

VOLUME
V of V

THE 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

RECEIVED
DEC 27 2018
S.C. SUPREME COURT

LESLIE TODD PARVIN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

APPENDIX

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

CHRISTIAN SAVILLE
Assistant Attorney General
S.C. Bar No. 103272

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

RICHARD A. HARPOOTLIAN
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848

MATTHEW A. ABEE
DWIGHT F. DRAKE
Nelson Mullins Riley & Scarborough,
LLP
1320 Main Street 17th Floor
Columbia, South Carolina

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRANSCRIPT OF RECORD (NOVEMBER 29, 2011)	1
TRANSCRIPT OF RECORD (DECEMBER 12, 2011)	30
TRANSCRIPT OF RECORD (DECEMBER 13, 2011)	176
TRANSCRIPT OF RECORD (DECEMBER 14, 2011)	436
TRANSCRIPT OF RECORD (DECEMBER 15, 2011)	784
TRANSCRIPT OF RECORD (DECEMBER 16, 2011)	1047
TRANSCRIPT OF RECORD (DECEMBER 19, 2011)	1333
TRANSCRIPT OF RECORD (DECEMBER 20, 2011)	1579
TRANSCRIPT OF RECORD (DECEMBER 21, 2011)	1739
TRANSCRIPT OF RECORD (DECEMBER 28, 2011)	1783
SENTENCING SHEET AND INDICTMENT	1806
DEFENDANT'S MOTION FOR A NEW TRIAL	1811
STATE'S RETURN TO MOTION FOR NEW TRIAL	1824
ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL	1828
FINAL BRIEF OF APPELLANT	1829
FINAL BRIEF OF RESPONDENT	1859
SCCOA OPINION NUMBER 5254 (AFFRIMED, FILED JULY 30, 2014)	1882
RESPONDENT'S PETITION FOR REHEARING <i>EN BANC</i>	1889
APPELLANT'S PETITION FOR REHEARING	1899
APPELLANT'S RETURN TO RESPONDENT'S PETITION FOR REHEARING	1905

INDEX

RESPONDENT’S RETURN TO APPELLANT’S PETITION FOR REHEARING	1927
APPELLANT’S REPLY TO RETURN FOR PETITION FOR REHEARING.....	1939
SCCOA ORDER DENYING STATE’S PETITION FOR REHEARING	1945
SCCOA OPINION NUMBER 5254 (AFFIRMED, REFILED JUNE 10, 2015)	1947
APPELLANT’S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING <i>EN BANC</i>	1957
ORDER DENYING PETITION FOR REHEARING	1971
PETITION FOR WRIT OF CERTIORARI.....	1972
RETURN TO PETITION FOR WRIT OF CERTIORARI.....	1998
ORDER DENYING PETITION FOR WRIT OF CERTIORARI	2028
REMITTITUR	2029
APPLICATION FOR POST-CONVICTION RELIEF (FILED APRIL 12, 2017)	2030
STATE’S RETURN.....	2040
PCR HEARING TRANSCRIPT (MARCH 21, 2018)	2046
PROPOSED ORDER OF DISMISSAL.....	2114
ORDER GRANTING POST-CONVICTION RELIEF	2126
MOTION TO RECONSIDER PURSUANT TO RULE 59(E), SCRCP	2141
RESPONSE IN OPPOSITION TO MOTION TO RECONSIDER.....	2148
REPLY TO APPLICANT’S RESPONSE IN OPPOSITION	2162
ORDER ON MOTION TO RECONSIDER.....	2167

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

- I. Whether the Court of Appeals erred in its harmless error analysis when the testimony at issue—victim Edgar Lopez's statements to Adan Soto and Marlin Avila that he had received \$200 from Petitioner Leslie Parvin in exchange for sex—was cumulative when viewed within the context of the entire record, particularly the unchallenged testimony of Investigator William Gonzalez, Investigator Brien Gwyn and Jose Monroy.
- II. Whether the Court of Appeals, in applying its harmless error analysis, erred when it relied on established case law concerning harmless error and considered the testimony of Investigators William Gonzalez and Brien Gwyn where trial counsel, despite objecting to the admission of Soto and Avila's hearsay testimony concerning Lopez's statements, failed to contemporaneously object to the admission of similar testimony through Investigators Gonzalez and Gwyn.
- III. Whether the Court of Appeals erred in rejecting Parvin's claims that its harmless error analysis: (a) treated opening statements and statements made in voir dire as evidence; and (b) erroneously relied on evidence from defense counsel's cross-examination of Gonzalez to conclude the admission of Soto and Avilla's testimony was harmless.

INTRODUCTION AND STATEMENT OF THE CASE

Leslie Todd Parvin ("Parvin") was indicted by a Richland County grand jury for murdering Edgar Lopez ("Lopez") and Pablo Guzman-Gutierrez ("Gutierrez").¹ (R. 1773-74). Parvin was tried before the Honorable Clifton Newman and a jury on December 12 through December 21, 2011 where he was represented by Fielding Pringle, Jennifer Davis and Luke Shealy. (R. 2, 148, 408, 757, 1020, 1306, 1552, 1711). At the conclusion of trial, Parvin was found guilty as charged and on December 28, 2011, received concurrent thirty-five (35) year sentences. (R. 1744, 1755). Following his conviction, Parvin unsuccessfully sought a new trial. (R. 1755-62, 1769-72, 1).

Parvin subsequently sought appellate review arguing only that the introduction of Lopez's statements to two acquaintances, Adan Soto ("Soto") and Marlin Avila ("Avila"), in the time leading up to his death was reversible error because the statements were purportedly inadmissible hearsay. (Br. of App. at 3). In response, the State argued *inter alia*² that the evidence at issue was admissible pursuant to Rule 804(b)(3), SCRE and further maintained any error was harmless. (App. 1799-1823).

On July 30, 2014, the Court of Appeals issued a published opinion affirming Parvin's conviction and sentence finding the admission of Soto's and Avila testimony concerning Lopez's statements constituted harmless error. (App. 1846-52). Both parties sought rehearing. (App. 1854-64, 1865-72). The State's petition for rehearing was denied while Parvin's petition was

¹ As noted in Parvin's final brief before the Court of Appeals, Gutierrez is referenced throughout the record as Pablo Guzman or Guzman. In an effort to be consistent with Parvin's brief, the State will refer to him solely as Gutierrez.

² The State reiterated each of its arguments for affirming Parvin's conviction and sentence in its petition for rehearing and in the event certiorari is granted, reserves the right to raise these arguments in support of affirmance pursuant to Rule 220(c), SCACR. See Rule 220(c), SCACR (2015) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); Sims v. AMISUB of South Carolina, Inc., 408 S.C. 202, 214-15, 758 S.E.2d 187, 194 (Ct. App. 2014) (quoting 1'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'")).

granted in part. (App. 1916-17). The sole issue on rehearing was: “[w]hether the Court misapprehended or overlooked rules of error preservation in finding the admission of the victim’s hearsay statement constituted harmless error.” (App. 1916-17). Following oral argument, the Court issued a substituted opinion again affirming Parvin’s conviction and sentence. (App. 1918-27). Thereafter, Parvin unsuccessfully sought rehearing (App. 1928-41, 1942-43) and has now sought certiorari in this Court. The State asks that certiorari be denied.

WHY THE PETITION SHOULD BE DENIED

In summary, the State submits Parvin’s petition, which merely disagrees with the Court of Appeals’ harmless error analysis, fails to meet any of this Court’s “Considerations Governing Review” as explained in Rule 242(b)(1-5), SCACR.³ For instance, a review of Parvin’s petition reflects that none of the considerations present in subsections (b)(2), (b)(4) or (b)(5) are even alleged to exist in this case.⁴ Instead, Parvin only suggests the Court of Appeals’ harmless error ruling creates “new” so-called rules concerning error preservation and statements made in *voir dire*. See Pet. for Writ Cert. at 11. It does not and it cannot—this is not a case about error preservation, nor is it a case questioning whether statements made in *voir dire* are evidence—indeed the hearsay issue related to Parvin’s Rule 803(1), SCRE objection to Soto and Avila’s testimony is admittedly preserved and no one suggests that statements made in *voir dire* are

³ As this Court is well aware, Rule 242(b), SCACR’s “Considerations Governing Review,” while admittedly non-exclusive, provide examples of the type of issues amounting to the “special and important reasons” supporting a grant of certiorari and include: (1) “[w]here there are novel questions of law[;]” (2) “[w]here there is a dissent in the decision of the Court of Appeals[;]” (3) “[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court[;]” (4) “[w]here substantial constitutional issues are directly involved[;]” and (5) “[w]here a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” Rule 242(b)(1-5), SCACR (2015).

⁴ Indeed, there is no assertion, nor could there be, that there was a dissent in the Court of Appeals. Likewise, Parvin does not suggest the panel’s analysis conflicts with a decision by the Supreme Court of the United States, nor does it “directly involve[.]” a substantial constitutional issue.

evidence.⁵ Instead, the issue in this case, as well as in every criminal case applying a harmless error analysis, is simply whether the defendant was prejudiced by the admission of the allegedly erroneous evidence.⁶

Here, as demonstrated below, a review of the Court of Appeal's decision shows that it applied clearly-established precedent regarding harmless error and the admission of allegedly inadmissible hearsay testimony to conclude such evidence was cumulative to other evidence in the record.⁷ Particularly, the Court correctly found the "unobjected-to testimonies" of Investigators William Gonzalez and Brien Gwyn, both of whom testified two witnesses had told them Lopez accepted money from Parvin in exchange for sex, was cumulative to the objected-to testimony of Soto and Avila and was therefore harmless. (App. 1925-27). Moreover, and as noted above, because the Court of Appeals correctly concluded preservation rules do "not alter the rule requiring a contemporaneous objection *when evidence is presented to preserve the issue of its admissibility on appeal*" there was no error when the Court relied on Gonzalez and Gwyn's testimony to conclude the alleged error regarding the admission of Soto and Avila's testimony was cumulative. (App. 1925) (emphasis added). Additionally, since the Court of Appeals' opinion merely relied on Parvin's *voir dire* request as well as an unobjected-to portion of the State's opening argument to reflect that such information, "while . . . not evidence" had already been relayed to the jury prior to the admission of Soto and Avila's respective testimony, it cannot be said that the Court of Appeals erred in merely mentioning these historical facts when

⁵ In fact, this was noted by the Court of Appeals in its opinion stating, "the trial court's comments during voir dire . . . are not evidence[.]" (App. 1926).

⁶ See e.g., State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors."); State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result.").

⁷ See Parvin, 413 S.C. at 505, 777 S.E.2d at – (citing State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996)); Parvin, 413 S.C. at 505, 777 S.E.2d at – (citing State v. Kirby, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct. App. 1996)).

analyzing whether Parvin was prejudiced by the admission of such evidence. Finally, the fact that the Court of Appeals relied, in part, on Gonzalez's testimony on cross-examination is irrelevant as there is simply nothing to reflect that a harmless error analysis can only be based upon evidence (i.e. testimony) elicited by the prosecution. To the contrary, and as noted above, an appellate court performing a harmless error analysis must do so within the "context of the entire record" rather than against only one portion of the record as Parvin now suggests.⁸ Accordingly, the State respectfully asks certiorari be denied.

RESPONDENT'S STATEMENT OF THE FACTS

A. The Murder of Edgar Lopez and Pablo Gutierrez

On July 30, 2010, Parvin, a twenty year military veteran, shot and killed Lopez and Gutierrez in the front yard of Lopez's Richland County residence⁹ with a .45 caliber semi-automatic handgun. (R. 1065-67, 1068, 1072-73, 1078, 1189, 1060-61, 789). According to forensic pathologist Dr. Clay Nichols, Lopez, who was 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. (R. 497, 469-71, 474-75, 497, 485-86). Both Lopez and Gutierrez died on the scene. (R. 462-63). Describing the incident, eyewitness 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. (R. 386-87). 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

⁸ See *State v. Holder*, 382, S.C. 278, 289, 676 S.E.2d 690, 696-97 (2009) (citing *State v. Brown*, 344 S.C. 70, 75, 543 S.E.2d 552, 554-55 (2001)) (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection.).

⁹ The address where the incident occurred consisted of two separate buildings, a main residence, which was occupied by Dimas Fernandez, and a detached furnished garage which was Lopez's residence. (R. 343, 379).

shot both Lopez and Gutierrez, both of whom were inside the fence. (R. 386-87, 388). Lopez and Gutierrez were unarmed when Parvin shot them. (R. 388-89).

Following the shooting, Parvin calmly walked to his minivan and fled the scene. (R. 387, 389, 391-92, 394, 1126, 1127). 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. (R. 1126, 1130-31, 913, 1128, 1129-30, 991). 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. (R. 1126, 1130, 1128, 1129-30, 666-68, 915). After selling his minivan for scrap, Parvin and his father stayed in Louisiana to "figure out what the heck to do." (R. 1131). They then continued to Texas where Parvin visited with his in-laws. (R. 915, 1131). On August 15, 2010, Parvin and his father returned to Columbia. (R. 1131-32). Despite knowing authorities were looking for him, Parvin admitted he never attempted to contact police about the shooting.¹⁰ (R. 1132). Likewise, Parvin's family never attempted to contact police about the shooting. (R. 987).

Four days after his return to Columbia, Parvin was apprehended at his residence when authorities attempted to execute a search warrant on the premises. (R. 910). 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. (R. 735, 907, 909, 909-10).

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

¹⁰ A composite was generated on August 5, 2010 and was circulated thereafter. (R. 505). Additionally, once authorities determined the neighborhood in which Parvin resided, they issued a reverse 9-1-1 call warning citizens to be on the lookout for Parvin. (R. 916-17). Authorities testified the reverse 9-1-1 warning was received by the Parvin household. (R. 917).

In *voir dire*, the trial court, at the request of defense counsel,¹¹ 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.” (R. 38, 48-49). Continuing, the trial court asked whether these allegations would adversely affect any potential juror’s ability to be fair and impartial. (R. 48-49). No member of the jury pool indicated such an allegation would affect their duty to be fair and impartial. (R. 48-49).

Curiously, 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.” (R. 102). 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 (R. 102-04); and (2) prior to going to the gas station, Jose Monroy, another acquaintance of Lopez, heard Lopez tell Gutierrez that Parvin was gay. (R. 105). As such, defense counsel argued evidence of Lopez’s statements was improper character evidence citing to Rule 404(b), SCRE. (R. 104-05). Additionally, defense counsel acknowledged that while such evidence may be admissible as evidence of motive (i.e. that Parvin shot Lopez when their deal went awry after which he shot Gutierrez) neither of Lopez’s statements were proven by clear and convincing evidence and therefore, the introduction of the statements would be unfairly prejudicial. (R. 106). Defense counsel also argued Lopez’s statements were inadmissible hearsay. (R. 107).

¹¹ See (R. 103-04) (“Trial Judge: You filed a voir dire request and you asked to introduce [the homosexual sex for money aspect of the case] to the jury. And then you are arguing that what you asked me to inquire concerning the jury is that it should not be presented to them. Why would you ask – why would you submit a voir dire request of something that you are seeking to have excluded?”).

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.” (R. 107). The State then explained its timeline for its present sense impression argument.¹² (R. 108-09):

After giving its version of the timeline, the State maintained its purpose in 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.” (R. 109). 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*. (R. 109). The State then opined Lopez’s statements were also admissible under Simpson as a present sense impression. (R. 109-10). 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.” (R. 110).

¹² Specifically, the State said:

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.

(R. 108-09).

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. (R. 111-12). 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. (R. 111-12).

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." (R. 112). 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. (R. 132-46). 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 gay—was admissible.¹³ (R. 180-81). Defense counsel renewed its' objection to the introduction of the statements made by Lopez to Avila and Soto in the Shell station at trial. (R. 304, 313). 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.¹⁴ (R. 395-96).

C. Opening Arguments and Lopez's Statements

At trial, the State, consistent with the statements advanced in argument regarding its motive for the shooting, surmised in opening argument that Parvin shot Lopez and Gutierrez

¹³ Parvin only seeks review from the trial court's ruling regarding the admission of the statements made to Soto and Avila at the Shell station. See (App. 1785) ("The trial court committed reversible error by allowing Soto and Avila to testify to the Lopez statements for three reasons.").

¹⁴ The admissibility of Lopez's statements at the gas station was raised again in defense counsel's motion for a new trial. (R. 1755-62).

after Lopez refused to have sex with him.¹⁵ (R. 241). Meanwhile, defense counsel, in its opening argument claimed Parvin was acting in self-defense when he shot Lopez and Gutierrez. (R. 263). Specifically, defense counsel alleged Lopez and Gutierrez “attacked” Parvin at which point he shot and killed them. (R. 263). Addressing the sexual encounter gone wrong theory, defense counsel attacked Lopez’s credibility noting his blood alcohol level was later determined to be .379 and further argued the jury should, “[b]e insulted” with such a theory since it asked them to believe Parvin would rather solicit homosexual sex than return home to his beloved wife. (R. 262).

D. Introduction of Evidence Supporting the State’s Theory of the Case at Trial

At trial, the State, in support of its sexual encounter gone-wrong theory, presented testimony from Monroy, who was drinking with Parvin, Lopez and Gutierrez in the time leading up to the incident. (R. 286-87). 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. (R. 287). The State also presented testimony from Soto and Avila from the Shell station. (R. 302-17). In particular, 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,

¹⁵ In particular, the State, summarizing Monroy, Soto and Avila’s expected testimony said:

So [Parvin, Lopez, Gutierrez, and Monroy] are drinking, sitting around, [having] conversations. And there’s a conversation in which [Lopez] began speaking in Spanish and he starts calling [Parvin] a homosexual. [Gutierrez] tells him to be quiet, though, because he doesn’t know that. And they continue talking about other things. [Lopez] has mentioned that [Gutierrez] will have to sleep outside because [Parvin] will be staying in his room. And [Parvin] actually asked [Lopez] “what are y’all saying?” And [Lopez] told him exactly what he said, but [Parvin] doesn’t get upset. They continued drinking and at some point Alfredo [Vidal] arrives, because [Monroy] called him. And then [Parvin] and [Lopez] leave and go to the gas station to get more beer, because they ran out.

(R. 244).

"[Parvin] had given him \$200 to buy beer because he wanted to have sex with him." (R. 305, 306, 307). According to Soto, Lopez then showed him the \$200 Parvin had given him.¹⁶ (R. 311). Avila's testimony largely corroborated Soto's recollection of the encounter with Lopez outside the Shell station explaining Lopez, who she met inside the Shell station, told her Parvin had taken him to buy beer and had given him \$200 to have sex. (R. 313). Notably, Avila added that Parvin 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." (R. 313).

Similarly, the State also elicited testimony from Investigator Brien Gwyn. On direct examination, Gwyn testified, without objection, 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." (R. 892). Later, Gwyn, on two occasions during cross-examination, confirmed the store was "the place where [Lopez was] telling [Avila] about this sex for money." (R. 934-35).¹⁷

In addition to the testimony regarding the agreement between Lopez and Parvin, the State also presented testimony from Gonzalez-Merrin and Dimas Fernandez which largely corroborated its theory that Parvin shot Lopez and Gutierrez after he became frustrated with Lopez. In particular, 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.¹⁸ (R. 387). Continuing, Gonzales-Merrin said Parvin next turned the gun on Gutierrez, who was attempting

¹⁶ In his testimony, Parvin said Lopez did not have any money and further stated he only gave Lopez two twenty dollar bills to purchase beer. (R. 1109).

¹⁷ Notably, Detective William Gonzalez, like Detective Gwyn, testified to essentially the same thing. In particular, Gonzalez, in response to defense counsel's questioning during cross-examination, testified, again without objection, that Lopez told Avila and Soto that "the fucking American . . . gave me \$200 to have sex with him." (R. 716).

¹⁸ Gonzalez-Merrin, who does not speak English, further testified Parvin was yelling at Lopez just before the shooting. (R. 386-88).

to flee the scene, and shot him in the back. (R. 386-87). 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 Gutierrez, both of whom were inside the fence. (R. 386-87, 388). Gonzalez-Merrin confirmed that neither Lopez nor Gutierrez were armed. (R. 388-389).

Similarly, Fernandez, who lived in the main residence on the property, testified that while he did not see the actual shooting, he observed Parvin, who he saw was armed with a pistol, slam a chair, throw a beer and go outside of the fence. (R. 347). He then looked on as Lopez began to reach into his pocket and take out money extending it in Parvin's direction. (R. 347). Shortly thereafter, Fernandez said he heard gunshots and actually passed Parvin in his minivan as he was leaving the scene. (R. 349).

The State further attempted to support its theory by offering evidence showing Parvin fled the scene in the aftermath of the shooting, disposed of evidence and evaded capture leading up to his apprehension.¹⁹ (R. 387, 389, 391-92, 394). 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. (R. 913, 991, 666-68, 915). They also learned Parvin continued to Texas where he visited with his in-laws before returning to Columbia. (R. 915). 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. (R. 505, 916-17, 987, 910, 735, 907, 909-10).

¹⁹ As this Court is well aware, evidence of flight is admissible as guilty knowledge and intent. See e.g., State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612-13 (1999) (holding evidence demonstrating a murder defendant left South Carolina for Florida and then, after learning he was wanted, drove overnight to Kentucky, was admissible as evidence of "guilty knowledge and intent" despite the fact the defendant later returned to South Carolina); State v. Pagan, 357 S.C. 132, 140-41, 591 S.E.2d 646, 650-51 (Ct. App. 2004) (explaining that a murder defendant's flight was admissible as evidence indicating consciousness of guilt).

E. Parvin's Defense

Following the close of the State's case, Parvin 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. (R. 1060-61). In his testimony, Parvin claimed he was "attacked" and "had to fight [his] way out of the yard." (R. 1061).

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.²⁰ (R. 1111). 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. (R. 1111-12). 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." (R. 1117). 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."²¹ (R. 1119). 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. (R. 1120-21). After this exchange, Parvin 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. (R. 1124). Parvin explained it was after this struggle that he pushed Gutierrez away and began firing. (R. 1124-25). Before he

²⁰ This is actually at odds with Monroy's testimony. Specifically, Monroy testified he met Parvin when Parvin initially invited him to have a Modelo beer with Lopez and Gutierrez. (R. 283). Continuing, Monroy noted Parvin then offered him a second beer before Lopez and Parvin left Lopez's residence to get more beer. (R. 283-84).

²¹ While Parvin's testimony implies Monroy and Vidal remained at the residence during this altercation (R. 1118-19, 1120), both Monroy and Vidal said they left prior to the shooting. (R. 288-89, 327).

shot both Lopez and Gutierrez, Parvin maintained he “was saying no, no, no, no, no.” (R. 1126). After the shooting, Parvin told the jury he walked to his minivan and “drove off.” (R. 1126, 1127).

F. Closing Arguments and Parvin’s Conviction

After the State opened on the law, defense counsel again criticized the State’s theory of the case in its closing, reiterating its belief that Parvin was acting in self-defense when he shot and killed Lopez and Gutierrez. (R. 1624-25, 1626). In reviewing the testimony, defense counsel again attacked Lopez’s credibility noting Lopez was drunk in the convenience store and therefore, was not to be believed implying Lopez’s statements were simply drunken “ramblings.” (R. 1627, 1633). Defense counsel further criticized the sex for money aspect of the case arguing it was devoid of common sense.²² Continuing, defense counsel returned to Parvin’s testimony regarding self-defense and engaged in a thorough self-defense analysis telling the jury Parvin’s actions “met all of the elements required for self-defense.” (R. 1643). As such, defense counsel concluded, “Todd Parvin is not guilty. Todd Parvin spent his life protecting others, and I’m going to ask you to protect him.” (R. 1645).

