] had to say." Malice could be found in the way Petitioner slammed the door as he walked out of the house, causing Brenda Petty to worry that he may have been fighting with her son. A jury could find malice from the fact that the victim had sex with at least one, if not both, of the other men in the house in the early morning before she died, but she

left Petitioner outside the bedroom door knocking. A jury could find malice in his failure to call the police, instead choosing to go visit his friends, cruise around town, and then lie to the victim's uncle about what happened. A jury could even find malice just based on the physical evidence of her wounds, showing that she had been strangled for so long and so aggressively that her neck was left bruised and the blood vessels in her eyes had ruptured. Evidence that Petitioner acted with malice was pervasive.

Petitioner's trial counsel objected a total of seven times during the State's direct and redirect examination of Officer Denton. (See App. 240 – App. 277). Doing something usual, like objecting to testimony *they themselves had elicited* on cross-examination, would likely draw the jury's eyes to perhaps the most incriminating piece of evidence available: a second confession, signed by Petitioner, stating that he strangled Miranda Aull to death because she would not listen to him. Considering all the evidence, it was reasonable for Petitioner's trial counsel not to object. The PCR court recognized this in denying Petitioner's motion for post-conviction relief. These findings are not controlled by an error of law and are supported by the probative evidence in the record. Consequently, this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR Court's findings that Petitioner received effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

[Signature page follows]

Respectfully submitted

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This 27th day of August, 2020