

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Nov 03 2021**

**S.C. SUPREME COURT**

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APPEAL FROM JASPER COUNTY  
Court of General Sessions

The Honorable Carmen Mullen, Circuit Court Judge

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Appellate Case No. 2021-1007

RICHARD PASSIO, Jr.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

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**REPLY BRIEF**

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## ARGUMENTS

### **I. The State did not present substantial circumstantial evidence tending to prove Appellant guilty of the murder of his wife when it relied on false and misleading evidence.**

It is not open to serious doubt that the State used, if not demonstrably false, then highly misleading testimony relating to the decedent's time of death, throughout its case-in-chief. There has never been any question but that Petitioner was present with his wife when she died; the only issue was whether she was murdered or she committed suicide. The evidence being in equipoise, the State peppered its case with misleading "facts" to argue not just that Petitioner murdered his wife (which it could have argued without this misleading evidence), but that he had done so hours before he called 911. Conspicuously, the State failed to ask a single question of its pathologist regarding the decedent's time of death, even though she (and only she) had the subject matter expertise to testify to the issue. Even with consideration of the State's problematic evidence, the evidence adduced at trial was insufficient to withstand counsel's motion for a directed verdict. Subtracting that evidence from consideration lays bare how thin the State's case against Petitioner was from the beginning, as Petitioner has demonstrated in his petition for writ of certiorari. It is true the State presented evidence of Petitioner and his wife's difficult marriage, but there was also abundant evidence introduced at trial to support the claim that the decedent was struggling with serious mental health issues at the time of her death. In addition to that, the State failed to prove Petitioner retrieved his gun from Jasper's Porch on the night (or early morning) of his wife's death because it failed to offer any witnesses to prove either the gun was in the box or identify that as the box in which the gun had been previously kept.

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result

obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue v. Illinois*, 360 U.S. 264 (1959) (citations omitted); *see also Riddle v. Ozmint*, 369 S.C. 39, 47-48 (2006) (“The failure to correct false evidence is as reprehensible as its presentation.” (citing *Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 834-35 (1996))). “In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. If the case against [the defendant] had been strong, or, as some courts have said, the evidence of his guilt ‘overwhelming,’ a different conclusion might be reached.” *Berger v. United States*, 295 U.S. 78, 89 (1935).

The Court of Appeals erred in affirming Petitioner’s sentence and conviction and he respectfully asks this Court to grant certiorari on this issue.

**II. The trial court erred when it allowed the State to present a Facebook post posted by Petitioner because it was irrelevant and unduly prejudicial.**

The State argues the Facebook post, which includes a quotation lifted from a comedy film was relevant to show Petitioner's father did not have "reliable knowledge about what went on inside his son's home." Respondent's Brief, p. 22. Perhaps that would be true if the issue in dispute was whether Petitioner's father was aware of what movies Petitioner watches. But as to the issue of whether Petitioner murdered his wife, the basis upon which the State argued its probative value, it was irrelevant and unduly prejudicial since it bore absolutely no connection to the events of the night of Petitioner's wife's death. It was misleading and improper, and it prejudiced Petitioner.

As its back up argument, the State argues the error was harmless because counsel's cross-examination of Petitioner's father "cures the prejudice." Respondent's brief, p. 23. The State also appears to argue this was an overwhelming case of guilt. *Id.* Both of these arguments should be

rejected by the Court. The State overlooks two important facts. First, the State used this evidence in its closing argument to argue Petitioner knows "the monster inside that he has tried to disguise." ROA 700, l. 23. Given that Petitioner's credibility in this case was a central issue, it cannot be harmless that the State improperly attacked Petitioner's character with this improper evidence. Also, the jury-- who had been admonished not to conduct any extraneous investigation (even if they had had the time to do so) would not have known that this quote-- which could sound nefarious but is not-- is from a 2008 movie, a comedy at that. Without knowing what this quotation even refers to, the jury would not have understood the evidence they were being asked to consider. When the State argued to them that it proved Petitioner was a deceptive person, that suggested an improper and highly inflammatory basis upon which to convict Petitioner, completely unrelated to the events of the night Petitioner's wife died.

As to the State's specific arguments. Petitioner disagrees the cross examination of Petitioner's father cured any prejudice. If anything, any cross examination on this comedy-movie quotation would have been confusing to the jury since they had no idea what it referred to, except for the State's improper claim that it showed Petitioner was a deceptive person. Petitioner also disagrees this was an overwhelming case of guilt. It was not. There was abundant evidence in the record to support Petitioner's defense that his wife committed suicide, and the jury should have been allowed to consider that evidence without the State's interjecting irrelevant and inflammatory matters into their deliberations.

The Court of Appeals erred in affirming Petitioner's sentence and conviction and Petitioner respectfully asks this Court to grant certiorari on this issue.

Respectfully submitted,

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November 3, 2021.