Meanwhile, the State, in its closing, asked the jurors to consider the merits of Parvin’s self-defense claim. (R. 1649). It then explained to the jury its burden of proof, noting it is not

²² Notably, defense counsel said:

This is—I guess this is my version of common sense. If you are going to pay a man for sex, first of all, two hundred bucks, are you going to pay it up front and then hang out and court the guy, I guess, or—I don’t know what their theory is. I don’t get it. I don’t understand it. I don’t get what happens. He shows up and says “here, take it in advance and you pay me later, or I’ll cash in later.” That makes no sense. All right. Obviously I don’t—obviously I have no idea how to even respond to that. It’s ridiculous. And to use that as a basis of someone saying “oh, now you are not going to do it. I’m going to kill you and this guy for no reason?” That guy? That Todd Parvin would do that?

(R. 1634).

required to prove Parvin's sexual preference, but instead, is simply required to prove the elements of murder which it explained was "a killing of another human being, in this case two, with malice aforethought." (R. 1652). Regarding malice, the State noted Gutierrez was likely shot because he served as a witness to Lopez's murder. (R. 1652). Addressing malice with respect to the killing of Lopez the State continued with its sexual encounter gone wrong theory, pairing Monroy, Soto and Avila's testimony with Gonzalez-Merrin's eyewitness testimony of the shooting. (R. 1653-54, 1656-57). In particular, the State pointed out that Gonzalez-Merrin's testimony failed to corroborate Parvin's version of events noting Gonzalez-Merrin never saw Lopez attack Parvin and therefore Parvin's naked assertion of self-defense was not supported by the evidence meaning Parvin was acting with implied malice when he fired his gun and shot and killed Lopez. (R. 1657). The State then asked the jury to scrutinize Parvin's testimony and highlighted various inconsistencies in Parvin's story before concluding he should be found guilty of murder. (R. 1649, 1686). After being charged on the law, the jury was sent back for deliberations and ultimately agreed with the State finding Parvin guilty of murder. (R. 1687-1702, 1704, 1744-47).

ARGUMENT

- I. The Court of Appeals correctly found the testimony at issue—Lopez's statements to Soto and Avila that he had received \$200 from Parvin in exchange for sex—was cumulative when viewed within the context of the entire record, particularly the unchallenged testimony of Investigator William Gonzalez, Investigator Brien Gwyn and Jose Monroy

Parvin first maintains the Court of Appeals erred in its harmless error analysis because the evidence at issue—Soto and Avila's testimony that Lopez approached them and said Parvin had given him \$200 in exchange for sex—was "the central issue of the case and allowed the State to frame its entire case to the jury." Pet. for Writ of Cert. at 13. In response, the State

submits that even assuming Parvin's characterization of Soto and Avila's testimony as "the central issue of the case" is correct, which it is not, because Soto and Avila's testimony was merely cumulative to the unobjected-to testimony of Investigators Gonzalez and Gwyn, as well as that of Jose Monroy, the Court of Appeals was correct in finding the admission of Soto and Avila's testimony was harmless.

A. Soto and Avila's Testimony was far from the "central issue" of the case

As an initial matter, Parvin's claim that Soto and Avila's testimony was the "central issue of the case" is simply incorrect. To the contrary, the central issue in this case was not whether Soto and Avila's money for sex testimony was credible, nor was it whether Parvin was a homosexual; instead, the sole question the jury was asked to resolve was whether the State met its burden of proving, beyond a reasonable doubt, that Parvin was acting with "malice aforethought" when he shot and killed Lopez and Gutierrez.²³ In fact, this was stressed by the State in closing when the assistant solicitor told the jury, "[w]hat we have to prove is . . . not whatever his sexual preferences are. What we must prove are the elements of murder; that there was a killing of another human being, in this case two, with malice aforethought." (R. 1652). Thus, the central issue in the case was not the credibility of Soto and Avila's testimony, but whether Parvin was acting with malice when he shot and killed Lopez and Gutierrez.

²³ Moreover, to the extent Parvin suggests the State could not have proven malice without Soto and Avila's testimony, this is also incorrect. In fact, as mentioned by the assistant solicitor in her closing, Gonzalez-Merrin's eyewitness testimony—that Parvin was not acting in self-defense when he shot and killed both Lopez and Gutierrez with a .45 handgun—can be construed as evidence of malice by itself. (R. 1655-56). See e.g., *State v. Belcher*, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009) (explaining the State may argue "to the jury for a finding of malice from the use of a deadly weapon[.]"). In particular, the assistant solicitor argued Gonzalez-Merrin's testimony that Parvin was outside of the fence and by his van when he shot Lopez, who was inside the fence and, according to Gonzalez-Merrin, was not grabbing Parvin as Parvin testified, was evidence of malice. (R. 1655-56). Likewise, the assistant solicitor, again relying on Gonzalez-Merrin's testimony that Gutierrez was shot from a distance with his hands up, also argued that such testimony was indicative of malice and "proves the case beyond a reasonable doubt." (R. 1657). In other words, not only *could* the State argue malice without the admission of the evidence Parvin claims is "central" to the case, but it *did argue this*, meaning that contrary to Parvin's claim, the State *did not* premise its "entire case on a theory that Parvin offered Lopez money in exchange for sex[.]"

Parvin also argues Soto and Avila's testimony was central in supporting the State's motive theory. Again, this is incorrect as a factual matter since the record, as well as the Court of Appeals' opinion, clearly reflects Soto and Avila's testimony was cumulative to the testimony of Investigators Gonzalez and Gwyn, as well as that of Jose Monroy. Stated differently, because Soto and Avila's testimony was cumulative to the testimony of Gonzalez, Gwyn and Monroy, each of whom testified without objection, Soto and Avila's testimony could not be any more "central" than Gonzalez, Gwyn and Monroy's unchallenged testimony since they all established essentially the same thing—that Parvin solicited Lopez for sex. Therefore, while it might be correct to say that one of the State's theories of the case was the sex for money narrative, it is simply not true that Soto and Avila's testimony was any more central to presenting this narrative since, under the facts of the case, the State could have done so without their testimony.

Furthermore, even assuming no evidence was introduced concerning the sex for money aspect of the case, Monroy's unchallenged testimony concerning Parvin and Lopez's sleeping arrangements in conjunction with Gonzalez-Merrin's testimony—that he observed Parvin shouting at Lopez, who then tried to give money to Parvin before Parvin shot him—would still allow the State to, at a minimum, frame the case as a sexual encounter gone wrong. Indeed, the jury, who was informed of the nature of the case through defense counsel's *voir dire* request, could have inferred from both Monroy and Gonzalez-Merrin's testimony that Parvin and Lopez previously decided to sleep together; Lopez backed out; Parvin asked for his money back; got angry; shot Lopez; and then shot Gutierrez. Accordingly, not only is Parvin's "central issue" argument factually inaccurate, but even if one were to remove any mention of the sex for money motive, the State could have still presented, and the jury could have still inferred, that Parvin killed Lopez as a result of a sexual encounter gone wrong before then turning the gun on

Gutierrez who he believed was the only witness to the crime. As a result, Soto and Avila's testimony cannot be characterized as truly central to the State's case since, on these facts, it could have presented a nearly identical case to the jury without mentioning sex for money at all.

B. Even assuming Soto and Avila's testimony was the "central issue" in this case, because their testimony was cumulative to Investigators Gwyn and Gonzalez as well as that of Jose Monroy, the Court of Appeals did not err in its' harmless error analysis

The State further submits that even if one were to assume Parvin is correct in factually characterizing Soto and Avila's testimony as central to the State's case, he is incorrect in his conclusion that this somehow mandates reversal. In particular, Parvin claims that an "[e]rror related directly to the central issue of a case cannot constitute harmless error" citing to Sulton v. Health South, 400 S.C. 412, 418, 734 S.E.2d 641, 644 (2012). See Pet. for Writ of Cert. at 14. However, because South Carolina law, including Sulton, explains a determination of harmless error is necessarily based on the individual facts and circumstances of a particular case, this statement, without more, is largely incorrect.²⁴ In light of this, the State submits the Court of Appeals did not err in its harmless error determination, but instead correctly found the admission of Soto and Avila's testimony was cumulative to other evidence in the record and was therefore harmless.

In Sulton, this Court reversed a verdict in a survival action on the basis that the trial court's jury charge improperly instructed the jury that the defendant, HealthSouth, owed the plaintiff "a heightened duty of care." 400 S.C. at 416, 734 S.E.2d at 643. In so doing, the Court, after first explaining the charge was an incorrect statement of law, considered adopting the rule from a North Carolina case which mandated reversal. 400 S.C. at 418, 734 S.E.2d at 644

²⁴ Notably, Parvin essentially concedes this in his petition where he acknowledges, at page 13, that the issue of "[w]hether an error is harmless depends on the circumstances of the particular case" adding that "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." See Pet. for Writ of Cert. at 13 (citing State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)).

(internal quotations omitted). The Court declined to do so, instead explaining, “[the] North Carolina standard does not comport with South Carolina jurisprudence regarding jury instructions, which analyzes jury instructions as a whole and emphasizes prejudice analysis.” *Id.* Thus, even a cursory review of Sulton shows that not only is there no *per se* rule of reversal as suggested by Parvin, but it further confirms an erroneous jury instruction, like the allegedly erroneous admission of hearsay testimony in this case, is subject to a prejudice analysis.²⁵

Furthermore, even if Sulton merely stands for the proposition that an appellate court, when performing a harmless error analysis, should look to whether the alleged error is the central issue in the case, the State submits that such an error, and whether it is prejudicial, would still be based on the entirety of the record. In Garner, a case cited by the Court of Appeals in its opinion, the Court correctly described the relationship between error and prejudicial error in the context of allegedly inadmissible hearsay testimony explaining, “improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice.” 389 S.C. at 67-68, 697 S.E.2d at 618. Continuing, the Court said, “such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors.” *Id.*

When assessing prejudice as part of a harmless error analysis, South Carolina law requires an appellate court to determine whether the alleged error is prejudicial in light of the entirety of the record, an analysis which the Court of Appeals performed in this case.²⁶ As this Court recently explained, “in applying the harmless error rule, the court must be able to declare

²⁵ See Sulton, 400 S.C. at 418, 734 S.E.2d at 644 (analyzing erroneous jury instruction as a whole and utilizing a prejudice analysis); State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) (stating the improper admission of hearsay evidence constitutes reversible error only when the admission cause prejudice).

²⁶ See State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 94-95 (2011) (analyzing improperly admitted hearsay evidence against other evidence in the record for purposes of determining whether the improperly admitted testimony is prejudicial); Garner, 389 S.C. at 67-68, 697 S.E.2d at 618 (explaining the trial court’s erroneous admission of inadmissible hearsay is subject to a harmless error analysis comparing the relationship of the alleged error to other evidence in the record).

the error had little, if any, likelihood of having changed the result of trial[.]” State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29 (2014) (quoting State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996)). In the words of the Supreme Court of the United States, the relevant question under a harmless error analysis is whether the alleged error, when compared to the entirety of the record, including the individual facts and circumstances of the case at hand, was “unimportant in relation to everything else the jury considered on the issue in question.” Yates v. Evatt, 500 U.S. 391, 403 (1991).

Moreover, while this Court explained in Collins that harmless error has not set formula, 409 S.C. at 538, 763 S.E.2d at 29, there are certain situations in which an error may be more likely to be found harmless. Notably, South Carolina’s appellate courts have long stated, specifically within the context of inadmissible hearsay, that “the admission of improper evidence is harmless where it is merely cumulative to other evidence.” State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). This is based on the “overriding rule” recognized by appellate courts that, “whatever doesn’t make any difference, doesn’t matter.” State v. Jolly, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (1991) (“Appellate courts recognize an overriding rule which says: whatever doesn’t make any difference, doesn’t matter.”) (internal quotations omitted).

For example, this Court in State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) affirmed the admission of allegedly inadmissible hearsay evidence on the basis that the testimony at issue, hearsay testimony from a counselor repeating statements made by the victim, was “harmless” because “two other witnesses testified without objection” to similar hearsay statements. 312 S.C. at 507, 435 S.E.2d at 862. Likewise, in State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989), a case cited by the Schumpert Court, this Court affirmed the trial court’s erroneous admission of inadmissible hearsay concerning a family court restraining order because

the order “was merely cumulative to the second order admitted without objection[.]” 298 S.C. at 498-99, 381 S.E.2d at 733. The same was true in State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) where this Court, affirming the admission of a child’s hearsay statement in a criminal sexual assault case, found not only that the statement at issue was admissible as an excited utterance, but added that since a doctor who examined the victim later testified the victim had told him the same thing, any error caused by the admission of the allegedly inadmissible hearsay was rendered harmless when defense counsel failed to object to the doctor’s testimony. Id. at 113 n.8, 644 S.E.2d at 689 n.8

Understanding this, the State submits the Court of Appeals was correct when it found Soto and Avila’s testimony concerning their conversation with Lopez was cumulative to the unobjected-to testimony of Detectives Gonzalez and Gwyn.²⁷ In particular, since the only alleged error identified by Parvin’s trial and appellate counsel was the purportedly inadmissible hearsay testimony of Soto and Avila, the Court of Appeals was correct in analyzing the alleged error against testimony from Detectives Gonzalez and Gwyn consistent with that of Soto and Avila—that Lopez received \$200 from Parvin in exchange for sex.²⁸ (R. 716, 892, 951, 954-55). As stated above, inadmissible hearsay evidence that is cumulative to other evidence may be harmless since “appellate courts will not set aside convictions due to insubstantial errors not affecting the result” of the proceeding.²⁹ Thus, the Court of Appeals was necessarily correct in

²⁷ Notably, Detective Gonzalez’s testimony concerning the sex for money theory was elicited during *cross-examination* on this issue. (R. 716). Additionally, Detective Gwyn’s testimony, which came in on direct (R. 892), *cross-examination* (R. 951) and re-direct (R. 954-55) was also elicited without objection on this matter. Also, while not exactly the same, Monroy’s unchallenged testimony reflected that Lopez and Parvin planned on sleeping together that night. (R. 285, 286).

²⁸ Again, the State notes that Detective Gonzalez’s testimony came in response to defense counsel’s questioning on *cross-examination*. (R. 716).

²⁹ See State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) (citing State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)); see also, Jennings, 394 S.C. at 478, 716 S.E.2d at 94-95 (“Improperly admitted hearsay evidence which is merely cumulative to other evidence may be viewed as harmless.”); State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (holding improper admission of an investigator’s hearsay testimony that

rejecting Parvin's Sulton argument and concluding the admission of Soto and Avila's testimony was harmless when viewed against the entirety of the record; particularly the testimony of Detectives Gonzalez and Gwyn as well as that of Jose Monroy.³⁰

- II. The Court of Appeals, in applying its harmless error analysis, correctly relied on established case law concerning harmless error when it considered the testimony of Investigators William Gonzalez and Brien Gwyn since trial counsel, while objecting to the admission of Soto and Avila's testimony concerning Lopez's hearsay statements, failed to contemporaneously object to the admission of similar testimony through Investigators Gonzalez and Gwyn.

Parvin also argues the Court of Appeals erred in considering the unchallenged testimony of Detectives Gonzalez and Gwyn in its harmless error analysis, claiming error preservation rules did not require him to contemporaneously object to the admission of either investigator's testimony. Specifically, Parvin claims his objection to the admission of Soto and Avila's testimony relieved him of his duty to contemporaneously object to the admission of "the same or substantially similar" testimony and, as a result, argues the Court of Appeals erred by relying on Gonzalez and Gwyn's unchallenged testimony to conclude the admission of Soto and Avila's testimony was cumulative and therefore harmless. Because established law concerning preservation of error requires a litigant to contemporaneously object to the admission of evidence in order to later appeal its admissibility, the State submits the Court of Appeals was correct when it relied on established case law and considered Gonzalez and Gwyn's unchallenged testimony in its harmless error analysis.

was "solely based on information from informants" in a murder trial was "merely cumulative."); State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) ("Where the hearsay is merely cumulative to other evidence, its admission is harmless."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.")³⁰ See Kirton, 381 S.C. at 37-38, 671 S.E.2d at 122 (explaining that while three individuals testified regarding allegedly improper evidence, defense counsel only registered a contemporaneous objection as to one of the individual's testimony and as a result, any evidence which was allegedly improperly admitted, was harmless in light of the unobjected-to testimony); State v. Haselden, 353 S.C. 190, 196-97, 577 S.E.2d 445, 448-49 (2003) (acknowledging the admission of improper evidence is harmless where it is cumulative to other evidence that was not the subject of an objection).

It is well established that a party seeking to appeal a trial court's ruling concerning the admission of evidence must register a contemporaneous objection.³¹ Here, the Court of Appeals simply applied this rule and correctly found Parvin, by failing to object to the admission of both Gonzalez and Gwyn's testimony, could not complain about the presence of such evidence in the record when it applied its harmless error analysis. Indeed, the Court of Appeals discussion on this matter correctly reflects that while Parvin certainly preserved the admissibility of Soto and Avila's testimony on appeal, his failure to object to the admission of Gonzalez and Gwyn's testimony waived his ability to argue such testimony was erroneously admitted. In fact, were Parvin now permitted to contest the Court of Appeals' harmless error ruling on the basis of preservation, doing so would actually turn the doctrine of preservation of error on its head by permitting Parvin to now argue, for the first time, that Gonzalez and Gwyn's testimony was also erroneously admitted.

Moreover, and as mentioned by the Court of Appeals, Parvin's argument is also at odds with South Carolina authority concerning the application of harmless error.³² Indeed, a court performing a harmless error analysis must determine whether the admission of the erroneously

³¹ See State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (internal citations omitted) (“To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.”); State v. Humphries, 325 S.C. 28, 35, 479 S.E.2d 52, 56 (1996) (concluding that capital defendant's failure to contemporaneously object to “the amount of victim impact evidence” as well as “the way in which it was used” was not preserved for review despite the fact defense counsel objected to the admission of such evidence on the basis that it had not received prior notice concerning the evidence at issue); State v. Southerland, 316 S.C. 377, 382–83, 447 S.E.2d 862, 866 (1994) (finding defense counsel's failure to contemporaneously object to the admission of testimony reflecting defendant stole murder weapon, killed victim and then sold murder weapon for drugs resulted in the admissibility of such testimony being waived on appeal); see also, 15 S.C. Jur. Appeal & Error § 79 (detailing that a “timely” objection is required in order to preserve the issue of the admissibility of evidence on appeal).

³² See e.g., Jennings, 394 S.C. at 478, 716 S.E.2d at 94–95 (analyzing improperly admitted hearsay evidence against other evidence in the record for purposes of determining whether the improperly admitted testimony is prejudicial); Garner, 389 S.C. at 67–68, 697 S.E.2d at 618 (explaining the trial court's erroneous admission of inadmissible hearsay is subject to a harmless error analysis comparing the relationship of the alleged error to other evidence in the record); Yates, 500 U.S. at 403 (explaining the relevant question under a harmless error analysis is whether the alleged error, when compared to the entirety of the record, including the individual facts and circumstances of the case at hand, was “unimportant in relation to everything else the jury considered on the issue in question.”).

admitted evidence is prejudicial when viewed against the entirety of the record.³³ Here, were this Court to adopt Parvin's argument and rely on the doctrine of preservation of error as a means of mounting a backdoor challenge to the admission of Gonzalez and Gwyn's testimony, such a ruling would immediately call to question the viability of this Court's ruling in harmless error cases such as State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007), State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), and State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989). Likewise, it would call into question the validity of the Court of Appeals' conclusions in cases like State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008). Since the present case, like each of the cases mentioned above, establish the admission of improper hearsay testimony is harmless where it is cumulative to other evidence in the record, the State asks that certiorari be denied.³⁴

III. The Court of Appeals correctly rejected Parvin's claims that it: (a) treated opening statements and statements made in voir dire as evidence; and (b) erroneously relied on evidence from defense counsel's cross-examination to conclude the admission of Soto and Avilla's testimony was harmless

In arguments three and four of his petition, Parvin suggests the Court of Appeals erred in: (a) "using statements made in voir dire and during the State's opening statement as evidence as support for its harmless error holding" and (b) "erred in relying on cross-examination to support its harmless error finding." Pet. for Writ of Cert. at i. The State disagrees.

With respect to Parvin's claim the Court of Appeals erroneously treated defense counsel's requested *voir dire* questions as well as the State's opening argument as evidence in its

³³ See n.32 *supra*.

³⁴ The State adds that revisiting the holding in these cases would be especially troubling based on the facts of this case. For instance: (1) the substance of Soto and Avilla's testimony was initially mentioned to the jury through defense counsel's *voir dire* requests, requests which were given by the judge prior to defense counsel even presenting its motion *in limine*; (2) Detective Gonzalez's testimony regarding the sex for money aspect of the case was elicited during defense counsel's cross-examination; (3) defense counsel's "you should be insulted" defense was premised upon the admission of the evidence Parvin now contests; (4) the admission of Monroy's testimony—that Parvin would be sleeping with Lopez that evening—is, by all accounts, unchallenged; and (5) even without the sex for money evidence, there is a variety of other evidence establishing Parvin murdered Lopez and Gutierrez.

harmless error analysis, the State notes the Court's opinion expressly states otherwise. As even Parvin acknowledges, the Court of Appeals' opinion merely explains, "[w]hile trial court's comments during voir dire and counsels' opening arguments *are not evidence* Parvin offered Lopez \$200 for sex, these instances show how this issue permeated the entire trial." (App. 1926) (emphasis added). Quite simply, this is true—the Court's opinion confirms that while it did not consider either of these as evidence, a review of the record does in fact show that independent of the introduction of any evidence, the jury would have been aware of the sex for money aspect of the case. Indeed, defense counsel initially injected this information to the jury pool via defense counsel's *voir dire* request (as mentioned by the trial court). Moreover, the Court of Appeals was correct to point out that when defense counsel failed to object to the portions of State's opening statement summarizing the conversation that was later testified to by Monroy (without objection), the jury was obviously aware of the sex for money aspect of the case. Thus, because the Court's opinion did not premise its harmless error analysis on the existence of either of these historical facts, but instead merely highlighted that jury was aware of the sex for money component of the case, certiorari should be denied.

Likewise, the State submits the Court of Appeals did not err by relying on Gonzalez's testimony on cross-examination concerning the sex for money aspect of the case. Indeed, as established above, case law concerning harmless error uniformly reflects that such an analysis is based on the entirety of the record. Here, while Parvin complains this ruling somehow limits cross-examination, the fact is defense counsel—not the Court of Appeals—chose to elicit testimony on the sex for money aspect of the case. To the extent this amounts to any error at all, it would appear the question to consider is whether defense counsel, by asking the question

leading to Gonzalez's response, had an articulable strategy for doing so—a question that would be addressed in PCR as a potential ineffective assistance of counsel claim.

CONCLUSION

In conclusion, the State requests this Court deny certiorari. In particular, and for the reasons discussed above, the Court of Appeals was correct when it applied established case law concerning harmless error and, comparing the alleged error in this case against the entirety of the record, determined the trial court's allegedly erroneous admission of Soto and Avila's hearsay testimony did not affect the jury's verdict in this case.

Respectfully Submitted,

ALAN WILSON
Attorney General

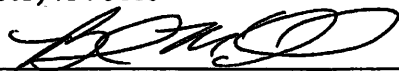
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188


Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Brendan J. McDonald, hereby certify that I have served the Return to Petition for Writ of Certiorari in the foregoing action by depositing two copies of same in the United States

Mail to:

**Michael J. Anzelmo, Esquire
Nelson Mullins Riley & Scarborough, LLP
P. O. Box 11070
Columbia, SC 29211-1070**

**Dwight F. Drake, Esquire
Nelson Mullins Riley & Scarborough, LLP
P. O. Box 11070
Columbia, SC 29211-1070**

This 16th day of December, 2015.



BRENDAN J. McDONALD
Assistant Attorney General

The Supreme Court of South Carolina

The State, Respondent,

v.

Leslie Parvin, Petitioner.

Appellate Case No. 2015-002285

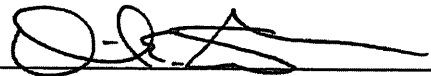
Lower Court Case No. 2010-GS-40-00897, 2010-GS-40-00898

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

September 9, 2016

cc:

Michael J. Anzelmo, Esquire

Brendan Jackson McDonald, Esquire

Alan McCrory Wilson, Esquire

Dwight Franklin Drake, Esquire

The Honorable Jeanette W. McBride

The Honorable Jenny Abbott Kitchings

RECEIVED

SEP 12 2016

Referred to Zelenka/dm

Answered _____



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 14, 2016

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Leslie Parvin
Lower Court Case No. 2010GS4000897, 2010GS4000898
Appellate Case No. 2012-205888

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Dwight Franklin Drake, Esquire
Michael J. Anzelmo, Esquire
Brendan Jackson McDonald, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire
Daniel Edward Johnson, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Leslie Todd Parvin (#00349127),

Plaintiff(s)

vs.

State of South Carolina,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017-CP - 40- 02220

Submitted By: Michael J. Anzelmo

Address: Nelson Mullins Riley & Scarborough LLP

1320 Main Street, 17th Floor (29201)

Post Office Box 11070

Columbia, SC 29211

SC Bar #: 72933

Telephone #: 803-255-9312

Fax #: 803-255-5167

Other:

E-mail: michael.anzelmo@nelsonmullins.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|---|
| ☐ Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☐ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver/
Warranty (160)
☐ Employment Discrim (170)
☐ Employment (180)
☐ Other (199) _____ | ☐ Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI- _____
☐ Notice/ File Med Mal (230)
☐ Other (299) _____ | ☐ Torts - Personal Injury
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Libel (380)
☐ Other (399) _____ | ☐ Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mediana's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) _____ |
| ☒ Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) _____ | ☐ Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) _____ | ☐ Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured
Settlement Payment Rights
Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers
Compensation Settlement
Approval (780)
☐ Other (799) _____ | ☐ Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) _____ |
| ☐ Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) _____
☐ Sexual Predator (510)
☐ Permanent Restraining Order (680) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in
an Out-of-County Action (660)
☐ Pre-Suit Discovery (670) | ☐ Confession of Judgment (770)
☐ Petition for Workers
Compensation Settlement
Approval (780)
☐ Other (799) _____ | |

Submitting Party Signature: _____

Date: 4/12/2017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (03/2016)

Page 1 of 2

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Leslie Todd Parvin (#00349127)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Court of General Sessions located in Richland County, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-GS-40-0897
 - (b) 2011-GS-40-0898
 - (c)
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

- (a) The trial court sentenced Parvin to thirty-five (35) years on December 28, 2011.
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The South Carolina Court of Appeals
- ii. The Supreme Court of South Carolina
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. The Court of Appeals found the trial court erred in the admission of evidence but affirmed the sentence on a harmless error analysis.
- ii. The Supreme Court denied Parvin's writ of certiorari.
- iii. _____
- (c) the date of each such result:
- i. The Court of Appeals entered the order on June 10, 2015.
- ii. The Supreme Court denied certiorari on September 9, 2016.
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. The State v. Leslie Parvin, 413 S.C. 497, 777 S.E.2d 1 (2015)
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of trial counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (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.
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____

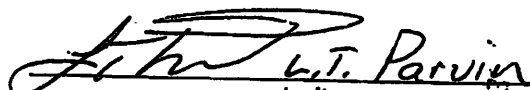
- ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) This is Parvin's first application for post-conviction relief. The issues raised in this application are properly brought for the first time in this application.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes. See Paragraph 21.
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Jennifer C. Davis, Fiedling Pringle, and Luke Shealey, all Assistant Public Defenders at the Fifth Circuit Public Defenders Office, 1701 Main Street, Suite 103, Columbia, SC 29201
 - ii. Dwight F. Drake and Michael J. Anzelmo, Nelson Mullins Riley & Scarborough LLP, 1320 Main Street, 17th Floor, Columbia, SC 29201
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Ms. Davis, Ms. Pringle, and Mr. Shealey represented Parvin at trial and sentencing.
 - ii. Mr. Drake and Mr. Anzelmo represented Parvin before the South Carolina Court of Appeals and Supreme Court.
 - iii. _____

19. State clearly the relief you seek in filing this application:
Parvin seeks to have his conviction overturned and be released from custody of the State.
20. Are you now under sentence from any other court that you have not challenged?
No.
21. Note to Court regarding representation of Petitioner:
This Court does not need to appoint counsel for Petitioner for this proceeding. Dwight F. Drake and Michael J. Anzelmo, both of Nelson Mullins Riley & Scarborough, LLP, and Richard A. Harpootlian, of Richard A. Harpootlian, P.A., will represent Petitioner in this proceeding.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Leslie Todd Parvin, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
22nd day of December, 2016.


Notary Public

My Commission Expires: May 26, 2020

2017 APR 12 PM 12:42
JANETTE W. ROBERTS
C.C.P. & G.S.

STATE OF SOUTH CAROLINA

County of Dorchester

VERIFICATION

I, Leslie Todd Parvin, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Leslie Todd Parvin

SWORN to and subscribed before me this 22nd
day of December, 2016.

Leahann Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

2017 APR 12 PM 12:42
JEANNETTE W. MORRIS
C.C. & G.S.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
Leslie Parvin, #349127,	)	Case No.: 2017-CP-40-2220
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on April 12 2017 by and through Dwight F. Drake, Michael J. Anzelmo, and Richard A. Harpootlian, Esquires, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In February 2011, the Richland County Grand Jury indicted Applicant for two counts of murder (2011-GS-40-0897; -0898). Fielding Pringle, Jennifer Davis, and Luke Shealey, Esquires, represented Applicant. Assistant Solicitors Nicole M. Simpson, Kathryn "Luck" Campbell, and Meghan Walker, Esquires, prosecuted the case. On December 12, 2011, Applicant proceeded to trial before the Honorable Clifton Newman and a jury. The jury found Applicant guilty as indicted on both charges on December 21, 2011, and sentencing was deferred to the Christmas holidays. On December 28, 2011, Judge Newman sentenced Applicant to imprisonment for concurrent terms of thirty-five years each for charge.

Applicant filed a timely notice of appeal. Dwight F. Drake and Michael J. Anzelmo, Esquires perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction

on July 30, 2014. State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015). On April 18, 2014, Applicant filed a petition for rehearing to the South Carolina Court of Appeals. On September 29, 2014, Respondent filed a return to petition for rehearing. On October 10, 2014, Applicant filed a reply to return for petition for rehearing. On December 11, 2014, after careful consideration, the South Carolina Court of Appeals granted Applicant's petition in part and ordered additional oral arguments on one issue. Respondent's petition for rehearing was denied. After oral arguments, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences; the Court withdrew, substituted, and refiled its opinion on June 10, 2015. State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015). On June 25, 2015, Applicant filed a petition for rehearing and suggestion for rehearing *en banc*. On October 8, 2015, the South Carolina Court of Appeals denied the petition. On November 16, 2015, Applicant filed a petition for writ of certiorari to the South Carolina Supreme Court. Respondent filed its return to petition for writ of certiorari on December 16, 2015. On September 9, 2016, the South Carolina Supreme Court denied Applicant's petition. The remittitur was returned to the lower court on September 14, 2016.

Attached to this return and incorporated by reference are the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial 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."

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466

U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be

sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

V.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VI.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JESSICA E. KINARD
Assistant Attorney General

By: *Jenna E. Kinard*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

29 Sept., 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LESLIE PARVIN, #349127,

Applicant,

vs

State Of South Carolina,

Respondent,

IN THE COURT OF COMMON PLEAS

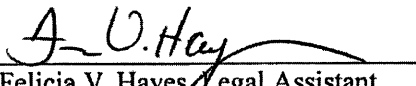
2017-CP-40-2220

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Michael J. Anzelmo, Esquire
Nelson, Mullins, Riley & Scarborough, LLP
P. O. Box 11070
Columbia, SC 29211

DATED this the 29th day of September, 2017.


Felicia V. Hayes, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2017-CP-40-02220
	)	
LESLIE TODD PARVIN,	)	
	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT,	)	

March 21, 2018
Columbia, South Carolina

BEFORE:

THE HONORABLE BROOKS P. GOLDSMITH, JUDGE.

APPEARANCES:

CHRISTOPHER KENNEY, ESQ.
RICHARD HARPOOTLIAN, ESQ
Attorneys for the Applicant

JESSICA KINARD, ASSISTANT ATTORNEY GENERAL
Attorney for the State

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S
INDEX OF WITNESSES:

FIELDING PRINGLE

Direct By Mr. Harpootlian 13

JENNIFER DAVIS

Direct By Mr. Kenney 21

Cross By Ms. Kinard 40

Redirect By Mr. Kenney 48

JACK SWERLING

Direct By Mr. Harpootlian 52

Cross By Ms. Kinard 63

> > > < < <

CERTIFICATE OF REPORTER 68

APPLICANT'S EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	413 SC 497 case	13	
2	Transcript	13	

1 MS. KINARD: This is the matter of Leslie Todd Parvin
2 versus the State of South Carolina, Richland County case
3 number 2017-CP-40-2220.

4 We're before the Court on an application for Post
5 Conviction Relief filed April 12th, 2017 on behalf of Mr.
6 Parvin by Dwight Drake, Michael Anzelmo, and Richard
7 Harpootlian.

8 Mr. Parvin is presently confined in the South
9 Carolina Department of Corrections pursuant to orders of
10 commitment from the Richland County Clerk of Court.

11 In February 2011, the Richland County Grand Jury
12 indicted Mr. Parvin for two counts of murder. He was
13 represented at trial by Fielding Pringle, Jennifer Davis,
14 and Luke Shealey. Assistant Solicitor Nicole Simpson,
15 Kathryn Luck Campbell, and Meghan Walker prosecuted the
16 case.

17 On December 12, 2011, they proceeded to trial before
18 the Honorable Clifton Newman and a jury. Mr. Parvin was
19 found guilty as indicted on both charges on December 21st,
20 2011. Sentencing was deferred until after the Christmas
21 holidays. On December 28th, 2011, Judge Newman sentenced
22 him to imprisonment for the concurrent terms of 35 years
23 for each charge.

24 He filed a timely Notice of Appeal, and Dwight Drake
25 and Michael Anzelmo perfected the appeal. The South

1 Carolina Court of Appeals affirmed this conviction on July
2 30, 2014. Petitions for rehearing were filed to the Court
3 of Appeals, and on December 11th, 2014, the Court of
4 Appeals granted the petition in part and ordered
5 additional oral arguments. Respondent's petition for
6 rehearing was denied.

7 After oral arguments, the convictions were affirmed,
8 as well as sentences. The Court withdrew, substituted and
9 refiled its opinion on June 10th, 2015. The citation for
10 that is 413 SC 497.

11 On June 25th, 2015 the Applicant filed a petition for
12 rehearing and a suggestion for rehearing on bond. On
13 October 8th, 2015, that petition was denied.

14 On November 16th, 2015, the Applicant filed a
15 petition for a writ of certiorari to the South Carolina
16 Supreme Court. The return was filed December 16th, 2015.
17 On September 9th, 2016, the petition was denied. A
18 remittitur was returned September 14th, 2016.

19 The State is present. Mr. Parvin is present and
20 represented by Dick Harpootlian, Matt Abee, and Chris
21 Kenney, as well as Dwight Drake.

22 From the outset, I have a few housekeeping matters
23 I'd like to take up.

24 THE COURT: Okay.

25 MS. KINARD: First of all, I have come in and seen

1 that the Applicant and his counsel have approximately four
2 Bankers Boxes worth of material, none of which I have
3 seen.

4 I cannot, certainly, presume that these will be
5 presented during -- during the evidentiary hearing, but
6 there's been no exchange of information whatsoever. I
7 haven't been provided with a witness list despite
8 requesting it this week.

9 So for that basis, I would move for a continuance in
10 order to be able to engage in the discovery process and be
11 able to work with these gentlemen and figure out exactly
12 what we need before we go forward.

13 This case is new. It was filed in 2017, and this is
14 the first time it has been put on the roster. So on that
15 basis, in the interest of justice based on all of the
16 information that these gentlemen have at hand, none of
17 which I have been privy to, I would ask for a continuance
18 on that basis.

19 MR. HARPOOTLIAN: Your Honor, if I could be heard on
20 that?

21 THE COURT: Certainly.

22 MR. HARPOOTLIAN: Your Honor, I hand up to the Court
23 a copy of section 17-27-150. This is the statute which
24 allows for discovery in Post Conviction Relief matters.

25 It requires the petition to be filed by either party

1 with the Court, and then the Court can decide what
2 discovery, if any, will be allowed. No such motion was
3 ever made. The Attorney General has not asked for
4 discovery, and therefore, they're not entitled to know who
5 our witnesses are.

6 If they wanted to know who our witnesses were, they
7 should have filed a motion with the court back in
8 September, and then we would have had depositions, if
9 allowed. We would have exchanged documents. She could
10 serve interrogatories, requests to produce, did not do
11 that.

12 There is no requirement under the statute or the
13 rules that we produce a witness list or that we produce
14 any documents to the Attorney General absent a motion
15 under the statute.

16 MS. KINARD: Your Honor, with due respect to Mr.
17 Harpootlian, that argument, as well as the statutory
18 provisions as they apply, that -- that kind of cuts both
19 ways.

20 I did mention in my return, I request all potential
21 exhibits and materials used to produce potential expert
22 witnesses particularly to be sent well in advance of the
23 hearing.

24 I realize that is not a formal request for discovery,
25 but in the manner and custom in which most PCR cases are

1 practiced, it is typical that there is communication
2 between parties and any requests that I have sent have
3 gone unanswered.

4 MR. HARPOOTLIAN: Your Honor, I might note that this
5 is the third Post Conviction Relief I've been involved in
6 in the last 18 months. Whenever I make a motion for
7 discovery, it's been opposed and denied.

8 The custom and practice is not in the Code of Laws
9 nor is it in the Rules of Court. The statute requires the
10 Attorney General in putting it in her return does not
11 comply with the statute.

12 We're here today. This matter has been pending for
13 awhile. We've got witnesses here to testify, and if, in
14 fact, she was concerned -- and apparently, in the return
15 they were concerned about experts. There was a statutory
16 way to get that. She has not done that.

17 And, Your Honor, we -- we object. We believe our
18 client would be prejudiced by a continuance. Allowing
19 them to at this point conduct discovery, in effect, is
20 prejudicial to the -- to Mr. Parvin.

21 So I'd ask the Court to deny the motion and go
22 forward today with what we've got. And by the way, Your
23 Honor, the issues in this case are not complicated.

24 It's a Court of Appeals decision which indicates
25 what -- in effect, what the deficits were on the part of

1 defense counsel and this court..

2 Basically, I don't think there's going to be any
3 question that the attorneys were deficient in their
4 performance. The question is whether or not it met the --
5 meets the second prong of Strickland. That's really the
6 issue.

7 The elemental decision is not to an expert. It's to
8 you. That is -- and Your Honor, if I might hand up to the
9 Court a copy of the Court of Appeals decision in this
10 case, I think you'll see this is not complicated.

11 THE COURT: All right. I will read the Court of
12 Appeals opinion.

13 MR. HARPOOTLIAN: Thank you, Your Honor.

14 (Pause.)

15 THE COURT: Mr. Harpootlian, let me ask you a
16 question. I have -- I just finished reading the Court of
17 Appeals decision.

18 MR. HARPOOTLIAN: Yes, sir.

19 THE COURT: The issues addressed in that opinion are
20 the issues that are -- you intend to address here?

21 MR. HARPOOTLIAN: Yes, sir.

22 THE COURT: Only those issues?

23 MR. HARPOOTLIAN: Just those issues.

24 THE COURT: Let me hear from the Attorney General on
25 that.

1 MS. KINARD: Your Honor, I understand that's his
2 position. That's -- his allegations are outlined clearly
3 in the application. It does, however, mention a second
4 allegation regarding PTSD and any introduction of that
5 evidence which I don't believe was addressed at all in the
6 Court of Appeals opinion.

7 If I may make a slight amendment to my motion is that
8 not only -- this statute that does govern PCR cases that
9 Mr. Harpootlian presented, certainly it would require --
10 it could enable the parties to engage in discovery with
11 each other, but it also requires an order of the court to
12 engage in any outside discovery meaning that if they
13 needed to obtain any documents in preparation of this
14 trial, then they should have obtained an order of the
15 court from that.

16 I realize they have an advantage because they
17 represented Mr. Parvin on appeal, and -- so that is
18 something that is concerning to us and something that I
19 would make a second motion on after your ruling on this.

20 I did just want to mention that the convention of
21 that statute is that any discovery processes in PCR
22 require an order of the court.

23 MR. HARPOOTLIAN: Your Honor, we're not raising the
24 PTSD. We're abandoning that if that's raised. We have
25 abandoned it. To my knowledge, we have not subpoenaed,

1 gathered, sought.

2 (Pause).

3 Well, just to protect, the only subpoenas we issued
4 are the witnesses who are seated right here for testimony.
5 That's it. That is the three lawyers who were involved,
6 and they would have come probably without a subpoena, but
7 just to be on -- we've done no discovery. We've done no
8 discovery.

9 MS. KINARD: And that's simply something I did not
10 know until right at this moment.

11 MR. HARPOOTLIAN: So, Your Honor, we're -- the issue
12 is clearly defined by the opinion. There is only one --
13 one issue, and that is were they ineffective for not
14 objecting during the -- during the summary of witnesses
15 and what, if any, prejudicial -- the prejudice analysis is
16 yours to have, but -- but again, if she wanted to know who
17 we were calling -- and we may have an expert. I don't
18 know whether we're going to need that expert or not. It's
19 going to -- that's Mr. Swerling. He is seated right back
20 here.

21 I'm not sure we're going to call him, but there was
22 no Motion for Discovery. If they -- she had done that,
23 asked us if we had any experts, we would have responded,
24 but no motion was -- no motion was made under the statute.
25 So we'd like to go forward this morning. Everybody is

1 here.

2 Your Honor, again, since I think it is on that one
3 narrow issue, I can't imagine this thing lasting very
4 long. I just think it's a -- it's a -- we've got to
5 affirm what the Court of Appeals said that they did or did
6 not do, and then the analysis, Your Honor, is what -- you
7 know, would that have made a difference.

8 And so it's not -- I don't think it's a complicated
9 issue, not that he shouldn't spend time analyzing it. I'm
10 saying it's a -- it's an issue for which the facts are not
11 going to be in dispute.

12 THE COURT: Does that sound like the way it should
13 come down to you, Ms. Kinard?

14 MS. KINARD: That seems like it, Your Honor.

15 THE COURT: I'm going to deny the motion to continue
16 then.

17 MR. HARPOOTLIAN: Thank you, Your Honor.

18 MS. KINARD: All right. In that case, a matter of
19 housekeeping because these gentlemen did represent the
20 Applicant on appeal, I would just ask that the Court
21 pursuant to Carter vs. State question the Applicant and
22 confirm that there are no appellate ineffective assistance
23 of counsel allegations since he is using the same team.

24 THE COURT: All right.

25 MR. HARPOOTLIAN: Your Honor, give us two seconds to

1 explain what that means as I understand it.

2 (Pause).

3 Your Honor, the defendant will be happy to answer any
4 questions you have about appellate Post Conviction Relief.

5 THE APPLICANT: Your Honor, I do not have any -- any
6 reason to be pursuing a PCR for my appellate attorneys, so
7 I am correct in saying they are without any fault.

8 THE COURT: Is that the same thing as saying you're
9 satisfied with the way that he represented you in handling
10 your appeal?

11 THE APPLICANT: Yes, sir. Yes, Your Honor, it is.

12 THE COURT: You don't need to consult with any other
13 attorney about that issue?

14 THE APPLICANT: No, sir. I do not.

15 THE COURT: So you're saying the same thing. You're
16 waiving any complaints against them?

17 THE APPLICANT: Yes, sir.

18 MS. KINARD: Thank you, Your Honor. I think that
19 satisfies the burden. I just wanted to get that out for
20 the sake of the record.

21 At this time, State would defer to Mr. Parvin's
22 counsel.

23 MR. HARPOOTLIAN: May it please the Court, Your
24 Honor. Let me -- I have a couple of housekeeping matters.
25 I'm going to enter into the record a copy of the decision

1 that I handed up to you, if I may do so. Any objection?

2 MS. KINARD: No objection.

3 THE COURT: All right. All right.

4 MR. HARPOOTLIAN: And, Your Honor, this is copy of a
5 transcript in the matter. I need to make it -- I
6 understand you already have a copy, but I need to make it
7 a part of the record.

8 MS. KINARD: Without objection.

9 THE COURT: Without objection, the motion is granted.
10 As one exhibit?

11 MR. HARPOOTLIAN: Yes, sir. It's two volumes but one
12 exhibit.

13 (WHEREUPON, Appellant's Exhibits Nos. 1 and 2 were
14 marked for identification only.)
15

16 MR. HARPOOTLIAN: May it please the Court, Your
17 Honor. We would now call Fielding Pringle to the stand,
18 please.

19 FIELDING PRINGLE, after being duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION:

22 BY MR. HARPOOTLIAN:

23 Q State your full name for the record, please.

24 A Elizabeth Fielding Pringle.

25 Q And Ms. Pringle, what do you do for a living?

1 A I'm the Chief Public Defender for Richland County.

2 Q And where did you go to law school?

3 A University of South Carolina.

4 Q And how long have you been with the Public Defenders
5 Office?

6 A All told, about 17 years.

7 Q How long?

8 A About 17 years.

9 Q Seventeen years. And have you been involved in the
10 trial or defense of homicide cases?

11 A Yes.

12 Q And you were involved in the defense of this homicide
13 case?

14 A I was co-counsel with Jennifer Davis and Luke Shealey
15 on this case.

16 Q This was not your first homicide case?

17 A No, sir.

18 Q You represented multiple individuals charged with
19 murder?

20 A That is correct.

21 Q And other serious crimes?

22 A Yes, sir.

23 Q All right. And in preparation for this trial on
24 Mr. Parvin, were you assigned any specific duties, or did
25 you take over any specific duties or you just basically

1 second seating and observing?

2 A I did a large portion of the character presentation.
3 We did a character defense, good character, and I did a
4 large portion of that, presented a number of those
5 witnesses.

6 I think we had 13 our 14 character witnesses, and I
7 presented quite a lot of those. I was equally involved in
8 decision making. I think Ms. Davis had more of those
9 substantive witnesses during the State's case --

10 Q Okay.

11 A -- but I did a lot during the defense case.

12 Q Let me take just a minute to give a -- if you gave a
13 synopsis of the character witnesses and the character
14 evidence you provided concerning -- while I realize this
15 is in the transcript, perhaps we can save the judge some
16 time and review all of it, just short summary please.

17 A All right. Todd, at the time of this, had retired
18 from the military. He had been out for about a year. He
19 was enlisted for about 20 years. He retired as a Master
20 Sergeant, but Todd was not just your average veteran or
21 your average person.

22 Todd was an absolutely extraordinary member of the
23 military, and when it came time to gather witnesses and
24 speak to people and find people that would come and speak
25 on his behalf, we were literally flooded with people.

1 We presented a character defense that spanned his
2 entire life, his entire career, and we also presented
3 family members and people to talk about his personal life,
4 but we had I think a dozen members of the military. Not
5 just members of the military. We had three Colonels who
6 came from the Pentagon, one of whom is here today.
7 Colonel Phillip Wright has come down from Washington, DC
8 today with less than a week's notice. That sort of speaks
9 to the folks we were dealing with.

10 We had a Brigadier General from the Pentagon who
11 came. They were people that were eager to come. Todd had
12 a unique role in the military that I had never known
13 about. He was what's known as a Chaplain's Assistant.

14 So chaplains in the military provide, of course,
15 religious support in combat and non-combat, but chaplains
16 are considered noncombatants. So they don't carry a
17 weapon, and they cannot protect themselves.

18 So Todd, as a young man and just out of high school,
19 heard about somebody doing that specific job in the
20 military and enlisted specifically to do that, and he
21 spent his entire career as a Chaplain's Assistant.

22 So, for instance, Colonel Wright was a chaplain that
23 he served with, and we had 11 other chaplains that he
24 served with. He was deployed five times in war zones:
25 Iraq, Kuwait, Afghanistan three times. We brought those

1 chaplains in who had seen him.

2 In those 20 years and five deployments, Todd was
3 highly trained. He was -- he was also a part of the
4 Special Ops community as a service, service, not as an
5 operator. So he wasn't one of the people that went up on
6 the beach in the middle of the night, but he had the same
7 training and was part of that community.

8 So it was a really unique situation. He had a
9 tremendous amount of training in force, use of force,
10 self-defense. In 20 years of service, five deployments,
11 honorably protecting, successfully protecting his
12 chaplains. He never had to take anyone's life.

13 So it was -- it was a very -- he was very, very
14 unique person, and the people that came in and testified
15 to knowing him over those 20 years for his entire
16 career -- we also had peers of his.

17 I'm referring to my notes so I don't mess up the
18 rank, Your Honor, but Sergeant Major Charles Heigher was a
19 Chaplain's Assistant. He is also here today. They served
20 together, so we just presented a broad range of witnesses
21 in that regard.

22 Q Well -- well -- and -- and as character witness, this
23 character evidence you developed, when you're developing
24 this, did you know -- I mean, you knew that y'all were
25 going to make an objection to hearsay testimony which is

1 discussed, and -- and if that testimony had been kept out,
2 would this character evidence have had even more impact in
3 your opinion?

4 A Yes. Because to say that the statement that came in
5 as hearsay that Todd was soliciting sex was so -- was such
6 an aberration and so out of character, but -- but more
7 importantly, I think the point is that it was very, very
8 clear that the only reason that Todd would have done this
9 would have been to protect himself, and that was the
10 defense. That was what happened, what he said happened.

11 That was -- but the point of the hearsay was to
12 provide this -- what we believe was a fictitious narrative
13 to really just assail his character throughout the course
14 of the trial, and they needed that because there was no
15 motive other than self-defense.

16 Q Okay. So there was a pretrial hearing on whether or
17 not that the -- I'm going to call it, Your Honor, the
18 objectionable testimony rather than having to walk through
19 -- that is the testimony about them paying money for
20 homosexual sex.

21 THE COURT: You're referring to the objectionable
22 testimony that was in front of the Court of Appeals?

23 BY MR. HARPOOTLIAN:

24 Q I'm referring to the Court of Appeals decision.

25 There was a pre-trial hearing on that in front of

1 Judge Newman?

2 A Yes, sir.

3 Q And he ruled it was admissible?

4 A Yes, sir.

5 Q The -- and there were -- the witnesses that testified
6 to this hearsay, there were contemporaneous objections to
7 their testimony?

8 A Yes, Soto and Avila, I believe.

9 Q Okay. Now, later on, two police officers, so called
10 summary witnesses testified. You were in the courtroom?

11 A Yes, sir.

12 Q And who was responsible on your team for examining
13 those witnesses and then would be the person to object,
14 enter a contemporaneous objection, who was supposed to do
15 that?

16 A Ms. Jennifer Davis. She was the lead counsel.

17 Q Okay. And that's this young lady sitting back here?

18 A Yes, sir.

19 Q Okay. You were in the courtroom when this occurred?

20 A I would have been sitting next to her.

21 Q And do you remember when it occurred?

22 A During the officer's testimony?

23 Q Yes.

24 A No, sir.

25 Q Okay. So you have no recollection whether you would

1 have fell over or in some other way objected to that?

2 A If I had caught it, I would have.

3 Q But that wasn't your witness?

4 A No. No. I mean, I might have tried to get her
5 attention, but no. That was not my -- I would not have
6 been able to make that objection.

7 Q Beg the Court's indulgence.

8 (Pause.)

9 And you understand, with your experience, that one
10 has to make a contemporaneous objection to evidence coming
11 in?

12 A Yes.

13 Q And the failure to do so would be ineffective
14 assistance of counsel?

15 A Yes, sir; yes, sir.

16 MR. HARPOOTLIAN: Thank you. Please answer any
17 questions the Attorney General might have.

18 THE COURT: Cross-examination?

19 MS. KINARD: I have no questions for this witness.

20 THE COURT: No questions?

21 MS. KINARD: No questions.

22 THE COURT: Thank you, ma'am. You may step down.
23 You may call your next witness.

24 MR. HARPOOTLIAN: May it please the Court, Your
25 Honor. Mr. Kenney will be taking things from this point.

1 MR. KENNEY: If it please the Court, Your Honor. We
2 call Jennifer Davis.

3 JENNIFER DAVIS, after being duly
4 sworn, testified as follows:

5 THE COURT: All right. Please have a seat. Would
6 you state your full name for the record?

7 THE WITNESS: Jennifer C. Davis.

8 DIRECT EXAMINATION:

9 BY MR. KENNEY:

10 Q And are you employed?

11 A Yes.

12 Q What do you do?

13 A I am the Deputy Public Defender here in Richland
14 County.

15 Q Okay. And how long have you been a Public Defender
16 in Richland County?

17 A It's been a little over 11 years, I think.

18 Q Okay. And have you been a Public Defender the entire
19 time you've been a lawyer?

20 A Yes.

21 Q Okay. Now, this case was tried in 2011?

22 A Yes.

23 Q And you were lead counsel in this case?

24 A I was.

25 Q Okay. Prior to Mr. Parvin's matter, had you been

1 lead counsel on any other murder cases?

2 A Not -- not of my own cases, no, actually.

3 Q Okay. So this was your first murder case?

4 A As lead counsel, yes.

5 Q And you had been a second seat in other murder
6 matters?

7 A Yes.

8 Q All right. Had you been lead counsel in other
9 matters generally?

10 A Other than magistrate's court, I don't think any of
11 my cases actually made it through trial.

12 Q Okay. So this would have been your first case not
13 just in a murder but of any type where you're the first
14 chair?

15 A Yep, yes.

16 Q Okay. You heard Ms. Pringle's testimony?

17 A Yes, I did.

18 Q Do you agree in terms of the allocation of duties in
19 terms of who was responsible for preparing the
20 representation?

21 A Yes, yes.

22 Q Okay. Now, would you give the Court just a brief
23 overview of -- well, let me back up. Mr. Parvin testified
24 in this matter?

25 A He did.

1 Q Okay. Would you give the Court just a brief overview
2 of his testimony concerning of the night of the two
3 killings?

4 A Generally, Your Honor, that day he said he had
5 previously taken up a hobby where he would go out and kind
6 of look for scrap metal. We had records that supported
7 that where he had done that on several occasions.

8 He had come across this neighborhood and saw these
9 gentlemen outside drinking a beer. They had -- I think he
10 had slowed down, or he was driving by and they had kind of
11 waived to him. That caused him to slow down and waived
12 back. That led to him getting out of car to talk with
13 them.

14 They were in the front yard for some period of time.
15 One of the -- ends up being one of the victims, Mr. Lopez,
16 asks him to go to the store with him to get more beer.
17 Mr. Parvin, Todd, does drive him there.

18 Once they get there, that gentlemen then says, "Well,
19 can you give me money for the beer? I don't have any,"
20 which he does do that. They then leave that location, go
21 back to the house in the same front area, go inside the
22 fence. There's more communication.

23 Mr. Parvin and one of the victims, Mr. Lopez, is the
24 only ones that speak English. Prior to that -- if I
25 remember correctly, prior to that, Mr. Lopez was

1 translating for everybody. At some point that seemed to
2 stop, and that started to lead Todd to believe
3 something -- something was amiss, something was going on
4 because they were no longer communicating in the same way,
5 and that then when he was trying to leave, Mr. Lopez was
6 indicating "no, you're not leaving. You cannot leave"
7 repeatedly.

8 Another gentleman positioned himself in a way where
9 he felt he could not get out and that something was --
10 something was happening. At one point, the other victim,
11 Mr. Pablo Gutierrez, I believe --

12 Q Right.

13 A -- reached for the gun that he had on him that he had
14 on his, I think right side he had said. At that point,
15 they started to struggle.

16 The other gentleman he believed was reaching into a
17 garage which I think was actually a house, but it looked
18 like a shed where he thought there may be weapons. They
19 had indicated we have guns or something to that effect to
20 him.

21 At that point, that's when everything happened. He
22 was trying to get the one guy off of him. Once he did it,
23 he started shooting at that point thinking that they were
24 attacking him, trying to rob him, and that the other guy,
25 he believed, was going for a weapon.

1 Q And I mean, the Court can read Mr. Parvin's
2 testimony. It's all in the transcript, but I mean, the
3 essence of it is one of the victims comes at him. He
4 pulls his -- drops his weapon and fires believing, one, to
5 repel the first attacker, and then two, to repel an
6 attacker who appeared to be reaching for a weapon.
7 That's -- that's the essence of Mr. Parvin's testimony?

8 A Yes.

9 Q Okay. Now, you were probably the lawyer who spent
10 more time with him than anybody else on your team,
11 correct?

12 A Yes, as a total, yes.

13 Q How many times do you think you met with him in
14 preparing for this matter?

15 A Oh, I represented him. I guess it went to trial in
16 about a year-and-a-half. I mean, I saw him, I would say
17 over 20 times. I can't be sure. I didn't count but...

18 Q Okay, twenty or so times --

19 A Probably.

20 Q -- to get ready for a trial that lasted a
21 week-and-a-half?

22 A Yes.

23 Q Okay. Now, at any point during your representation
24 of Mr. Parvin, did he ever indicate to you that the facts
25 were anything other than what he testified in front of the

1 jury?

2 A No. It was always from -- from the beginning. It
3 was always self-defense.

4 Q Okay. Now, who is the witness Avila? Who is that?
5 Does that name mean anything you?

6 A Yes. She is the woman who was in the gas station.
7 Her testimony was that the victim who was there to get
8 beer that day had come up to her and made some comments
9 about -- I mean, made the comments that's in the record
10 about Edgar saying Mr. Parvin had given him money for sex.

11 Q Okay. So -- so in terms of Mr. Parvin's narrative
12 when they go to the gas station, Mr. Parvin remains in the
13 vehicle.

14 A Yes.

15 Q Okay. Mr. Lopez goes into the convenience store?

16 A Right.

17 Q Mr. Lopez speaks to Ms. Avila?

18 A Right.

19 Q And her husband, Mr. Soto?

20 A Right.

21 Q Okay. And these two individuals, Soto and Avila,
22 testify at trial that Mr. Parvin --- well, that Mr. Lopez had
23 said that "This American is going to pay \$200 to have gay
24 sex with me?"

25 A Right.

1 Q Something to that effect.

2 A Right.

3 Q Now, did you think that testimony was a problem?

4 A Well, one, we thought it was a problem, and also
5 thought it was inadmissible.

6 Q Okay. Well, let's -- let's talk about generally the
7 problem. In your time with Mr. Parvin, your investigation
8 of this case, you spent time with him. You spent time
9 with his friends and family in order to prepare a
10 character defense that Ms. Pringle talked about, correct?

11 A Right.

12 Q Okay. Did any --

13 MS. KINARD: Your Honor, I'm sorry. I realize that
14 this is probably in the interest of expedience, but a lot
15 of these questions are leading. I would just ask that --
16 to kind of back off a little bit. I realize you're trying
17 to get the narrative out, but out of an abundance of
18 caution.

19 MR. KENNEY: Not a problem, Your Honor. I can.

20 Beg the Court's indulgence.

21 (Pause.)

22 BY MR. KENNEY:

23 Q What, if anything, did your investigation reveal
24 about whether Mr. Parvin is homosexual?

25 A Nothing. We found nothing to suggest that.

1 Q How many witnesses did you interview in preparation
2 for this trial?

3 A We spoke to -- just estimating probably 15 to 20
4 people that had some connection to the military with him,
5 family, friends. I think his grandparents -- or his
6 parents, children's grandparents, obviously, so 20, 30
7 maybe.

8 Q Okay. What about fact witnesses who were called
9 about -- with respect to the killing? Did any of them
10 other than Soto and Avila replicate the claim that
11 Mr. Parvin was a homosexual?

12 A No one else. There was no other testimony. Yeah, no
13 other witnesses that said he paid \$200 for sex.

14 Q Okay. What did Mr. Parvin -- just generally, what
15 did he testify with respect to his family life and sexual
16 orientation?

17 A That he was heterosexual and married to Shannon, had
18 been for -- since he was 18 or 19 years old, I believe.

19 Q Okay. So these are childhood sweethearts who get
20 married and have children together?

21 A Yes.

22 Q He spends 20 years in the military, and you found no
23 evidence to corroborate these -- these claims by the
24 hearsay witnesses?

25 A Correct.

1 Q Okay. So let's go to the second part. The
2 inadmissibility of this testimony. What, if anything, did
3 you do to keep this out?

4 A There was a pretrial motion that I believe Mr.
5 Shealey argued to Judge Newman as to why we thought the
6 State may try to introduce that, and obviously good
7 reasons as to why we did not think it would be admissible.

8 Q Okay. And you said Mr. Shealey. That's Luke
9 Shealey. He is here in the courtroom. He was a third
10 lawyer on your team, correct?

11 A Correct.

12 Q Okay. So you made that motion. Was that motion
13 granted or denied?

14 A It was denied.

15 Q Okay. Now, what if anything is trial counsel
16 required to do in order to preserve that issue on appeal?

17 A Object. When it -- when it comes into evidence,
18 object.

19 Q Okay. And Ms. Davis, I want to direct your attention
20 to -- if I may, Your Honor.

21 THE COURT: You may.

22 BY MR. KENNEY:

23 Q All right. Ms. Davis, you have got two binders in
24 front of you that's been marked as Plaintiff's Exhibit
25 Number 2, and why don't we start with -- turn to page 312

1 if you would.

2 (Pause).

3 I'm sorry. Let's go to page 303 first of all.

4 A Okay. We'll wait just moment for the Court.

5 THE COURT: Got it.

6 BY MR. KENNEY:

7 Q Now, 303, Don Soto. This is the gas station we
8 talked about a moment ago.

9 A Yes.

10 Q Okay. Now, who was responsible for this witness?

11 A Mr. Shealey.

12 Q All right. And if you would just read, it says 303
13 beginning at line 10: Question, "And did you have a
14 chance to speak with Edgar on that day?"

15 Answer: "Yeah. I spoke to him the day that I saw
16 him at the gas station at that time."

17 Question: "Can you tell us what you all talked
18 about?"

19 Mr. Shealey: "Your Honor, we would object at this
20 time. It's a pretrial objection."

21 The Court: "Objection overruled."

22 So do you see that testimony?

23 A Yes.

24 Q Okay. So Mr. Shealey interposed an objection that
25 was denied, correct?

1 A Yes.

2 Q Turn to page -- turn to page 312.

3 A Okay.

4 Q Okay. Now, this is Marlin Avila, correct?

5 A Yes.

6 Q The other gas station witness?

7 A Yes.

8 Q All right. And you see at 312 line 19 question:

9 "What did Edgar", Edgar being Mr. Lopez?

10 A Right.

11 Q One of the victims?

12 A Right.

13 Q "What did Edgar tell you he was doing with that
14 American?"

15 Ms. Davis: "Your Honor, we just renew our prior
16 objection."

17 The Court: "All right."

18 And then answer: "He said that the American had
19 taken him to buy beer, and he said the American had given
20 him \$200 to have sex"; is that correct?

21 A Right, yes.

22 Q Okay. Now, you made a timely objection.

23 A I did.

24 Q Okay. And you knew that was your obligation to do
25 that?

1 A Yes.

2 Q All right. Now, do you know who Investigator
3 Gonzales is?

4 A He is one of the investigators in the case that they
5 called.

6 Q Do you have a recollection of what role he played?

7 A I remember he was brought in. I don't remember if he
8 would have been assigned this case any way, but I know he
9 was specifically brought in to help because he was able to
10 translate. So he ended up interviewing several of the
11 witnesses for the State.

12 Q So in other words, Avila and Soto are Spanish
13 speakers?

14 A Yes.

15 Q And Investigator Gonzales is a Spanish speaking
16 sheriff's deputy?

17 A Yes.

18 Q Okay. Now, let's turn to -- turn to page 712, if you
19 would.

20 A Okay.

21 Q Now, I apologize.

22 Beg the Court's indulgence.

23 (Pause).

24 Well, let's start at 712. Now, on seven -- 713, flip
25 on page four. You were cross-examining Investigator

1 Gonzales, correct?

2 A Yes.

3 Q All right. And would you just read starting at line
4 12 on page 713?

5 A Question: "And in doing that, one of those -- you
6 interviewed multiple witnesses, but you interviewed Marlin
7 Avila on August 17th, right?"

8 He says, "Yes, ma'am."

9 Question: "Again, you were talking to her in
10 Spanish?"

11 Answer: "That's correct."

12 Q Now, skip ahead to page 714 and begin at line 12.
13 What is your question?

14 A "And in your report, you noted she told you that it
15 was -- that Edgar referred to the American as the fucking
16 American, and you put that in your report."

17 Q So the answer is that's correct, and then you say...

18 A "And because that's what she told you."

19 Q The answer is: "That's what she said." You say?

20 A Question: "So that is what you wrote in your
21 report?"

22 He says: "Yes, ma'am."

23 Q Okay. And read that last question.

24 A The last question: And next -- I'm sorry. You were
25 also involved, as the Solicitor stated, in the arrest

1 of...

2 Q And the answer -- you don't finish your question, but
3 the answer is quote, "Well, it -- can I clarify one thing?
4 It wasn't just, quote, the fucking American. It was,
5 quote, the fucking American gave me \$200 to have sex with
6 him?"

7 A Right.

8 Q Okay. Now, turn to page 715 if you'd like, but as I
9 read the record, at no point did you object or move to
10 strike that testimony?

11 A No.

12 Q Okay. Should you have?

13 A Yes.

14 Q Okay. Let's go to -- let's go to page 890, if you
15 would. Now -- okay. Now, who is Brien Gwyn?

16 A I think it's actually Brien Gwyn. He was, I believe,
17 the lead investigator on the case for the State.

18 Q Okay. So this would be another sheriff's deputy who
19 is investigating and made contact with the gas station
20 witnesses Avila Soto?

21 A Yes. I don't remember if he specifically interviewed
22 them, but he certainly was aware.

23 Q All right. Beginning on page 16 on -- at 890, the
24 question is: "After you viewed the actual video in this
25 case" -- now, they're referring to the gas station video,

1 correct?

2 A Right.

3 Q Okay. "After you viewed the actual video in this
4 case, did you make contact with Mr. Soto and his wife?"

5 Answer: "We did."

6 "Were they able to give you information?"

7 Answer: "Yes, they did. They both gave statements."

8 Question: "And that was proved pertinent in this
9 investigation?"

10 Answer: "It did. Both in their statement advised us
11 that according to Edgar's conversation with them in the
12 store or at the store, he was solicited for sex by the
13 individual he was at the store with."

14 Did I read that correctly?

15 A Yes.

16 Q Okay. Now, there's -- there's no objection that I
17 see in this record, correct?

18 A Correct.

19 Q All right. Should you have objected here?

20 A Yes.

21 Q This is hearsay?

22 A Correct.

23 Q It's the same hearsay that you had moved in limine to
24 exclude, and you lost that motion, but it's the same --
25 same testimony?

1 A Right.

2 Q Okay. Was that error in not objecting?

3 A Yes.

4 Q Were you ineffective in not objecting?

5 A Yes.

6 Q Okay. Now, did either Mr. Shealey or Ms. Pringle
7 elbow you or nudge you or slip you a note, or whisper in
8 your ear, "Hey, you need to get up and object?"

9 A I mean, I can't say I specifically remember the
10 moment that happened, but not that I recall.

11 Q Okay. And if they did, obviously, you didn't object
12 and they didn't object?

13 A No one objected.

14 Q I'm sorry?

15 A No one objected.

16 Q Okay. Now, I just want to go over two other passages
17 briefly. If you'll turn to page 924. This is your
18 cross-examination of Investigator Gwyn, correct?

19 A Yes.

20 Q And what you say is Question: "This is the place" --
21 meaning the gas station -- "this is the place where he's
22 telling her about this sex for money, right?"

23 And the answer: "That would be correct."

24 So on cross-examination, you've now elicited this
25 hearsay testimony about Mr. Parvin soliciting gay sex for

1 money. You have affirmatively elicited this testimony on
2 cross-examination, correct?

3 A Yes.

4 Q Okay. Was there -- well, let's look at one other
5 thing, and I'll follow up. Turn to page 932.

6 A Okay.

7 Q And beginning at -- I'm not going to read it into the
8 record, but if you look at 932 beginning at line 21 and
9 then make the jump to 933, you elicit this testimony again
10 where you say the only evidence that you had that there is
11 a sex for money in the words of a man who is .379 alcohol,
12 right, so in other words, you raised the issue again in
13 cross-examination?

14 A Yes.

15 Q Okay. Now, first of all, explain to the Court what
16 is this reference, the .379. What is that about?

17 A The victim, Mr. Lopez, who is the one they are saying
18 this is conveying this information that there was some sex
19 for money, his alcohol level was .379 at the time -- or
20 when they did the toxicology.

21 Q What about the other victim? Do you have a
22 recollection of what his blood alcohol was?

23 A I know -- I believe both were high, but I do not
24 remember.

25 Q Okay. Would it have been somewhat consistent with

1 Mr. Lopez?

2 A I believe they were both pretty high.

3 Q Okay. Now, these are questions that -- this is
4 testimony you elicit on cross-examination. Are you --
5 well, let me -- Your Honor, if I could approach?

6 THE COURT: All right. Certainly.

7 BY MR. KENNEY:

8 Q Now, Ms. Davis, that is copy of Rule 17 of the South
9 Carolina Rules of Criminal Procedure. I assume you've
10 seen this before at some point, correct?

11 A Yeah, yes.

12 Q And it says if an objection has been made at any
13 stage of the admission of evidence, it shall not be
14 necessary thereafter to reserve rights concerning the
15 objectionable evidence.

16 Now, as I understand this, if you had objected on
17 direct, your objection on cross would have been preserved,
18 and you could have gone into these matters that you asked
19 the witness about. Is that consistent with your
20 understanding?

21 A I believe so, yeah.

22 Q But your failure to object on direct meant that when
23 you raised the issue on cross-examination, it now comes in
24 again?

25 A Right.

1 Q Okay. So was there any trial strategy behind the
2 failure to object to the hearsay testimony?

3 A No.

4 Q Do you have any recollection of any meeting or
5 discussion or anything with co-counsel about whether you
6 would perhaps not object to this testimony?

7 A No. We, obviously, were trying to keep it out.

8 Q Okay. And what is your recollection of the State's
9 argument in opening and closing with respect to this
10 testimony?

11 A I mean, my recollection throughout the whole trial is
12 that this was very important to their case. It's what
13 gave them a motive. It was mentioned in opening. It was
14 certainly mentioned in closing. I mean, it was what they
15 were putting forward as to why this occurred as the
16 motive.

17 Q Do you believe -- I know I asked this already, but do
18 you believe you were ineffective in failing to object?

19 A Yes.

20 Q Okay. Do you believe Mr. Parvin should get a new
21 trial?

22 A Yes.

23 Q Has that belief in any way colored or shaded your
24 testimony, the truthfulness of your testimony here this
25 morning?

1 A No.

2 MR. KENNEY: Your Honor, that's all the questions I
3 have for this witness.

4 THE COURT: Cross-examination?

5 MS. KINARD: Thank you, Your Honor.

6 Thank you for being here, Ms. Davis.

7 THE WITNESS: Sure.

8 CROSS-EXAMINATION:

9 BY MS. KINARD:

10 Q Now, you gave the background as far as you were
11 concerned of the facts of the case. Do you recall the
12 differences between defense's version of events and the
13 State's version of events, particularly how the conflict
14 arose?

15 A I'm not sure exactly what you...

16 Q So, for example, you testified that there is --
17 Mr. Parvin became uncomfortable when one of the gentlemen
18 stopped translating, and he felt the situation kind of
19 shifted. Is that a fair statement?

20 A I mean, that is part of his testimony, yeah.

21 Q Yes. Do you recall that the State argued that it was
22 a different incendiary moment that perhaps it was the fact
23 that sex was refused, and that's when Mr. Parvin became
24 angry?

25 A Well, I mean, that was their entire motive. That's

1 the point of them trying to get this information out is I
2 think they were trying to make that -- that somehow them
3 changing their mind or something to that effect is what
4 would make this happen.

5 Q And that would defeat -- potentially defeat the
6 self-defense case that you were presenting as his defense;
7 is that correct?

8 A I mean, if they had a motive of saying that that's
9 what caused it and the jury believed it, yeah, of course.

10 Q Okay. Do you believe that Mr. Parvin's case
11 satisfied all four elements of self-defense?

12 A Yes.

13 Q Now, in the investigation of this case, were there
14 any eyewitnesses?

15 A There was a neighbor across the street that saw
16 portions of it, I guess, or heard the shots and looked
17 over.

18 Q And were there also two other witnesses that heard
19 the shots?

20 A I think there were two other people somewhere around.
21 They didn't actually see what happened, I don't recall.
22 Or I don't recall that they saw exactly what happened, but
23 they were -- they heard shooting or gunfire.

24 Q Okay. Could you describe Mr. Parvin's behavior after
25 the shooting? Do you recall the evidence and testimony of

1 that?

2 A Evidence was, I believe, that he had gone home, then
3 had gone to Texas for some period of time, came back and
4 was arrested in his house. I honestly can't remember how
5 many days that was in between, but there were several days
6 in between that he was arrested at his home.

7 Q All right. Well, to go into a little more detail,
8 first he left the scene; is that correct?

9 A Yes.

10 Q Did he destroy the weapon?

11 A I believe he testified that -- I know they didn't
12 recover the weapon. I know he testified that he had taken
13 the weapon apart somehow or dismantled it somehow.

14 Q He put his family in the hotel for the evening?

15 A I believe his daughter or -- I'm sorry, his wife and
16 one of his sons, yes, went to a hotel.

17 Q And he made affirmative efforts to change his
18 appearance?

19 A He testified that he had cut his hair, I believe, and
20 -- I know he had testified that he cut his hair.

21 Q And as part of that testimony and that specific line
22 of questioning, did he say -- did he testify that he was
23 trying to run away? He was trying to get away?

24 A I don't remember specifically what he said. I know I
25 think part of it was that he was trying to get away, and

1 that he also believed there might have been an ongoing
2 danger.

3 I remember him -- there was some testimony of him
4 thinking that these guys may have been connected to other
5 people. They knew where he lived, and that he was
6 additionally concerned they may come to his house for his
7 family and/or for him.

8 Q All right. So he took the minivan that was at the
9 scene?

10 A Right.

11 Q And drove to Louisiana, almost to Texas?

12 A That -- that could be.

13 Q All right. And then he called his dad to come meet
14 him?

15 A Yes.

16 Q They -- he sold the van for scrap, so the van has
17 disappeared; is that correct?

18 A Right. The van was never recovered, yes.

19 Q And he and dad go to Texas to visit family?

20 A Right.

21 Q All right. Some they returned to South Carolina
22 about two weeks later. Does that seem fair?

23 A I did not think it had been that long, but I honestly
24 don't remember how many days were in between.

25 Q Okay. The record reflects that they returned

1 August 15th, and the crime occurred July 30th.

2 A Okay.

3 Q When he returned, did he contact the police?

4 A I don't believe there was ever any testimony that he
5 called the police.

6 Q Do you recall if there was testimony that he was
7 aware he was being investigated or there was a BOLO or
8 anything like that for him?

9 A I think they had done some sort of phone call to the
10 neighborhood or something.

11 Q A reverse 911?

12 A Yes.

13 Q Okay. And as part of that investigation, do you
14 recall his family, how did they contact the police?

15 A I know they did. I think his wife and maybe his dad
16 was interviewed by them at headquarters.

17 Q All right. And they told the police he was not there
18 even though he was at some point?

19 A Well, when they went to -- yeah. When they went to
20 arrest him, they said that the police were under the
21 impression that no one was in the house, yes.

22 Q Okay. And also at the scene there was DNA found of
23 Mr. Parvin's, correct?

24 A Yes.

25 Q And that was on several beer cans, as well as a gate?

1 A I remember specifically the beer cans.

2 Q Okay. Are you familiar with the Court of Appeals
3 ruling in this case?

4 A I've read it.

5 Q You have read it. Do you recall that one of issues
6 specifically brought up is Rule 17 which Mr. Kenney just
7 questioned you about?

8 A Yeah.

9 Q And that talks about the objection and the
10 reservation of rights, and it also refers to Rule 43(C) (1)
11 which is a predecessor of Rule 17. Do you recall the
12 ruling that the Court of Appeals made about that.

13 A I do.

14 Q Okay. May I approach?

15 A I mean, just I think -- overall, what I recall, the
16 ruling being is that it was error. It wasn't
17 present-sense impression but because we -- you know, this
18 other stuff had come in; that it was cumulative, and we
19 did need to object in order to preserve the issue for
20 appeal.

21 Q Okay. Do you recall the State's arguments about how
22 they wanted to get around the objectionable statement?

23 A In the pretrial motion?

24 Q In the pretrial motion, yeah. Sorry to jump back and
25 forth.

1 A I believe they argued -- well, obviously the
2 present-sense impression. I think they denied that it was
3 404 initially. I don't remember if they came back and
4 said that it was and may have argued res gestae at some
5 point, and I think went back to present-sense impression.

6 Q Okay. And if I could ask you to turn you to page 180
7 of the transcript?

8 A Okay.

9 Q And my apologies. My computer is glitching.
10 (Pause).

11 There's a ruling on there -- do you see where it was
12 ruled admissible under res gestae and an exception to
13 hearsay?

14 THE COURT: All right. Ms. Kinard, which page?
15 Which page are we on?

16 THE WITNESS: Yeah, I'm sorry. I don't see.

17 BY MS. KINARD:

18 Q It was page -- I had 180 and 181, but I don't
19 believe -- it was transcript page 179. I apologize. I
20 had the wrong number page.

21 So under 178 and 179, the Court says it's basically a
22 split decision. It's admissible as part of the res gestae
23 and an exception to the hearsay rule to explain the nature
24 of what's going on.

25 Is that a fair summary of lines approximately three

1 through nine?

2 A The -- yeah, he says it's admissible. It's part of
3 res gestae and an exception to the hearsay rule and to
4 explain.

5 Q All right. And then you turn to page 395 and 396.
6 Mostly 395, lines six through ten, if I may read it out.

7 This is Judge Manning speaking: "I've considered the
8 probative value versus the prejudicial effect of allowing
9 the evidence, the res gestae evidence, and I find the
10 probative value outweighs any prejudicial effect."

11 So that would be considered a 404(b) ruling, as well,
12 wouldn't it?

13 A It's certainly a res gestae.

14 Q Res gestae, yeah.

15 A Okay. Based on what he said, it's res gestae
16 evidence, yes.

17 Q So based on all these, does it seem that there are
18 several different grounds in which the Court allowed in
19 this controversial testimony?

20 A I mean, yeah, I guess. He says res gestae evidence
21 and then probative value outweighs prejudicial effect.

22 Q Beg the Court's indulgence.

23 (Pause.)

24 Is there any discussion in pretrial or at any other
25 time about the facts that this could have been considered

1 solicitation of prostitution depending on the perspective
2 of the parties in question?

3 A From -- that we talked about?

4 Q Yeah. In terms of whether it would be evidence of a
5 bad act just in making that request in itself?

6 A I don't remember if we spoke about it on the record.
7 We certainly had talked about it generally being bad
8 conduct.

9 Q Okay.

10 A I mean, being although uncharged, certainly it could
11 be a crime.

12 Q And would that factor into a 404 analysis?

13 A Sure.

14 MS. KINARD: I have no further questions at this
15 time. Please answer any...

16 MR. KENNEY: Very briefly, Your Honor.

17 THE COURT: Yes, sir.

18 REDIRECT EXAMINATION:

19 BY MR. KENNEY:

20 Q Ms. Davis, you weren't involved with the Court of
21 Appeals, were you? You didn't help Mr. Abee or Mr. Drake
22 in that?

23 A Oh no.

24 Q That's not something that you were involved in, but
25 let me just have you look at -- read that sentence

1 starting with the State on page two of the decision and
2 read -- go to the next page and finish it for me.

3 A "The State, however, asserted it was not attempting
4 to enter the Lopez statements pursuant to 404(b)."

5 Q In other words, they abandoned that argument on
6 appeal?

7 A Right.

8 Q Okay. Now, did any -- other than Soto and Avila,
9 Avila, I'm sure I said it five different ways this
10 morning, other than those two witnesses, did anybody
11 testify about Mr. Parvin soliciting gay sex from Lopez or
12 the other victim?

13 A Those are the only two witnesses as I recall that
14 said he offered \$200 for sex.

15 Q And aside from the two summary police officers who
16 then repeated their hearsay?

17 A Right.

18 Q Okay. And so nobody else testified about that?

19 A Not to that, that I recall.

20 Q What was -- was there any other theory of motive
21 presented by any party at any time other than on the one
22 hand solicitation by the State and self-defense by Mr.
23 Parvin?

24 A No.

25 Q Any other motive in this case?

1 A No.

2 Q So if those hearsay statements never came in, the
3 testimony at trial would have been Mr. Parvin's
4 explanation that he was acting in self-defense, correct?

5 A Right.

6 Q With respect to -- and he's testified about it
7 extensively. It's in the record. I'm not going to
8 belabor it, but with respect to his family and moving his
9 family, do you have a recollection about why he was
10 concerned about their safety?

11 A I remember him testifying that he had some fear or
12 didn't know these gentlemen very well; that there are
13 other people that had been out in the yard; that he had
14 told them essentially where he lived.

15 It was within a mile I think, mile-and-a-half of
16 where they were at, and that he thought that living that
17 close, not knowing them and what had just transpired, he
18 thought that they may very well come to try to find him
19 and/or his family.

20 Q That --

21 A He did not want his family there.

22 Q There were other individuals that Mr. Parvin did not
23 know who were not present when the killings happened but
24 were present at the house that night drinking beer with
25 them, correct?

1 A Right. There were other people in the house, I
2 believe, in and out.

3 Q All right. And -- beg the Court's indulgence one
4 second.

5 (Pause.)

6 MR. KENNEY: Your Honor, that's all I have for this
7 witness.

8 THE COURT: Any recross?

9 MS. KINARD: No, thank you. I do not.

10 THE COURT: Thank you, ma'am. You may step down.

11 MR. HARPOOTLIAN: Your Honor, may we have a brief
12 recess? I have one more witness. I think we can speed it
13 up.

14 THE COURT: Sure. Probably not a bad time to take a
15 ten-minute recess anyhow.

16 (WHEREUPON, a short break was taken.)

17 MR. HARPOOTLIAN: May it please the Court, Your
18 Honor. We've come to that stage where we have to call
19 Mr. Jack Swerling.

20 THE COURT: Mr. Swerling.

21 MR. HARPOOTLIAN: Take the stand, Mr. Swerling.

22 JACK SWERLING, after being duly sworn,
23 testified as follows:

24 THE COURT: Please be seated.

25 DIRECT EXAMINATION:

1 BY MR. HARPOOTLIAN:

2 Q All right. State your full name for the record,
3 please.

4 A Jack Swerling.

5 Q And Mr. Swerling, tell the court a little bit for the
6 record, your background, where did you go to law school
7 and what kind of -- well, law practice have you had since
8 graduating from college?

9 A I went to USC Law School. I graduated in 1973,
10 entered practice with Isadore Lourie and practiced with
11 him for ten years, did a little bit of everything for
12 awhile but then focused on criminal.

13 Q And after practicing with Mr. Lourie, you practiced
14 with me, I believe, for a year.

15 A You and Joe McCullough.

16 Q Joe McCullough. And then you, since then, have been
17 a sole practitioner?

18 A Yes.

19 Q Since 1989 our '90; is that correct?

20 A Yeah. Whenever you ran for Solicitor. I don't
21 remember.

22 Q And have you ever defended a homicide case?

23 A Many.

24 Q And do you continue to do that?

25 A Yes, still doing it.

1 Q You have tried three or four in the last couple of
2 years, have you not?

3 A Yes.

4 Q All right. Have you ever been qualified as an expert
5 in criminal law for the defense of criminal cases by
6 courts of this state?

7 A I mean, I've testified in a number of cases, but I
8 think I have testified as an expert in at least two or
9 three cases. But I can't give you a specific number over
10 44 years.

11 Q Okay.

12 Your Honor, we would offer Mr. Swerling as an expert
13 in the area of the practice of trial of criminal matters
14 in the courts of this state.

15 Any objection?

16 MS. KINARD: Yes, Your Honor. I believe under Rule
17 702 that this doesn't necessarily qualify as an expert
18 opinion as necessary. I don't think it's relevant.

19 While I certainly do not dispute Mr. Swerling's
20 illustrious career and experience, I don't believe that an
21 expert witness in the practice of criminal law is
22 necessary to discuss whether trial counsel was effective
23 or not in the presentation of this case.

24 There is case law on point. It's Green vs. State.
25 The citation is 351 SC 184 which speaks about the relevant

1 evidence necessary as required under 401. Expert
2 witnesses are provided to assist the trier of fact, which
3 in this case certainly would be Your Honor.

4 And in this point based on Your Honor's career,
5 history, and experience, the State simply doesn't believe
6 that it is necessary for such as expert to be offered at
7 this time.

8 MR. HARPOOTLIAN: May it please the Court, Your
9 Honor. Let me hand up to you a copy of this paper, Green
10 vs. State. I think you'll find that -- I assume you
11 already have a copy since you're citing it.

12 MS. KINARD: Uh-huh.

13 MR. HARPOOTLIAN: I would point out...

14 (Pause).

15 Right, right, right. We're not going to ask him for
16 a legal opinion. We're going to ask him for his opinion
17 as to whether or not the conduct of the defense lawyer was
18 objectively, objectively below the standard.

19 It happens in malpractice cases all the time, and in
20 this particular case we're not going to ask him for a
21 legal opinion. We're going ask him for an opinion as to
22 whether the conduct or the defense attorney was
23 objectively below standard.

24 So perhaps she is not objecting to him being
25 qualified as an expert as I understand it. So we could

1 qualify him as an expert. I can ask the question. She
2 can object, and Your Honor can rule rather than doing this
3 in soft of an abstract way, if -- if I might suggest.

4 THE COURT: Let me -- the pertinent parts of State
5 vs. Green -- or Green vs. State would be found where?

6 MS. KINARD: In Subsection 5 of the ruling. It's
7 page 198 of the SC -- I apologize I'm not looking at the
8 same copy you are, Your Honor.

9 MR. HARPOOTLIAN: Well, let me give you copy.

10 THE COURT: It may just be a very illustrious
11 conclusion.

12 MS. KINARD: Yes, sir, right before the conclusion.

13 THE COURT: At the beginning of the PCR hearing?

14 MS. KINARD: Yes, sir.

15 MR. HARPOOTLIAN: And Your Honor, let me hand up a
16 case. This is a civil case. It's a legal malpractice
17 case, and perhaps this makes my point a little bit
18 clearer.

19 If you go to page nine -- and this is Holmes vs.
20 Haynesworth, Sinkler, Boyd, 2014 408 South Carolina 620.
21 What the Court says on expert testimony here is, "With
22 respect to a legal malpractice claim, the claimant must
23 rely on expert testimony to, quote, establish both the
24 standard of care and the deviation by defendant from such
25 standard."

1 They found that a lawyer could testify as to the
2 standard of care, not a legal conclusion, but what -- what
3 is the normal standard of care for a lawyer in this kind
4 of case.

5 In a legal malpractice case, very clearly it's
6 admissible and willing to assist the trier of facts. What
7 Mr. Swerling can do is say based on the facts in the
8 transcript and the testimony he's heard here today, did
9 that conduct fall below the standard of care. That's all
10 we're trying to get into, not -- Your Honor is the only
11 one that can make a legal conclusion.

12 In this context, it's even more acceptable because
13 there's not a jury where he is attempting to tell the jury
14 what the law is, and we can cabin his testimony very
15 carefully.

16 MS. KINARD: Your Honor, this case is not relevant
17 whatsoever. This is a legal malpractice case. It's bound
18 by an entire different statutory act and set of
19 circumstances. It's bound by an entire different standard
20 of review. I has nothing do with PCR.

21 The requirement of the impressional satisfying in a
22 malpractice claim is --

23 THE COURT: Whoa, whoa, whoa.

24 MS. KINARD: -- is a requirement enacted by the
25 statute. It is not required in a PCR, and I believe that

1 the argument that Mr. Harpootlian is making tend to imply
2 that some of the testimony that was offered would be in
3 the line of decision making that is entirely in Your
4 Honor's realm.

5 THE COURT: Well, let me go back. Let me go back to
6 Green vs. State.

7 MS. KINARD: Yes, sir.

8 THE COURT: Mr. Harpootlian, tell me about the last
9 three paragraphs that deal with the testimony of an
10 attorney in a PCR case.

11 MR. HARPOOTLIAN: Well, I think -- I mean this would
12 be distinguished in a number of different ways. It says
13 here the expert offered no factual evidence.

14 I think Mr. Swerling did an offer of factual
15 evidence. That is what the transcript said, what the
16 witnesses said. He proffered his opinion assuming certain
17 facts.

18 Well, I mean, he's not going to assume certain facts.
19 He is going to testify based on what the facts are in the
20 transcript and what he's heard here today. So I mean, I'm
21 not -- again, we don't have the entire transcript here of
22 this -- of this case.

23 And, Your Honor, again, it's -- whether it's
24 admissible or not is -- at this stage I'm attempting to
25 qualify him as an expert. If I elicit an opinion, you may

1 rule it not relevant.

2 If the question is should he be allowed to testify,
3 you could find in whatever order you issue that it wasn't
4 relevant, and under State vs. Green you couldn't consider
5 it.

6 All I'm attempting to do is get in the record his
7 opinion, and then you can either reject it, accept it,
8 disregard it, find it not relevant.

9 At this stage, though, I ask that he be qualified as
10 an expert, and then Your Honor can rule on whether or not
11 that opinion is admissible if that makes sense.

12 THE COURT: It does.

13 MR. HARPOOTLIAN: And it also preserves the -- the
14 record.

15 THE COURT: Okay. I find he is -- he is qualified as
16 an expert as requested, and I'll permit him to testify
17 until an objection is heard.

18 MR. HARPOOTLIAN: Thank you, Your Honor.

19 MS. KINARD: Thank you, Your Honor.

20 BY MR. HARPOOTLIAN:

21 Q All right. Mr. Swerling, you've been qualified as an
22 expert. In preparing for your -- first of all, have you
23 been paid anything for your testimony?

24 A No.

25 Q All right. And do you expect to be paid anything for

1 your testimony?

2 A No.

3 Q And have you read the certain portions of the
4 transcript in this case?

5 A Yes, relevant portions.

6 Q Relevant portions. You've had an opportunity to
7 speak with the defense lawyers in this case?

8 A Yes.

9 Q And have you had an opportunity to hear their
10 testimony here today?

11 A Yes.

12 Q Have you read the Court of Appeals opinion?

13 A Yes.

14 Q And you yourself have tried a number of homicide
15 cases?

16 A Correct.

17 Q And I don't want to get into the history on, you
18 know, how the rules developed in terms of objections, but
19 after reading the Court of Appeals decision -- well, after
20 looking at the transcript and reading the Court of Appeals
21 decision, do you have an opinion as to whether or not
22 counsel's performance in this case was below the standard?

23 A Yes.

24 MS. KINARD: Objection, Your Honor. I don't believe
25 this is relevant based on my -- relevant based on my

1 prior-stated grounds.

2 THE COURT: I find that question is actually
3 different than the ones in the scenario set forth in Green
4 vs. State.

5 Are you aware the expert apparently tried to tell the
6 Court what the Court should do?

7 MR. HARPOOTLIAN: Yes.

8 THE COURT: I'll overrule the objection.

9 MS. KINARD: Thank you.

10 BY MR. HARPOOTLIAN:

11 Q Thank you.

12 Did you find the performance of -- and let me be
13 specific, any specific attorney in this case below the
14 standard?

15 A Yes.

16 Q Who was that?

17 A I mean, counsel who was cross-examining the
18 officer -- the detectives.

19 Q Okay.

20 A Counsel was cross-examining the detectives.

21 Q Okay. And explain to the Court why, the basis for
22 your opinion.

23 A All right. That's fine. Just I think it is relevant
24 to discuss what Rule 43 and Rule 17 have to do -- back
25 when I first started practicing law in the early '70s, one

1 had to reserve their objections before they cross-examined
2 a witness.

3 If you did not reserve your objections, then you
4 waived your objections. At some point the Supreme Court
5 adopted the rule, Rule 43, which said that you no longer
6 have to reserve your objections, but the Court always
7 maintained that you had to file and argue a
8 contemporaneous objection to the objectionable testimony.

9 Rule 17 basically took the same wording of Rule 43
10 and said again you no longer have to reserve your
11 objections as for years and years practitioners had to do.

12 So failure to go ahead and make a contemporaneous
13 objection, particularly in a case like this, did fall
14 below the standard because by not making a contemporary
15 objection -- contemporaneous objection to the detective's
16 testimony, it waived -- or there was a waiver. The Court
17 of Appeals could not address it because it had not been
18 preserved in a trial court below.

19 Q And in the Court of Appeals opinion, they found that
20 it was error, that Judge Newman committed error in this
21 pretrial hearing by allowing that testimony in?

22 A Right. The Court of Appeals said it was not
23 present-sense impression testimony, and -- but it was
24 admitted but it was not present-sense impression
25 testimony. Then the detectives were called to the stand

1 to testify what the witnesses, the two witnesses, had said
2 or told them. There was no objection made to their
3 testimony, so the Court of Appeals held that because of
4 that, because it came in under the detective's testimony,
5 it was harmless.

6 Q So the failure to object to the detective's testimony
7 was, in your opinion, error by the lawyer?

8 A Yes, it was.

9 Q And it was -- did not meet the standard of competent
10 representation? It was ineffective assistance?

11 A In my opinion, it did not.

12 Q Okay. Do you have any opinion about co-counsel's
13 objection to -- failure to object? Did they have a -- I
14 mean, can somebody other than the person examining the
15 witness object?

16 A Well, I mean, you can try, but I think most of the
17 experience I've had over my career is that a judge will
18 only let one lawyer do the objections from one witness.
19 Usually whoever is doing the examination is the one that
20 has to object. So I mean, I've been shut down a couple of
21 times trying to do that myself.

22 Q So when I failed to object to something, you stood up
23 and tried to correct it?

24 A Oh absolutely.

25 MR. HARPOOTLIAN: Thank you. I don't have any

1 further questions, Your Honor.

2 THE COURT: Cross-examination?

3 MS. KINARD: Thank you, Your Honor.

4 CROSS-EXAMINATION:

5 BY MS. KINARD:

6 Q Mr. Swerling, you testified that have read the Court
7 of Appeals opinion in this case; is that correct?

8 A That's correct.

9 Q And you stated that the bulk of that opinion was that
10 the testimony was improperly admitted on the grounds of
11 present-sense impression?

12 A That's correct.

13 Q Being a hearsay exception?

14 A Pardon?

15 Q As a hearsay exception?

16 A Yes.

17 Q Do you recall in your view of the case that the
18 questionable testimony, for lack of a better term, was
19 admitted actually in three different ways at trial?

20 A In the beginning of the opinion, they discussed the
21 fact that the trial court ruled it was admissible under
22 the res gestae theory under Rule 404, but the Court of
23 Appeals opinion also said that they were going forward.

24 They decided that since the 404 issue was abandoned,
25 that obviously, the res gestae theory would be abandoned,

1 as well. So they only addressed the present-sense
2 impression ruling that allowed the testimony in.

3 Q Do you believe there is any issue -- strike that.

4 Beg the Court's indulgence.

5 (Pause).

6 So your opinion is that the res gestae theory and
7 Rule 404 are inextricably linked?

8 A As they were -- as they were addressed in this case
9 as an ongoing chain of events, but in Rule 404, the State
10 stated they were not proceeding under the Rule 404 which
11 in my opinion did away with the res gestae issue that they
12 were -- or the court had ruled on.

13 Clearly, the Court of Appeals felt the same way
14 because they were only addressing the ruling on
15 present-sense impression.

16 MS. KINARD: I have no further questions, thank you.

17 MR. HARPOOTLIAN: No further questions, Your Honor.

18 He would be the expert in the field if you had any
19 questions you would like to ask of him.

20 THE COURT: I have no questions of the witness.

21 Thank you.

22 Step down.

23 MR. HARPOOTLIAN: Thank you, Your Honor.

24 THE COURT: Your Honor, we rest.

25 MS. KINARD: And there is no presentation from the

1 State, Your Honor. We request closing arguments.

2 MR. HARPOOTLIAN: Your Honor -- and we've done this
3 several times recently, and it seems to save the Court
4 time.

5 We would ask that the transcript be prepared and that
6 we submit proposed orders, and that way -- to be frank
7 with you, the argument to you today will be based upon --
8 without some analysis of the transcript and the exhibits,
9 an order citing to the transcript and citing to the
10 exhibits would suit I think Your Honor's needs a lot more
11 than me standing up here jammer-ring about what we have
12 already put in the petition.

13 The transcript shouldn't take -- our transcript has
14 been about 30 days that we prepare an order, proposed
15 order after that based on the transcript and the exhibits
16 that have been introduced which would be a lot more
17 efficient and effective.

18 Or we can do memorandums if Your Honor wants to
19 prepare your own -- or we can do memorandums and proposed
20 orders. I just find that it's much more coherent and
21 cohesive when we're able to present them in a very logical
22 way based on after reviewing the transcript.

23 And I mean, if she wants to argue and Your Honor
24 allows us to do this process, we would have no argument.
25 We would save whatever argument we have for the proposed

1 memo or order.

2 THE COURT: Well, one of the problems that your
3 suggestion is going to cause is that Madam Attorney
4 General is leaving.

5 MS. KINARD: Yes, Your Honor, but Mr. Seville has
6 graciously agreed to step in on the case. That's why he
7 has been here. We discussed it and prepped it, and I
8 intend to further work with him on this case to ensure
9 that he is in a position to write a proper proposed order.

10 THE COURT: All right.

11 MR. HARPOOTLIAN: So we can do that --

12 MS. KINARD: I'm aware of the Court's opinion on
13 argument and preference for that, but I would -- I would
14 defer to your decision.

15 THE COURT: All right. That's what we'll do. That's
16 what we'll do. Proposed orders.

17 MR. HARPOOTLIAN: Proposed orders. So, Your Honor,
18 we will deliver to the court reporter a written request
19 for the transcript today, and once we receive it, if
20 you'll give us 30 days after we get it? Thirty days after
21 we get to it submit to Your Honor, what we submit,
22 proposed orders.

23 THE COURT: All right. Thirty days after receipt
24 both sides will be due proposed orders.

25 MR. HARPOOTLIAN: Yes, sir.

1 MS. KINARD: Yes, sir.

2 THE COURT: All right.

3 MR. HARPOOTLIAN: And, Your Honor, may we --
4 obviously, we'll submit a hard copy, but we -- I found in
5 the past, a couple of other judges, they like it e-mailed
6 in Word so that you can manipulate it.

7 THE COURT: That's what I like, yeah.

8 MS. KINARD: Thank you, Your Honor.

9 THE COURT: Thank you.

10 MR. HARPOOTLIAN: Thank you, Your Honor.

11 (Whereupon, the proceedings were concluded.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 21 day of March,
2018.

May 4, 2018

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

2017-CP-40-2220

ORDER OF DISMISSAL

V.

Respondent.

2114

proceeded to a jury trial before the Honorable Clifton Newman. Applicant was found guilty of both counts on December 21, 2011, and Judge Newman sentenced Applicant to concurrent terms of imprisonment for thirty-five years for each charge on December 28, 2011.

Dwight F. Drake, Esquire, and Michael J. Anzelmo, Esquire, perfected an appeal on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction on July 30, 2014. State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015).

Applicant filed a petition for rehearing on April 18, 2014. On December 11, 2014, after careful consideration, the South Carolina Court of Appeals granted Applicant's petition in part and ordered additional arguments on one issue. Respondent's petition for rehearing was denied. After the oral arguments, the South Carolina Court of Appeals again affirmed Applicant's convictions and sentences. The Court withdrew, substituted, and refiled its opinion on June 10, 2015. Applicant subsequently filed a petition for rehearing and suggestion for rehearing *en banc* on June 25, 2015.

The South Carolina Court of Appeals denied the petition on October 8, 2015. Applicant filed a petition for writ of certiorari to the South Carolina Supreme Court on November 16, 2015. Respondent filed its return to petition for writ of certiorari on December 16, 2015. The South Carolina Supreme Court denied Applicant's petition on September 9, 2016. The remittitur was returned to the lower court on September 14, 2016.

II. ALLEGATIONS

In his application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

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."

Applicant expressly waived the allegation that Trial Counsel was ineffective for failing to introduce evidence he suffered from post-traumatic stress disorder at the evidentiary hearing.

PCR Tr. p. 9, l. 23.

SUMMARY OF RELEVANT TESTIMONY PRESENTED

At the evidentiary hearing, Applicant called Fielding Pringle, Esquire, Jennifer Davis, Esquire, and Jack Swerling, Esquire, to testify.

Ms. Pringle's testimony

Ms. Pringle testified that Ms. Davis served as lead counsel in this case. Ms. Pringle recalled she handled a large portion of Applicant's character presentation at trial, which included a character defense and numerous character witnesses from Applicant's extensive military record. She opined that in light of the character evidence the defense had, preventing the testimony about Applicant soliciting sex from the male victim for money from being admitted would have had even more impact and also because she felt the State had no other motive in this case. Ms. 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.

Ms. Davis's testimony

Ms. Davis recounted Applicant's version of the facts in this case which alleged Applicant

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, Applicant got out of the car to talk with them. One of the victims, Mr. Lopez, asked Applicant to go to the store for some more beer where he allegedly asked Applicant for beer money and Applicant obliged. The men then returned to where they first met. According to Applicant, only Mr. Lopez and he spoke English, so Mr. Lopez had been translating for Applicant and the other gentlemen. Applicant claimed to feel something was amiss and tried to leave when Mr. Lopez stopped translating but was repeatedly told he could not leave. Applicant 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. Applicant shot them, alleging he felt they were attempting to rob him.

Ms. Davis recalled the testimony of witnesses Avila and Soto, who were at the gas station where Mr. Lopez purchased the beer. They both testified at trial that Mr. Lopez said something to the effect that an American was going to pay him \$200 to have sex with him. Ms. 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 Applicant, who was married with children, did not replicate claims of homosexuality. Ms. 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 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 Mr. Lopez had told them he was solicited for sex by the individual he was at the store with. Ms. Davis claimed she was ineffective for not objecting and

noted her statement in which she asked on cross-examination if the only evidence against Applicant was a sex for money claim in the words of a man with .379 blood alcohol content. Ms. 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 Mr. Shealey to keep these statements out, but the motion was denied.

Ms. Davis recalled the State argued the refusal of sex was actually the incendiary moment which spike the violent incident rather than the cease of translation; Ms. Davis believed that was the only motive the State had to present. Ms. Davis was also questioned about Applicant's behavior following the incident, which included Applicant 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, Ms. Davis conceded there was never any testimony that Applicant contacted the police.

Ms. 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. Ms. 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.

Mr. Swerling's Testimony

Mr. Swerling testified as an expert in the area of the practice of trial of criminal matters over the State's objection under Rule 702, SCRE, and Green v. State, 351 S.C. 184 (2002). Mr. Swerling testified it was his opinion that Trial Counsel's failure to make a contemporaneous objection to the testimony fell below standard. The State objected to this testimony under the

previously stated grounds, but was overruled.

III. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Trial Counsel was ineffective for failing to object to hearsay testimony when two witnesses testified regarding statements made by victim, Mr. Lopez, indicating to two individuals at a convenience store that Applicant was paying him for sex. A pre-trial hearing was held before the trial judge after Trial Counsel moved *in limine* to exclude the reference. Tr. p. 101, l. 17. Nonetheless, the trial judge denied the motion and found the statements to be admissible as part of the *res gestae*, as an exception to the hearsay rule, and because it was probative on the issue of motive. Tr. p. 179, l. 3. It is not disputed that Trial Counsel also objected to the testimony at issue during the testimony by two witnesses present at the convenience store, Mr. Soto and Ms. Avila. Tr. p. 303, l. 15; p. 313, l. 21. It is also not disputed that Trial Counsel did not object during the testimony by summary witnesses Investigator Gonzales and Investigator Gwyn regarding Mr. Lopez's statement that Applicant was paying him for sex. Tr. p. 714, l. 23; p. 924, l. 1. Applicant alleges the failure to do so and preserve the issues for appeal was deficient performance and he was prejudiced as a result. This Court finds Applicant has failed to meet his burden of proving he is entitled to relief. Accordingly, post-conviction relief is denied.

This Court finds Applicant's allegation that he was prejudiced by the failure to preserve the challenged testimony for appellate review to be meritless. This Court observes that the challenged statements were admissible on multiple grounds, regardless of Trial Counsel's objections. The Court of Appeals held the present sense impression hearsay exception did not

apply to the testimony by the two witnesses to which Trial Counsel made objections, but found the error to be harmless and cumulative in light of the testimony by the two investigators. State v. Parvin, 413 S.C. at 505. Applicant alleges this opinion evidences prejudice from the failure to object to the testimony by the two investigators. However, there were additional sustaining grounds by which the statements were admissible that were not addressed, namely as statements against penal interest and *res gestae*. The testimony at issue was admissible regardless of Trial Counsel's objections, and Applicant therefore cannot establish deficiency on the part of Trial Counsel for not objecting to admissible testimony or prejudice from not objecting to admissible testimony.

Res Gestae

While the Court of Appeals ruled on Applicant's sole appellate argument which asserted error under Rule 803(1), SCRE, the statements were still 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 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). Tr. p. 179, ll. 3-9. 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.

Therefore, it is clear the trial judge 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 essentially explained what happened during the chain of events in question, and explained why Applicant "became enraged" and shot the victims when he was refused sex. Tr. p. 108, ll. 11-24.

Statements against Penal Interest

This Court finds the statements made by the victim at issue would have also been admissible under Rule 804(b)(3), SCRE, as statements 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)). The question is whether a reasonable person in Mr. Lopez's position would have made the statement that Applicant was paying him \$200 to have sex with him if it was not in fact true. See Williamson, 512 U.S. at 603-04. This statement by Mr. Lopez is clearly

inculpatory and against his penal interest as it constitutes an admission to prostitution. It is not reasonable to assume Mr. 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 Applicant if Mr. Lopez did not believe his own statement to be indeed true. Tr. p. 310, l. 2. For these reasons, the statements were clearly admissible as hearsay exceptions under Rule 804(b)(3), SCRE, regardless of Trial Counsel's objections or lack thereof.

Weight of Evidence Presented at Trial

This Court further finds there is no reasonable probability that the result of the proceedings would have been different even if the statements at issue were somehow excluded. There was ample evidence support Applicant's conviction for both murders and contradict a claim of self-defense. Applicant was identified by multiple witnesses as having been with the victims throughout the day and at the residence with the victims at the time of the incident. At trial, Gonzales-Merrin, who was painting a porch across the street, testified he heard Applicant raise his voice and point a gun at Lopez, who then extended his hand towards Applicant just before Applicant shot him. Tr. p. 385, l. 20 – p. 386, l. 2. Gonzales-Merrin further testified the other Applicant raised his hands and Applicant shot him two or three times. Tr. p. 386, ll. 2-5. He testified that both victims were unarmed, "They ha[d] a beer. They didn't have any arms to defend themselves." Tr. p. 387, l. 15. Another eyewitness, Dimas Fernandez, testified he saw Applicant throw a chair and his beer down before walking outside the fence at the residence. According to Mr. Fernandez, one of the victims pulled some money from his pockets and put his hand out with the money before he heard gunshots. Tr. p. 346, l. 12 – p. 348, l. 4.

There was also substantial evidence of flight and guilty conscience exhibited by Applicant. The jury heard eyewitness testimony the Applicant fled the scene in the aftermath of

the shooting in his green Kia van. Tr. pp. 387, 389, 391-92, 394, 1126, 1127. Applicant dismantled the murder weapon. PCR Tr. p. 42, l. 10. Applicant also moved his family into a hotel room that evening. Tr. p. 981, p. 19. The jury heard testimony from police officers that Applicant fled to Louisiana and Texas after the shooting, and Applicant had the green Kia van crushed in Louisiana. Tr. p. 912, l. 18 – p. 913, l. 9. Furthermore, as Ms. Davis recalled at the PCR hearing, Applicant did not return to South Carolina until two weeks after the incident after he made affirmative efforts to change his appearance. PCR Tr. p. 42, l. 17. Applicant at no time contacted the police, and as Trial Counsel recalled, his family had lied about his whereabouts. PCR Tr. p. 44, l. 17.

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, Applicant has failed to meet his burden of proving prejudice from any alleged deficiency, and this application must be denied and dismissed with prejudice.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-

conviction relief. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this ____ day of _____, 2018.

_____, South Carolina

BROOKS P. GOLDSMITH
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT
)

Leslie Todd Parvin (#349127),) Civil Action No. 2017-CP-40-02220
)

Applicant,)
)

vs.)
)

State of South Carolina,)
)

Respondent.)
)

Order
Granting Post-Conviction Relief

RICHLAND COUNTY
FILED
2018 JUN 27 PM 2:32
JEANETTE W. MCBRIDE
C.C.P. & J.S.

Applicant Leslie Todd Parvin was indicted on two counts of murder related to the deaths of Edgar Lopez and Pablo Guzman-Gutierrez. Before, during, and after trial, Parvin unsuccessfully tried to exclude certain hearsay statements by Lopez that Parvin had solicited and paid Lopez for sex. Despite Parvin's objections to the testimony of two witnesses who heard Lopez's statements, the trial court admitted the statements. The Court of Appeals ruled that admitting the hearsay was error, but found the error harmless because Parvin's trial counsel failed to object when two investigators later testified about the same hearsay statements. *State v. Parvin*, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015). Parvin contends his trial counsel's failure to object to the investigators' hearsay testimony denied him the effective assistance of counsel guaranteed by the Sixth Amendment because, but-for trial counsel's failure to contemporaneously object, the Court of Appeals would have reversed his convictions.

The Court held a post-conviction relief (PCR) hearing on March 21, 2018. Assistant Attorneys General Jessica E. Kinard and Christian Saville appeared for the State. Richard Harpootlian and Christopher Kenney of Richard A. Harpootlian, PA, as well as Dwight F. Drake and Matthew A. Abee of Nelson Mullins Riley & Scarborough LLP appeared for Parvin. Having

reviewed the record and competing proposed orders filed by Parvin and the State, Parvin's application for PCR is **GRANTED** and his convictions are **VACATED**.

Standard of Review

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Rutland v. State*, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016) (citing U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 683 (1984)). Under *Strickland*, a PCR applicant can establish a claim for ineffective assistance of counsel by proving: (1) counsel failed to render reasonably effective assistance under prevailing professional norms and (2) the deficient performance prejudiced the applicant's case. *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland*, 466 U.S. at 687), abrogated in part by *Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 840 n.2 (2018), reh'g denied (Mar. 29, 2018).

Under the effective-assistance prong, trial counsel's assistance is measured by "an objective standard of reasonableness." *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). Under the prejudice prong, an applicant must show a "reasonable probability" that but for counsel's errors, the result of the trial would have been different. *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *Id.* at 603, 602 S.E.2d at 740-41; *Strickland*, 466 U.S. at 687-94. An applicant bears the burden of proving both prongs. *Porter*, 368 S.C. at 383, 629 S.E.2d at 356.

Findings of Fact

A circuit court hearing an application for PCR must resolve any factual dispute necessary to decide the application. See S.C. Code Ann. § 17-27-70; *Leamon v. State*, 363 S.C. 432, 434, 611

S.E.2d 494, 495 (2005). To do so, the Court must weigh the credibility of witnesses and determine the weight to give the evidence presented. *See Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). The Court's decision must be supported by probative evidence. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (PCR court's findings will be upheld "if there is any evidence of probative value sufficient to support them.").

The Court has carefully reviewed the record. That review has included an examination of the full transcript from the December 12–21, 2011 trial, live testimony taken during the PCR hearing, and the Court of Appeals' opinion on rehearing in Parvin's direct appeal.¹ Having made such a review, the Court makes the following factual findings.

A. The State's Theory and Parvin's Defense

To understand Parvin's PCR application, it is necessary first to understand the theories the State and Parvin tried to the jury. It is undisputed that Parvin noticed Lopez and Guzman-Gutierrez drinking in the front yard of a house near Parvin's neighborhood. Parvin stopped and introduced himself, and the group drank together along with others who came and went throughout the evening. When the beer was finished, Parvin and Lopez went to a gas station, bought beer, and returned to the same house. Eventually, Parvin would shoot Lopez and Guzman-Gutierrez, and would then be indicted on two counts of murder by the Richland County Grand Jury (2011-GS-40-897 and -898).

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. *Parvin*, 413 S.C. at 499, 777 S.E.2d at 1. The State based this

¹ The full trial transcript of the trial and the Court of Appeals' opinion in *State v. Parvin*, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015) were admitted into evidence without objection at the PCR Hearing. (PCR Hr'g. Tr. 13:4–12, Mar. 21, 2018.)

theory on statements Lopez made at the gas station before his death to two separate witnesses: Adan Soto and Marlin Avila. Both testified that Lopez said Parvin paid Lopez money for sex. (Trial Tr. 303:10–304:16; 312:13–25.) In its opening and closing statements to the jury, the State argued Parvin was a closeted homosexual veteran who led a secret double life. (Trial Tr. 239:21–240:24; 242:20–244:17; 1667:17–68:7.) In one life, he was a military hero, a veteran, and a devoted family man; in the other life, he solicited and paid unknown men for sex. (*Id.*)

Parvin disputed the State's sex-for-money claims and defended on the grounds of self-defense. (Trial Tr. 263:1–2; 264:3–12; 1070:13–72:14; 1121:19–24; 1123:10–13; 1124:18–21; 1144:8–21; 1623:15–24.) Parvin testified he was out looking for scrap metal, stopped for beer, and was headed home when he stopped to speak to Lopez and Guzman-Gutierrez about salvage. (Trial Tr. 1091:22–97:24) After the men spoke for a time, Parvin and Lopez drove to the gas station to buy more beer, then returned to the house. (Trial Tr. 1102:21–03:7; 1106:18–08:21). Parvin testified his interactions with Lopez and Guzman-Gutierrez escalated when Lopez refused to allow Parvin to leave without paying more money. (Trial Tr. 1114:18–18:5; 1120:2–13.) When Parvin refused, Lopez became visibly upset and threatened Parvin and his family. (Trial Tr. 1120:14–21:24.) Parvin still tried to leave, but Guzman-Gutierrez blocked the exit from the yard, making physical contact in the process. (Trial Tr. 1118:3–5; 1122:6–12.) 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. (Trial Tr. 1122:7–18.) Fearful for his life, Parvin used his gun and military training to protect himself shooting both Lopez and Guzman-Gutierrez. (Trial Tr. 1122:19–24:21.)² Because of Parvin's testimony, the trial court charged the jury on self-defense. (Trial Tr. 1691:19–95:17.)

² Parvin had served a distinguished 20-year military career, including five tours of duty, and the Bronze Star. (Trial Tr. 1063:1–65:24; 1071:11–18; 1076:1–1077:6.)



B. Trial Counsel's Objections to the Hearsay Testimony

Because the State intended to proceed on the theory that Parvin had solicited Lopez for sex, Parvin moved *in limine* to exclude any testimony of other bad acts. *Parvin*, 413 S.C. at 499, 777 S.E.2d at 1. Parvin argued the State's theory was based on witnesses who would testify to the statements Lopez made to Soto and Avila at the gas station about Parvin's alleged payment for sex. (Trial Tr. 101-11.) Parvin specifically objected to the statements as inadmissible hearsay to which the present sense impression exception did not apply. (Trial Tr. 106:18-22.) The trial court denied the pretrial motion. (Trial Tr. 179:3-9.) 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. (Trial Tr. 179:3-9.) 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." *Parvin*, 413 S.C. at 500, 777 S.E.2d at 2.

Parvin renewed his objection to these statements at trial. When Soto testified that "[Lopez] said the American [Parvin] had given him \$200 to buy beer because he wanted to have sex with him" (Trial Tr. 304:15-16), Parvin objected and was overruled, (Trial Tr. 303:15-17). When Avila also testified 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," (Trial Tr. 312:24-25), Parvin objected and was again overruled (Trial Tr. 312:21-24).

C. Trial Counsel's Failure to Object to the Hearsay Testimony

The State later presented Investigator William Gonzales and Investigator Brien Gwyn. (Trial Tr. 694-721 (Gonzalez); 873-956 (Gwyn).) Both testified that Soto and Avila told them about Lopez's statements. On cross, 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."

(Trial Tr. 714:12–25.) Trial counsel failed to object to this hearsay testimony.

The second investigator testified from his report on direct to the same statements that Lopez had 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]." (Trial Tr. 890:22–25.) Trial counsel again failed to object to this hearsay testimony.

D. 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. (Trial Tr. 1741:15–1742:11.) Parvin timely moved for a new trial based on the improper admission of the hearsay testimony, which was denied. Parvin's direct appeal was timely filed—he argued the trial court improperly admitted the Lopez statements as a present sense impression under Rule 803(1), SCRE. *Parvin*, 413 S.C. at 502–03, 777 S.E.2d at 4.

After issuing its initial opinion, the Court of Appeals granted rehearing to decide whether trial counsel's failure to object to the investigator's hearsay testimony rendered the trial court's error in admitting the hearsay harmless. *Parvin*, 413 S.C. at 505–06, 777 S.E.2d at 5. The State did not argue that the trial court's reliance on the present sense impression exception was correct on rehearing, nor did it challenge the Court of Appeals' holding that the exception did not apply. On rehearing the Court of Appeals again affirmed, explaining:

[T]he admission of Soto's and Avila's testimonies was rendered harmless in light of the other evidence that was later admitted at trial without objection. 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.

Parvin, 413 S.C. at 507, 777 S.E.2d at 6. Parvin timely petitioned for certiorari, which was denied on September 9, 2016.

E. Parvin's PCR Hearing

Parvin filed his PCR application on April 12, 2017. Parvin argues the seminal issue on appeal was whether the trial court erred in admitting the Lopez statements as present sense impressions, such that his trial counsel was ineffective when they failed to properly preserve the argument on appeal by making contemporaneous objections to the investigators' hearsay statements.³ (PCR Application.) Parvin argues that had trial counsel objected to the investigators' testimony, the Court of Appeals could not have affirmed under the harmless error doctrine, but would have reversed his conviction and remanded for a new trial. (*Id.*)

To support his claim, Parvin called his former trial counsels and an expert witness to testify. Parvin's lead trial counsel admitted she was deficient in failing to object to the investigators' hearsay testimony. (PCR Hr'g. Tr. 34:8–13; 36:2–5; 39:17–19.) Trial counsel knew this testimony “was a problem, and also thought it was inadmissible.” (PCR Hr'g. Tr. 27:4–5.) Aside from the Lopez hearsay statements, Parvin's trial counsel were unaware of any evidence or history that corroborated the State's theory that Parvin led a secret life soliciting sex from other men, and

³ At the PCR Hearing, Parvin waived a second, unrelated ground for post-conviction relief about trial counsel's failure to introduce evidence that Parvin suffered from post-traumatic stress disorder (PTSD) from his military service. (PCR Hr'g. Tr. 9:23–25.)

presented more than a dozen character witnesses to testify based on their knowledge of Parvin's family life and 20 years of enlisted military service. (PCR Hr'g. Tr. 15:6–17:21.) Notwithstanding the importance Parvin's trial counsels ascribed to excluding and disputing the Lopez hearsay statements (PCR Hr'g. Tr. 39:8–16), trial co-counsel could not explain the failure to object to the investigators' testimony (PCR Hr'g. Tr. 19:5–20:6), and lead counsel confirmed that allowing the hearsay was not a part of any trial strategy (PCR Hr'g. Tr. 39:1–7). Further, Parvin's expert testified it was well understood by the criminal defense bar that a contemporaneous objection was necessary to preserve the issue on appeal.⁴

Though the State did not call any witnesses, it did cross-examine Parvin's lead trial counsel. (PCR Hr'g. Tr. 40–48.) Most of the cross-examination centered on other evidence presented at trial concerning Parvin leaving for Texas for two weeks following the incident and whether solicitation of sex for money would be a crime standing alone. (*Id.*) The State also cross-examined lead trial counsel on the trial court's grounds for admitting the hearsay statements, suggesting the trial court ruled the statements admissible under a *res gestae* theory or under Rule 403, SCRE. (PCR Hr'g. Tr. 45:21–47:21.) Trial counsel agreed there were several grounds discussed by the trial court as grounds to admit the hearsay statements. (PCR Hr'g. Tr. 47:17–21.)

⁴ Jack Swerling, Esquire, a well-known criminal defense practitioner of 44 years who has defended many homicide cases, testified that trial counsel's performance fell below the applicable standard of care because a contemporaneous objection was required. (PCR Hr'g. Tr. 52:2–53:10; 59:14–23; 60:12–61:18; 62:6–11.) The Court found Mr. Swerling qualified (PCR Hr'g. Tr. 58:15–17) and his opinion relevant to what objectively reasonable counsel should have known in those circumstances, without infringing the Court's province to decide the ultimate legal issue. *See* Rule 704, SCRE; *see also Green*, 351 S.C. at 198, 569 S.E.2d at 325 (holding a lawyer-expert's opinion offering "no factual evidence" constituted inadmissible legal conclusion); *but see Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014) (collecting cases for the proposition that a legal malpractice claimant "must rely on expert testimony" to establish breach of the standard of care), abrogated by *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

Yet, as Parvin correctly pointed out on redirect, lead trial counsel was not involved in the direct appeal where the State confirmed that “it was not attempting to enter the Lopez statements pursuant to 404(b).” (PCR Hr’g. Tr. 48:20–49:7 (quoting *Parvin*, 413 S.C. at 500, 777 S.E.2d at 2).) Put differently, the record here indicates the State’s sole theory of admissibility for the hearsay statements is under Rule 803(1), SCRE—a theory the Court of Appeals rejected as legal error. *Parvin*, 413 S.C. at 504, 777 S.E.2d at 4 (“We find the trial court erred in ruling the Lopez statements were admissible . . .”).

At the end of the hearing, the Court ordered the parties to submit competing proposed orders after receiving the transcript. Those orders were submitted by the parties and carefully reviewed by the Court.

Conclusions of Law

Parvin has met both prongs under *Strickland* here. First, trial counsel's performance was deficient by failing to object—after having objected before trial, during the testimony of two witnesses, and after trial—to the hearsay testimony given by the State’s investigators. Second, as evidenced by the Court of Appeals’ opinion, the hearsay statements were central to the State’s theory at trial and should not have been admitted. As a result, Parvin has proven that but for trial counsel’s failure to timely object to the introduction of the hearsay statements by the investigators, his conviction would have been reversed for a new trial without the hearsay statements. As a result, Parvin’s petition must be granted.

I. Trial counsel was deficient in failing to object to the investigators’ hearsay testimony.

Petitioner asserts that trial counsel rendered ineffective assistance by failing to object to inadmissible hearsay testimony given by the State’s investigators. The Court agrees and holds trial counsel’s failure to object was objectively unreasonable under prevailing professional norms.

Not only must counsel make a timely objection to exclude evidence, *see* Rule 103(a)(1), SCRE, but counsel must consistently object to the evidence they seek to exclude, *see Parr v. Gaines*, 309 S.C. 477, 481–82, 424 S.E.2d 515, 518–19 (Ct. App. 1992). That did not happen here. While Parvin’s trial counsel made contemporaneous objections to Soto’s and Avila’s testimony that preserved the hearsay objections raised before trial, (Trial Tr. 304:15–16; 312:24–25), that work was rendered meaningless when trial counsel failed to object to the testimony given by the State’s investigators. Because trial counsel objected to Soto’s and Avila’s testimony, they were clearly aware the testimony was problematic for Parvin’s defense and improper under the rules of evidence. *See Holman v. State*, 381 S.C. 491, 493, 674 S.E.2d 171, 172 (2009) (granting post-conviction relief for trial counsel’s failure to object to “clearly inadmissible evidence”). Moreover, the uncontradicted testimony of lead trial counsel, co-counsel (PCR Hr’g Tr. 19:25–20:6), and an independent expert witness establish that an objectively reasonable trial practitioner should have known a contemporaneous objection to the investigators’ testimony was necessary to preserve the hearsay objection. Thus, trial counsel’s oversight constitutes ineffective assistance.

Precedent supports this conclusion. Failure to make a timely objection to preserve an issue for appeal is routinely held as ineffective assistance unless trial counsel can point to a valid trial strategy for failing to object. *See, e.g., Stone v. State*, 419 S.C. 370, 798 S.E.2d 561, 570 (2017) (rejecting various explanations by trial counsel as failing “to articulate any valid strategic reason for not objecting to important victim impact testimony the trial court had the discretion to exclude.”); *Holman v. State*, 381 S.C. 491, 492–93, 674 S.E.2d 171, 172 (2009) (trial counsel’s failure to object to “clearly inadmissible evidence” was “troubling” and constituted ineffective assistance); *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996) (granting PCR where counsel objected to testimony, but not to improper argument regarding the same testimony); *Vail v. State*,



402 S.C. 77, 88–89, 738 S.E.2d 503, 509 (Ct. App. 2013) (admission of inadmissible evidence elsewhere was not a legitimate reason not to object).

Additionally, when trial counsel acknowledges there was no strategy motivating a failure to object, the presumption of adequate representation on that basis disappears. *See Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). As trial counsel candidly admitted, there was no strategy here even though Parvin’s trial team harbored real concern about the unfairly prejudicial effect of the hearsay statements. (PCR Hr’g. Tr. 39:4–16.) This necessarily means that the failure to object did not aid Parvin’s defense; to the contrary, the State repeatedly cited this evidence as motive for the killings and the Court of Appeals cited the investigators’ testimony as grounds to affirm his convictions. *Parvin*, 413 S.C. at 507, 777 S.E.2d at 6 (because the investigator’s hearsay “was admitted without objection, we find the error in allowing Soto’s and Avila’s testimonies was rendered harmless.”).

The Court thus holds trial counsel was deficient under the first prong of *Strickland* in failing to object to the admission of the hearsay statements presented to the jury by the State’s investigators.

II. As the only evidence supporting the State’s theory of the case, Parvin was prejudiced by trial counsel’s failure to object.

To satisfy the prejudice prong of *Strickland*, a PCR applicant must establish a “reasonable probability” that the outcome of the trial would have been different had trial counsel not committed the deficiencies outlined above. *See Rutland*, 415 S.C. at 577, 785 S.E.2d at 353. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Id.* (citing *Strickland*, 466 U.S. at 694).

A. Parvin was prejudiced by trial counsel's failure to object.

Parvin argues but for trial counsel's failure to object, his convictions would have been reversed and he would have received a new trial without repeated hearsay testimony and argument claiming the shootings arose from his purported effort to solicit sex for money. The Court agrees.

As an initial matter, it is uncontroverted that the State's entire theory of motive rested on Lopez's refusal to have sex with Parvin. The Court of Appeals reached this conclusion, noting the State's case hinged on its cash-for-sex theory. *Parvin*, 413 S.C. at 499, 777 S.E.2d at 1. Based on this Court's review of the trial record, that theory was repeatedly cited by the State during opening and closing arguments. *Cf. Parvin*, 413 S.C. at 508, 777 S.E.2d at 6 (noting the sex-for-money theory "permeated the entire trial."). Without the hearsay testimony from Soto, Avila, and the investigators concerning Parvin's solicitation of Lopez, the only record explanation for the killings is the one Parvin offered on the stand that he acted in self-defense. While this Court takes no view as to whether a jury would have credited Parvin's testimony in the absence of the Lopez hearsay statements, the jury would have considered a dramatically different version of what occurred that night had the State been barred from returning time and again to its cash-for-sex theory.

The record is clear that the trial court erred in admitting the hearsay statements and, had trial counsel objected to the investigators' testimony, Parvin's appeal would have resulted in a reversal and new trial. "Without an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion." *Stone*, 419 S.C. at 370, 798 S.E.2d at 569-70. More to the point here, assuming the trial court adhered to its earlier rulings allowing the Lopez hearsay statements, the failure to object foreclosed the possibility of appellate relief by negating the substantive, evidentiary debate Parvin won on technical, procedural grounds (i.e., issue

preservation). Thus, trial counsel's error is the but-for cause of Parvin's failure to have his conviction reversed on appeal. *See Parvin*, 413 S.C. at 505, 777 S.E.2d at 4.

These considerations are sufficient to undermine this Court's confidence in the trial result. Accordingly, the Court holds that Parvin was prejudiced by trial counsel's failure to interpose timely objections.

B. The State's alternative theories of admissibility raised at the PCR hearing do not undermine the prejudice to Parvin.

Though the State suggests counsel's error was not prejudicial because of the alternative grounds for admitting the hearsay statements (PCR Hr'g. Tr. 45:21-47:21), it relies on a misapplication of the rules of evidence. Parvin objected to the admission of any evidence he paid for sex as a prior bad act. (Trial Tr. 101.) The only evidence of that prior bad act were statements by Soto and Avila concerning what Lopez told them at the gas station. Parvin objected to the introduction of those statements because they were hearsay. (Trial Tr. 160:18-22.) The State countered the statements were admissible under the present sense impression exception; however, it relied on antiquated language (*res gestae*) to support its argument. (Trial Tr. 107:7-10.) However, the term *res gestae* "is no longer used to describe a hearsay exception." *State v. Gilmore*, 396 S.C. 72, 82 n.9, 719 S.E.2d 688, 694 n.9 (Ct. App. 2011). "Under the Rules of Evidence, which do not use the term [*res gestae*], arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an 'other' act under Rule 404(b), but rather is integral to the crime or event." *Id.* The State made clear that it was not "trying to enter anything under 404(b)." (*Id.*) This distinction is critical to understanding the prejudice caused to Parvin here.

The State is mistaken to suggest that Rules 403 or 404(b) could offer alternative grounds to justify admission of the Lopez statements. *Cf. Parvin*, 413 S.C. at 500, 777 S.E.2d at 2 (noting the trial court "clarified its decision" by stating the Lopez statements "may have suggested some

bad acts” and that the statements’ “probative value of the evidence outweighed the prejudicial effect.”). Generally, these are rules of *exclusion*, not inclusion. *See* Rule 403 (“Although relevant, evidence may be excluded ...”) & 404(b) (“Evidence of other crimes, wrongs, or acts is *not* admissible ...” (emphasis added)), SCRE; *see also State v. Spears*, 403 S.C. 247, 252, 742 S.E.2d 878, 880–81 (Ct. App. 2013) (discussing rules in conjunction with one another). Thus, had the disputed evidence been otherwise admissible, it might still have been kept out under Rule 403 or 404(b). However, where the Court of Appeals has held the Lopez hearsay statements are inadmissible, Rules 403 and 404(b) are not a means to admit inadmissible evidence.⁵ Thus, these alternative grounds are not a basis for avoiding the prejudice caused to Parvin by trial counsel’s failure to object.

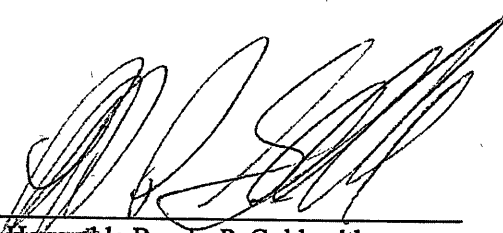
Conclusion

The Constitution’s right to counsel protects the fundamental right to a fair trial “in which evidence is subject to adversarial testing[.]” *Strickland*, 466 U.S. at 684 (citing U.S. CONST. amend. VI). The Sixth Amendment right to counsel requires the *effective* assistance of counsel because it is counsel’s skill and knowledge that equips a defendant to meet and defend the state’s claims. *Id.* When a defendant is denied effective assistance, the constitutional right to counsel is infringed. Here, trial counsel erred when she failed to object to the investigators’ hearsay testimony without a valid trial strategy. The consequence of that error was significant as the otherwise-inadmissible testimony was substantively and procedurally prejudicial to Parvin’s defense.

⁵ While Rule 404(b) permits the introduction of evidence to show motive, identity, common scheme, absence of mistake, or intent, it is evidence of *other* crimes, wrongs, or acts that can be used for that purpose.

This case presents the type of error PCR is intended to identify and correct. For these reasons, Parvin's application for post-conviction relief is **GRANTED** and his convictions are **VACATED**.

AND IT IS SO ORDERED.



The Honorable Brooks P. Goldsmith
Circuit Court Judge

JUNE 25, 2018
 , South Carolina.

**IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT**

2017-CP-40-2220

**MOTION TO RECONSIDER
PURSUANT TO RULE 59(e), SCRPC**

V.

**MOTION TO RECONSIDER
PURSUANT TO RULE 59(e), SCRPC**

Respondent.

2141

issue, and this conclusion is demonstrably supported by the opinion from the Court of Appeals. In affirming Applicant's conviction on appeal, the Court of Appeals specifically found, "We note that *several other occurrences at trial* further support our conclusion that the error in admitting Soto's and Avila's testimonies was harmless." State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015) (emphasis added). Specifically, the Court of Appeals noted that during voir dire and before the defendant's motion in limine, the trial court informed the pool of potential jurors the trial may involve allegations of homosexuality and/or sex for money. The pool of potential jurors were actually questioned on this issue twice, and none stood when asked to stand if such allegations would prevent them from being fair and impartial.² Moreover, the Court of Appeals opinion observed discussions of the sex-for-money plan in *both* parties' opening arguments. Parvin, 413 S.C. at 507-508. The Court of Appeals opinion itself refutes Applicant's claim that his convictions would have otherwise been reversed. Therefore, Respondent respectfully submits this Court should reconsider and deny Applicant's application.

The victim's statements were not dispositive.

Respondent respectfully submits the State's case did not rest on Applicant hiring the victims for sex in order to prove the elements of murder when Applicant shot and killed two unarmed individuals, with one of them having been shot three times in the back, before fleeing the state. Had the challenged testimony about sex-for-money been somehow excluded, its absence would have in no way been dispositive in Applicant's two murder convictions and the Court of Appeals finding of harmless error. There was ample evidence to support Applicant's conviction for both murders and ample evidence refuting Applicant's claim of self-defense. Regardless of any sex-for-money theme, the jury heard ample evidence to support Applicant's conviction for murder, even without such a motive. Applicant was identified by multiple

² ROA p. 37, ll. 1-9; p. 47, l. 24 – p. 48, l. 4.

witnesses as having been with the victims throughout the day and at the residence with the victims at the time of the incident, and his DNA was found at the scene. Tr. p. 806, l. 9.

The evidence at trial did not suggest the victims wielded weapons, but rather beer and money. At trial, Gonzales-Merrin, who was painting a porch across the street, testified he heard Applicant raise his voice and point a gun at Lopez, who then extended his hand towards Applicant just before Applicant shot him. Tr. p. 385, l. 20 – p. 386, l. 2. Gonzales-Merrin further testified the other Applicant raised his hands and Applicant shot him two or three times. Tr. p. 386, ll. 2-5. He testified that both victims were unarmed, “They ha[d] a beer. They didn’t have any arms to defend themselves.” Tr. p. 387, l. 15. There was indeed evidence presented at trial which suggested an impact point through a victim’s beer can. Tr. p. 560, ll. 12-21. Another eyewitness, Dimas Fernandez, testified he saw Applicant throw a chair and his beer down before walking outside the fence at the residence. According to Mr. Fernandez, one of the victims pulled some money from his pockets and put his hand out with the money before he heard gunshots. Tr. p. 346, l. 12 – p. 348, l. 4.

There was also substantial evidence of flight and guilty conscience exhibited by Applicant. The jury heard eyewitness testimony the Applicant fled the scene in the aftermath of the shooting in his green Kia van. Tr. pp. 387, 389, 391-92, 394, 1126, 1127. Applicant dismantled the murder weapon. PCR Tr. p. 42, l. 10. Applicant also moved his family into a hotel room that evening. Tr. p. 981, p. 19. The jury heard testimony from police officers that Applicant fled to Louisiana and Texas after the shooting, and Applicant had the green Kia van crushed in Louisiana. Tr. p. 912, l. 18 – p. 913, l. 9. Furthermore, as Ms. Davis recalled at the PCR hearing, Applicant did not return to South Carolina until two weeks after the incident after he made affirmative efforts to change his appearance. PCR Tr. p. 42, l. 17. Applicant at no time

contacted the police, and as Trial Counsel recalled, his family had lied about his whereabouts. PCR Tr. p. 44, l. 17.

Therefore, given the weight and nature of evidence presented in this case, Respondent respectfully requests that this Court reconsider its ruling and find there is no reasonable probability the result of the proceedings would have been different even if the testimony at issue would have been excluded.

Statements against Penal Interest

While the Court of Appeals ruled on Applicant's sole appellate argument which asserted error under Rule 803(1), SCRE, the statements were still admissible under numerous other theories. Respondent submits this Court should reconsider and find Applicant has failed to meet his burden of proving prejudice as the testimony he challenges 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)). The question is whether a reasonable person in Mr. Lopez's position would have made the statement that Applicant was paying him \$200 to have sex with him if it was not in fact true.

See Williamson, 512 U.S. at 603-04. This statement by Mr. Lopez is clearly inculpatory and against his penal interest as it constitutes an admission to prostitution. It is not reasonable to assume Mr. 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 Applicant if Mr. Lopez did not believe his own statement to be indeed true. Tr. p. 310, l. 2. The statements at issue here fall comfortably under the purview of Rule 804(b)(3), SCRE, refuting Applicant's allegation of prejudice from the lack of objections. Therefore, Respondent respectfully requests this Court's reconsideration on this issue and the denial of Applicant's application.

Res Gestae

Additionally, the trial court expressly allowed the testimony in under *res gestae*. 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 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). Tr. p. 179, ll. 3-9. 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.

Therefore, it is clear the trial judge 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 essentially explained what happened during the chain of events in question, and explained why Applicant "became enraged" and shot the victims when he was refused sex. Tr. p. 108, ll. 11-24. The Court of Appeals' finding that the testimony did not constitute a present sense impression, therefore, is in not dispositive and does not address the fact this testimony admissible on other such grounds.

CONCLUSION

Wherefore, the State respectfully requests that this Court reconsider the State's arguments and deny Applicant's application for Post-Conviction Relief.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 9, 2018

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LESLIE TODD PARVIN, #349127

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2017-CP-40-2220

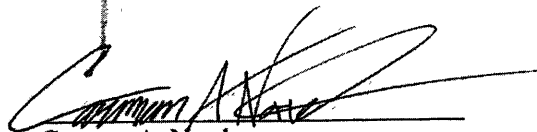
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Reconsider Pursuant to Rule 59(e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Matthew A. Abee
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, South Carolina 29211

Mr. Christopher Phillip Kenney
Richard A. Harpootlian, PA
Post Office Box 1090
Columbia, South Carolina 29202

DATED this the 9th day of July, 2018.



Carmen A. Nord
Legal Assistant
For Respondent

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
)

) Civil Action No. 2017-CP-40-02220

nt,)

)

)

it.)

RICHLAND COUNTY
 FILED
 2018 JUL 23 PM 4:55
 JESSICA W. MCBRIDE
 C.C.P. & G.S.
 Motion

3120E

money in

Court should reject this argument as waived, abandoned, judicially estopped, and substantively flawed. Finally, the State suggests that the inapplicable *res gestae* exception justifies reconsideration. This argument is contrary to the current state of the law.

Therefore, Parvin requests that the Court deny the State's Rule 59(e) motion.

- I. The State's attempt at misdirection ignores that trial counsel's error was the reason it could rely on the improper evidence at trial and on appeal.**

The State contends that the Court of Appeal's reference to "several other occurrences at trial" of the Lopez hearsay warrants a finding here that trial counsel's failure to contemporaneously object would *not* have changed the outcome. (See Mot. Reconsider at 1–2.) This conclusion is not supported by the appellate court's decision.

The Court of Appeals held that the trial court's error in admitting hearsay testimony "was rendered harmless because [the statements] subsequently became cumulative to Investigator Gonzalez's and Investigator Gwyn's unobjected-to testimonies." *Parvin*, 413 S.C. at 505, 777 S.E.2d at 5. The court rejected Parvin's argument that appellate preservation rules require only a single objection and analogized Parvin's case to *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007), where any error in admitting statements under the excited utterance exception was obviated by the admission of other unobjected-to hearsay testimony. See *Parvin*, 413 S.C. at 505–07, 777 S.E.2d at 5–6. After concluding the inadmissible Lopez hearsay was cumulative to the hearsay introduced through the officers without objection, the appellate court used the language now cited by the State to explain how pervasive the State's sex-for-money theory was at trial. See *id.* at 507–08, 777 S.E.2d at 6 (noting the sex-for-money theory was discussed during *voir dire* and opening statements).

Contrary to the State's suggestion, these other instances are further evidence of how Parvin's trial was infected by the hearsay claims. The State does not argue (nor can it) that appellate

preservation rules required contemporaneous objections during *voir dire* and opening statements to have preserved the hearsay objection that ultimately prevailed on appeal. *See Parvin*, 413 S.C. at 504, 777 S.E.2d at 4 (“We find the trial court erred in ruling the Lopez statements were admissible because the timing of the declarant’s statement is a critical component of the present sense impression exception.”). Instead, having identified the importance of excluding the Lopez hearsay, trial counsel transgressed the bounds of objectively effective counsel by not protecting the evidentiary record when Investigators Gonzalez and Gwyn testified. To the extent the State maintains trial counsel erred further by failing to object during *voir dire* and opening statements—neither of which is evidence—that assertion bolsters the conclusion Parvin was prejudiced by counsel’s performance. There is no authority to support the conclusory claim that the Court of Appeals’ opinion “itself refutes Applicant’s claim[.]” (*Cf.* Mot. Reconsider at 2.) The referenced language suggests trial counsel’s inattention to excluding the Lopez hearsay was *broad*er than just two momentary oversights during the investigators’ testimony. Thus, the only fair reading of *Parvin* is that the Court of Appeals was cognizant of other inconsistencies in trial counsel’s effort to exclude the Lopez hearsay, which explains why it affirmed under the harmless error doctrine.

II. The State’s reliance on other evidence is far short of “overwhelming.”

The State contends its case at trial “did not rest on Applicant hiring the victims for sex in order to prove the elements of murder,” (*see* Mot. Reconsider at 2–3), but fails to point to single piece of evidence sufficient to explain why Parvin—a decorated Army veteran and family man with no criminal record or history of seeking homosexual sex—would have shot and killed Edgar Lopez and Pablo Guzman-Guiterrez.

The only two explanations offered for the killings were (1) Parvin’s testimony that he acted in self-defense and (2) the Lopez hearsay statements. The rule against hearsay reflects the long-

held judgment in common law courts that hearsay is inherently unreliable evidence that must be excluded (absent a recognized exception):

The reason for this rule of exclusion is that hearsay is not subject to the ordinary tests required by law for ascertaining its truth, the author of the statements not being subject to cross-examination in the presence of a court of justice, and not speaking under the penal sanction of an oath, there being no opportunity to investigate his character and motives, and his deportment not being subject to observation. *And the misconception to which such evidence is exposed, from the ignorance or inattention of the hearers, or from criminal motives, is a powerful additional objection.*

Jones v. Charleston & W.C. Ry. Co., 144 S.C. 212, 216, 142 S.E. 516, 517 (1928) (emphasis added). Here, the only evidence that allowed the jury to credit the State's suggested motive over Parvin's testimony that he acted in self-defense was the often-retained-to claim that Parvin killed the men as part of a sex-for-money deal gone bad. Unlike Parvin's testimony, the Lopez hearsay cannot be challenged or impeached. Admission of that evidence was legal error and "[t]here is a legal presumption that incompetent testimony of some probative force upon a material issue of fact is prejudicial." *Id.* at 217, 142 S.E. at 517 (quoting *Powers v. Rawls*, 119 S. C. 159, 112 S. E. 87 (1922)). This Court was correct to conclude Parvin's trial would have been dramatically different without the State's motive theory such that counsel's failure to preserve Parvin's hearsay objection was an error sufficient to undermine confidence in the outcome. *See Strickland v. Washington*, 466 U.S. 668, 687-94 (1984); *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004).

The State's reliance on other evidence fails to disturb this conclusion. While the State points to testimony from a witness across the street and at the house, (*see* Mot. Reconsider at 3), neither witness explains *why* Parvin fired—whether in self-defense or to enforce the sex-for-money deal. Without using the term, the State suggests these witnesses offer overwhelming

evidence of guilt. (See Mot. Reconsider at 2 (“There is ample evidence to support Applicant’s conviction for both murders and ample evidence refuting Applicant’s claim of self-defense.”).) This suggestion is misplaced. The overwhelming evidence doctrine asks whether there is overwhelming evidence of guilt *independent of* the evidence being challenged. See, e.g., *State v. Chavis*, 412 S.C. 101, 110–11, 771 S.E.2d 336, 341 (2015) (“The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim.”); *Smalls v. State*, 422 S.C. 174, 189–90 & 194–95, 810 S.E.2d 836, 844 & 846–47 (2018), reh’g denied (Mar. 29, 2018) (explaining overwhelming evidence is just “one significant factor” considered alongside counsel’s error and other factors to discern the likely impact on the outcome). On retrial, a jury can certainly re-weigh testimony by these witnesses against Parvin’s testimony, but without the hearsay that the Court of Appeals held was inadmissible. Because there is no competent evidence aside from Parvin’s testimony concerning the motive for the killings, a trial error that allowed the State to prevail and uphold Parvin’s conviction based on the money-for-sex theory is necessarily prejudicial and cannot be construed as excusable under the overwhelming evidence doctrine.

Finally, the State’s reliance on evidence of flight is a red herring. Prior to the shooting, one of the victims threatened Parvin that they had guns, knew where his family was, and would come to his house. (See Trial Tr. 1121:19–1122:1.) Parvin left the scene because he did not know whether others would attack him if he waited for the police to arrive. (*Id.* at 1126:3–10.) Instead, the first thing he wanted to do was get his wife out of his house. (*Id.* at 1126:15–21.) When he got home, he sent his family to a hotel. (*Id.* at 1126:22–1127:1.) After a brief time visiting with family in Louisiana and Texas, Parvin *returned* to Columbia knowing he would be arrested. (See *id.* at 1128:1–1132:13.) Thus, the evidence indicates Parvin ran first out of fear of retaliation against his

family and then out of uncertainty about what to do next. Regardless of the reason, this evidence has no bearing on the admissibility of hearsay evidence offered to establish the motive for the crime. As a result, it cannot form the basis for reconsideration under Rule 59(e).

III. The State cannot raise new arguments through a Rule 59(e) motion.

The State's motion to reconsider argues—for the first time—that the Lopez hearsay statements were alternatively admissible as statements against penal interest under Rule 804(b)(3), SCRE. (*See* Mot. Reconsider at 4–5.) Rule 59(e) does not permit the State's novel argument here, and any prior iteration of this argument has long since been abandoned or waived.

A. The State's new argument should be dismissed as untimely.

The Court should reject the State's argument as procedurally untimely. "A party cannot for the first time raise an issue by way of a Rule 59(e), SCRCP, motion that could have been raised at trial." *State v. Williams*, 417 S.C. 209, 228, 789 S.E.2d 582, 593 (Ct. App. 2016) (brackets omitted); *Anderson Memorial Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) ("A party cannot use a motion to reconsider to present an issue he could have raised prior to" ruling but did not). Here, the State failed to raise the argument, including at the PCR hearing, until after the Court granted PCR. Likewise, the State's Return omits any mention of this alternative theory of admissibility as grounds to deny relief. This not only denied Parvin notice of the argument, but violates the Uniform Act on Post-Conviction Relief, which requires that "the State shall respond, by answer or by motion which may be supported by affidavits." S.C. Code Ann. § 17-27-70(a). The Return merely concludes the allegations are "without merit," but never bothers to explain why or the grounds on which the State planned to defend. *See* Ret., § III (regurgitating boilerplate law and concluding, "Applicant can satisfy neither requirement of the

Strickland test[.]” but nevertheless requesting an evidentiary hearing). Ironically, the State’s

Return warns:

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rule 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing.

Ret., § IV. Accordingly, Pursuant to South Carolina Code §17-27-70 and Rules 15 and 71.1 of the civil rules, and Rule 12(b) of the South Carolina Rules of Civil Procedure (requiring that “[e]very defense, in law or fact ... *shall* be asserted in the responsive pleading thereto if one is required ...” (emphasis added)), Parvin opposes the State’s untimely argument and the Court should reject the State’s statement against interest theory as procedurally barred.

B. The State has abandoned or waived this new evidentiary argument.

Even if the State could properly raise this argument here, it has long since been waived or abandoned. Waiver is the voluntary and intentional abandonment of a known right that can prevent a party from presenting a defense. See *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Following Parvin’s conviction, he appealed the introduction of the Lopez Statements, arguing that they were not properly introduced in light of his hearsay objection. The Court of Appeals issued two separate opinions regarding the Lopez hearsay—neither mention the Rule 804(b)(3) argument the State now raises. As can be seen in the Court of Appeals’ opinion on rehearing, the court focused only on the present sense impression argument, determining it did not apply to the Lopez hearsay. *Parvin*, 413 S.C. at 505, 777 S.E.2d at 5. The State did not respond to this petition for rehearing, nor did it file its own petition for rehearing to have the Court of Appeals

address whether Rule 804(b)(3) applied to the Lopez hearsay. Parvin then petitioned our Supreme Court for certiorari. Again the State failed to raise the Rule 804(b)(3) argument.

While arguments “not raised to or ruled upon by the trial court are not preserved for appellate review,” *State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005), an exception exists for a respondent (i.e., the “winner” in the lower court), who may raise additional sustaining grounds regardless of whether those reasons were presented to the lower court. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000). Important here, however, is that even “a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief.” *Id.* at 420, 526 S.E.2d at 723. The State’s failure to raise the applicability of Rule 804(b)(3), SCRE, following the Court of Appeals’ opinion holding that the Lopez hearsay statements were inadmissible confirms that the State has either waived or abandoned the argument. Accordingly, it should not be able to raise it here.

C. The State should be estopped from raising this new argument.

Assuming the State can overcome abandoning the issue during the appeal, it should be judicially estopped from raising the Rule 804(b)(3) argument in its Rule 59(e) motion, particularly because it failed to raise it in its Return to Parvin’s PCR Application.

“Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” *Parker*, 313 S.C. at 487, 443 S.E.2d at 391. “The essential element of estoppel is prejudice to the party raising the defense.” *Id.* For example, in *Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017), the Court rejected the argument a PCR claim was properly joined where the written application made no mention of the claim, no amendment was filed, counsel failed to mention the existence of an additional claim, and, when counsel finally did mention the claim, he failed to formulate it with any specificity. *Id.*

at 92–93, 805 S.E.2d at 571–72. The Supreme Court explained that, while Rule 15(b), SCRCP, permits amendment to conform to issues tried by express or implied consent, “[t]he focus of a Rule 15(b) analysis is prejudice to the opposing party[,]” which turns on the sufficiency of the notice to the other side to allow it to contest a newly raised issue. *Id.* at 95–96, 805 S.E.2d at 573.

The State’s failure to join its novel theory to this action prevented Mr. Parvin from addressing it during the PCR hearing or in his proposed order to the Court. As explained above, Rule 12(b), SCRCP, required the State to specifically set forth its defenses to Parvin’s Application. Instead of raising those defenses, the State relied on boilerplate assertions that Parvin could not meet his burden under *Strickland*. Now that this Court has found in Parvin’s favor, the State seeks a second bite at the apple with this motion. Estoppel forecloses the State, just like any other litigant, from sandbagging the opposing party. For that reason, the State should be estopped from raising the Rule 804(b)(3) argument in its Rule 59(e) motion.

D. The State’s new argument lacks merit.

The State’s Rule 804(b)(3) theory also fails on the merits. The Court of Appeals recently explained that the starting point for considering the admissibility of statements against penal interest is the United States Supreme Court’s decision in *Williamson v. United States*:

In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

State v. Barnes, 421 S.C. 47, 55, 804 S.E.2d 301, 305–06 (Ct. App. 2017) (quoting *Williamson*, 512 U.S. 594, 600–01 (1994)). Our courts “interpret the rule allowing statements against penal interest stringently,” with careful consideration to whether the declarant is actually accepting

responsibility or shifting it to another person. *See id.* at 55, 804 S.E.2d at 306 (citing *State v. Fuller*, 337 S.C. 236, 244–45, 523 S.E.2d 168, 172 (1999)). Application of the doctrine “requires the trial judge to view the disputed evidence in light of the surrounding circumstances and discern whether each particular remark is plainly self-inculpatory.” *Id.* “This entails a searching examination of both content and context.” *Id.* The trial court never conducted such an inquiry, such that the State cannot meet Rule 804(b)(3)’s stringent standard here. Had such an inquiry been conducted, the exception would likely have been held inapplicable because the hearsay statements tended to implicate someone else (*i.e.*, Parvin) in the alleged illegal act, might otherwise be explained or contextualized to frustrate the exceptions applicability here, or was too unreliable on account of the declarant’s intoxicated condition. Indeed, before such evidence can be admitted, the rule requires a trial court to find “corroborating circumstances” that “clearly indicate the trustworthiness of the statement.” *See* Rule 804(b)(3), SCRE. But, where the State failed to press this argument before the Court of Appeals, the necessary predicate to recognizing the exception is now beyond the province of this Court.

IV. *Res Gestae* is not an exception to the hearsay rule.

The State contends “the trial court expressly allowed the testimony under *res gestae*,” and argues the doctrine is an alternative theory of admissibility that render’s trial counsel’s error harmless. (*See* Mot. Reconsider at 5–6.) The Court has already considered and rejected this argument and the State offers no reason to revisit this conclusion.

The State’s contention—that *res gestae* is as an alternative theory of admissibility—reflects a misapprehension of the doctrine as presently understood and applied. The doctrine *previously* encapsulated two evidentiary theories, as explained by the Court of Appeals:

Before the adoption of the South Carolina Rules of Evidence in 1995, the latin term “*res gestae*” meant two things. First, the term

described 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). *See* Rule 803, SCRE, Note (citing *State v. Harrison*, 298 S.C. 333, 380 S.E.2d 818 (1989)).

* * *

Second, *res gestae* meant the evidence was part of the body of the crime. *See* Black's Law Dictionary 1173 (5th ed. 1979) ("Res gestae' means literally things or things happened...."). Under the Rules of Evidence, which do not use the term, arguing an event is part of the *res gestae* 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 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.* In *Gilmore*, Chief Judge Few could not have been more clear that "*The term is no longer used to describe a hearsay exception.*" *Id.*

The State's argument to the contrary seeks to have this Court overturn binding precedent from the Court of Appeals by reviving from the dead the *res gestae* exception to the hearsay rule. That the Court cannot do. *See Hamby v. Hamby*, 315 S.C. 518, 445 S.E.2d 656, 657 (1994) (explaining that a decision by the Court of Appeals is binding until reversed or modified by the South Carolina Supreme Court). But, to the extent the State contends the trial court found the *res gestae* doctrine allowed the Lopez hearsay to come—i.e., as an exception under the present sense impression and the excited utterance exceptions now codified under Rule 803—that argument was rejected by *Parvin*.

The alternative, integral-to-the-crime usage of the term is similarly unavailing because the State *abandoned* the issue on appeal. As the Court of Appeals explained:

The State argued the Lopez statements were admissible under the theory of *res gestae* or the present sense impression exception to the

hearsay rule. As to the issue of *res gestae*, the State asserted there was an ongoing chain of events and the Lopez statements were an integral part of the crime. The State also contended the Lopez statements were admissible under Rule 803(3), SCRE, as statements of the declarant's "[t]hen existing mental, emotional, or physical condition." Finally, the State emphasized that the Lopez statements also indicated Parvin's alleged motive and were not intended to show bad character. *The State, however, asserted it was not attempting to enter the Lopez statements pursuant to Rule 404(b), SCRE.*

Parvin, 413 S.C. at 500, 777 S.E.2d at 2 (footnotes omitted, emphasis added). Thus, on appeal, the State relied exclusively on the present-sense-impression and the Court of Appeals resolved the case on those terms, rejecting the State's contention and concluding that the Lopez hearsay was inadmissible. To now suggest that the other-bad-acts usage of the *res gestae* doctrine is the correct usage here is substantively wrong (for the reasons the Court explained in its Order granting PCR) and should be procedurally barred as having been abandoned on appeal.

The central issue Parvin raises on PCR is one of hearsay, not one of other bad acts (though he did properly raise a Rule 404(b) objection at trial). It is incumbent upon the State, as the proponent of the evidence, to put forth a *hearsay* exception to substantiate the admissibility of the Lopez Statements. It is not enough for the State to raise an exception to the other bad acts exclusion under Rule 404(b) in order to overcome the *hearsay* objection. The two rules are different exclusionary rules.

Therefore, the Court properly rejected the State's *res gestae* theory in its PCR order—it should do so again by denying the State's Motion to Reconsider.

Conclusion

The State fails to point to any error of law or fact warranting reconsideration. Instead, it relies on other evidence that is far short of overwhelming and novel evidentiary theories that are

procedurally barred and legally flawed. For these reasons, the Court should deny the State's motion to reconsider.


Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, PA
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
Phone (803) 252-4848
Facsimile (803) 252-4810
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

Dwight F. Drake (SC Bar No. 1745)
Matthew A. Abee (SC Bar No. 101100)
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
Phone (803) 799-2000
dwight.drake@nelsonmullins.com
matt.abee@nelsonmullins.com

Attorneys for Leslie Todd Parvin

July 23, 2018
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
)

Leslie Todd Parvin (#349127),

) Civil Action No. 2017-CP-40-02220
)

) Applicant,
)

vs.

) State of South Carolina,
)

) Respondent.
)

CERTIFICATE OF SERVICE

2018 JUL 23 PM 1:18
JEANETTE W. MCBRIDE
C.P. & G.S.
RICHLAND COUNTY
FILED

I, Holli Miller, paralegal to the attorney for the Defendant, Richard A. Harpootian, P.A., with offices located at 1410 Laurel Street, Columbia, South Carolina 29201, hereby certify that on July 23, 2018, I did serve by placing in the U.S. mail, first class postage affixed thereto, the following document to the below mentioned individuals:

Document: Response in Opposition to Motion to Reconsider

Served: Lindsey McCallister, Assistant Attorney General
Christian Saville, Assistant Attorney General
Office of The Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia South Carolina 29211-1549


Holli Miller

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT
Leslie Todd Parvin (#349127),) 2017-CP-40-2220
Applicant,)

v.) ORDER ON MOTION TO RECONSIDER

State of South Carolina,)
Respondent)

RICHLAND COUNTY
FILED
2018 AUG 16 PM 1:58
JEANETTE W. MCBRIDE
C.C.P. & G.S.

This matter comes before the court upon Respondent's Motion requesting that the court reconsider its Order filed June 27th, 2018. Both parties submitted briefs. After considering these briefs I can find no compelling reason to modify, alter or amend the prior Order of this court.

Accordingly, the Motion of Respondent is hereby DENIED.

August 14, 2018



Brooks P. Goldsmith

Circuit Judge

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP4002220**

Leslie Todd Parvin #349127

State Of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

8/16/2018

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on August 16, 2018, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm

SCCA SCRCP Form 4C (Revised 2/17)

Michael J. Anzelmo PO Box 11867 The Office Of House
Speaker Jay Lucas Columbia, SC 29211
Christopher Phillip Kenney PO Box 1090 Columbia, SC
29202

Lindsey Ann McCallister PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jeanette W. McBride
Jeanette W. McBride - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Leslie Todd Parvin, #349127,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No.: 2017-CP-40-2220

**REPLY TO APPLICANT'S RESPONSE
IN OPPOSITION TO RESPONDENT'S
MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE
59(E), SCRPC**

Respondent moved on July 9, 2018, pursuant to Rule 59(e), SCRPC, to alter or amend the trial court's judgment in this case, issued by written order filed June 27, 2018. Applicant filed a Response in Opposition to Respondent's Motion on July 23, 2018.

DISCUSSION

In its Rule 59(e) motion, Respondent argued the judgment of the trial court should be altered or amended based on the following three issues:

1. Several other occurrences at trial, as noted by the Court of Appeals, rendered the admission of the challenged testimony harmless.
2. The victim's statements challenged were not dispositive because the State's case did not rest on Applicant hiring the victims for sex in order to prove the elements of murder when Applicant shot and killed two unarmed individuals, with one of them having been shot three times in the back, before fleeing the state.
3. Regardless, the challenged statements were admissible as statements against penal interest and res gestae, which provided additional sustaining grounds for the Court of Appeals.

In response, Applicant argues Respondent is impermissibly raising an argument regarding Rule 804(b)(3), SCRE for the first time in its Rule 59(e) motion, and the court is barred from

considering it by error preservation rules. Respondent now submits to this Court the matter of additional sustaining grounds of Applicant's direct appeal as well as additional grounds by which the statements were admissible a trial were matters presented by Respondent at the PCR hearing. Moreover, the record reflects Respondent requested an opportunity for argument at the PCR hearing, but pursuant to Applicant's request, the parties submitted proposed orders instead. PCR Tr. p. 64, l. 25 – p. 66, l. 16. Pursuant to the decision, Respondent then submitted its Proposed Order of Dismissal which addresses *all* issues Applicant now alleges Respondent failed to argue at the PCR hearing.

The issue of other grounds for admissibility was raised at the PCR hearing

Notwithstanding the fact that proposed orders were submitted in lieu of arguments, Respondent submits the issues raised in its Rule 59(e) motion were indeed presented at the PCR hearing through testimony, and its Rule 59(e) motion is proper under the circumstances. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); see also Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012) (explaining the function of error preservation rules is to ensure the appellate courts do not reach issues not ruled upon the trial court). Additionally, the "purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Elam v. S.C. Dept. of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004). A Rule 59(e) motion is viewed as

“part and parcel of a party’s ‘single bite at the apple’ in presenting his case to the trial court.” Id. at 21, 602 S.E.2d 778.

At the PCR hearing, Respondent cross-examined Jack Swerling, Esquire on whether he had read the Court of Appeals opinion and whether the opinion mentioned the statements being admitted at the trial level for additional reasons other than as a present sense impression. Furthermore, Mr. Swerling, testifying on behalf of Applicant, also opined on whether other for admissibility grounds had been abandoned. PCR Tr. p. 63, l. 6 – p. 64, l. 15. Also, to begin the PCR hearing, the PCR judge also took time to read the Court of Appeals opinion after Applicant argued the opinion supports the allegation of deficiency and prejudice would be at issue. PCR Tr. p 7, l. 24 – p. 8, l. 10. In the Proposed Order of Dismissal and Motion to Reconsider, Respondent argued there were additional sustaining grounds to find the challenged statements admissible. The issues of admissibility and other sustaining grounds were clearly in issue at the PCR hearing, in addition to the fact Respondent submitted a proposed order to include them in lieu of argument. Therefore, these issues are “matters properly encompassed in a decision on the merits.” Arnold, 309 S.C. at 172, 420 S.E.2d at 842.

The State argued Rule 804(b)(3) on direct appeal, and the issue was not abandoned

Applicant now alleges Respondent should not be allowed to argue the challenged testimony was additionally admissible as a statement against penal interest because, during the direct appeal, the State did not raise the issue after the Court of Appeals affirmed Applicant’s conviction. As noted above, Respondent presented the theory that there were additional sustaining grounds by which to admit the challenged statements by questioning at the PCR hearing, Respondent’s Proposed Order, and Respondent’s Motion to Reconsider. Respondent submits these circumstances alone justify the timeliness of this argument. Nevertheless, Respondent notes for

this Court the State did in fact argue admissibility under Rule 804(b)(3), SCRE in their appellate brief as an additional sustaining ground. Final Brief of Respondent, pp. 15-17. For these reasons, the argument that Victim's admission to engaging in prostitution constitutes a statement against penal interest has been consistently raised, has not been abandoned or waived, and is now properly before this Court.

Despite Applicant's generous characterization of the facts, motive is not an element of murder

In its Response in Opposition to Motion to Consider, Applicant again cites to Applicant's admirable military history and alleges Respondent was incorrect in asserting there was ample evidence to support the conviction because there was no "motive" provided for the murder absent the challenged testimony. In fact, Respondent argued precisely that even absent the challenged testimony, there was enough evidence to support a conviction. Respondent respectfully notes 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. As Respondent submitted in its Motion to Reconsider, had the trial been completely devoid of the challenged statements, there was ample evidence presented at trial to support a conviction of murder. As noted in the Motion to Reconsider, testimony from multiple eyewitnesses and physical evidence support the facts that Applicant, a decorated military serviceman, killed two unarmed individuals, shooting one in the back, and fled the State before destroying the murder weapon and escape vehicle. The State was not required to prove Applicant's subjective motivation for murdering these two people. While Respondent is suspicious of Applicant's assertion that he only fled when these two people who were now dead had guns in their house and knew where he lived, the aforementioned evidence was certainly enough to prove every element of two counts of murder without the challenged statements.

Therefore, Respondent respectfully requests consider the arguments Respondent made at trial and in its Rule 59(e) motion, and issue an order altering or amending the judgment.

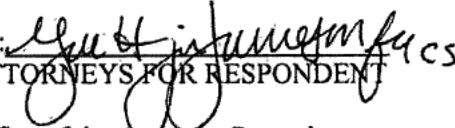
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

August 6, 2018

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LESLIE TODD PARVIN, #349127

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2017-CP-40-2220

AFFIDAVIT OF SERVICE BY MAIL

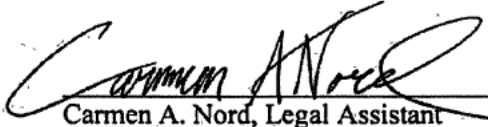
1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Reply to Applicant's Response in Opposition to Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(E), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Matthew A. Abce
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, South Carolina 29211

Mr. Christopher Phillip Kenney
Richard A. Harpootlian, PA
Post Office Box 1090
Columbia, South Carolina 29202

Mr. Richard A. Harpootlian
Richard A. Harpootlian, PA
Post Office Box 1090
Columbia, South Carolina 29202

DATED this the 6th day of August, 2018.


Carmen A. Nord, Legal Assistant
For Respondent