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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to Court of Appeals
The Honorable R. Knox McMahon, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Op. No. 2024-UP-129 (Ct. App. filed April 17, 2024)

DEVATEE T. CLINTON,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

D. RUSSELL BARLOW, II
Assistant Attorney General
S.C. Bar No. 105228

TALIDA BALAJ
Assistant Attorney General
S.C. Bar No. 106523

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3737
ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

Respondent Devatee T. Clinton is presently confined in the South Carolina Department of Corrections. During its March 2012 term, the Lancaster County Grand Jury indicted Clinton for murder (2012-GS-29-616) for his role in the murder of Jenika Jones (Victim). Clinton's codefendant, Al Martinez Green (Green), was also indicted for murder for his role in the killing. Assistant Public Defender William P. Frick, Esquire, represented Clinton on this charge. On March 10-14, 2014, Clinton, along with Green, proceeded to a joint jury trial before the Honorable R. Knox McMahon. The jury convicted Clinton and Green as indicted. Judge McMahon sentenced both Clinton and Green to terms of life imprisonment without the possibility of parole.

Clinton timely appealed his convictions and sentences, raising the following issues on appeal:

1. Did the trial court err in failing to find statements were admissible pursuant to the excited utterance or present sense impression exceptions to the rule against hearsay; and
2. Did the trial court err in denying Clinton's motion for a directed verdict.

After briefing and oral argument, the Court of Appeals affirmed Clinton's conviction and sentence in an unpublished opinion. State v. Devatee T. Clinton, Op. No. 2016-UP-206 (S.C. Ct. App. filed May 11, 2016). Clinton then filed a petition for rehearing and once denied, sought certiorari review from this Court. This Court denied certiorari, and the Remittitur was returned on August 23, 2017.

Clinton filed a timely application for post-conviction relief on February 6, 2018. An evidentiary hearing was convened January 23, 2019, before the Honorable Paul M. Burch. Clinton testified on his own behalf, and trial counsel William P. Frick, Esquire. Clinton proceeded on the following allegations of ineffective assistance of counsel:

1. Failure to properly preserve the record for [Clinton] 's appeal regarding the issue of excluding testimony of exculpatory statements made by the victim's oldest minor child;
2. Failure to present Hearsay Exception, Present Sense Impression, Rule 803(1), SCRE, as an argument in response to the State's objection to the admissibility of exculpatory statements made to officers and first responders by the victim's oldest minor child;
3. Failure to investigate Applicant's case;
 - a. Interviewing potential witnesses;
 - b. Evaluating the veracity and authenticity of DNA evidence and other evidence sought against Applicant;
 - c. Conducting an independent investigation of the crime scene; and
 - d. Investigating the alleged suspect named by the victim's oldest minor child to the police and first responders as the person who shot his mother as part of [Clinton] 's defense.

(App. 1040-41). Following a review of the record and testimony presented at the evidentiary hearing, Judge Burch denied and dismissed the application with prejudice on July 19, 2020, and filed July 26, 2019.

Following the denial of relief, Clinton timely filed a notice of appeal. Following the submission of his petition for writ of certiorari and appendix and the State's return to the petition, this Court transferred this matter to the Court of Appeals pursuant to Rule 243(1), SCACR. The Court of Appeals granted certiorari. Following briefing and oral argument, the Court of Appeals reversed the post-conviction relief court's denial of relief and remanded the matter for a new trial. State v. Devatee T. Clinton, Op. No. 2024-UP-129 (S.C. Ct. App. filed April 17, 2024). In reversing the post-conviction relief court and granting Clinton relief, the Court of Appeals found Clinton met his burden of establishing both that trial counsel was deficient and that this deficiency resulted in the requisite prejudice necessary for the grant of a new trial. Specifically, the Court of Appeals found: (1) the trial court's ruling that the hearsay statements were admissible as excited utterances was proper; (2) the statements themselves inferred the declarant had witnessed the shooting; (3) the post-conviction relief court erred in finding trial counsel was not deficient as he

failed to provide an objectively reasonable strategic reason for his failure to make a proffer; and (4) Clinton suffered the necessary prejudice to warrant relief because the "State's case turned on witness credibility, and the State failed to produce strong evidence other than Blakeney's testimony."

Pursuant to Rule 221(a), SCACR, the State petitioned for rehearing and suggested a rehearing en banc, which was denied. The State now petitions for certiorari pursuant to Rule 242, SCACR.

STATEMENT OF FACTS

In January 2012, Victim lived in a trailer park with her three minor children—ages four, two, and one. (App. 216; 218–19; 221–26; 264–65). Clinton lived with his grandmother in the neighboring trailer. On January 19, 2012, law enforcement responded to a reported home invasion at Victim's trailer. They found Victim's body on the couch in a pool of blood with a single gunshot wound to the head. She was dead upon law enforcement's arrival. Her children were still in the house. Clinton, Green, and Blakeney were ultimately arrested for murdering Victim.

Prior to Clinton and Green's joint trial, the State moved pretrial to bar Clinton or Green from eliciting out-of-court statements by Victim's four-year-old son to the first responders. (App. 157–58). Trial Counsel argued that after law enforcement arrived and was "still trying to assess what occurred," Victim's four-year-old son "spontaneously stat[ed] to . . . Investigator Crump first and then to another officer and . . . maybe a third officer on the scene that 'Shi's daddy shot my momma.'" Later, the child stated, "Shortycake shot my momma." (App. 158–59).

To further clarify the issue, Trial Counsel explained Victim's son was nicknamed Duce, and his father was Antonio Lamont Truesdale. The nickname in Duce's declaration, "Shortycake," was not the nickname of either Clinton or Green. Instead, it was the nickname of Rashad Johnson, who is the father of one of the Victim's children, "Shi." (App. 159–60). The State explained it verified Victim had a child nicknamed Shi, Rashad Johnson was Shi's father, and Rashad Johnson's nickname is "Shortycake." The State also acknowledged that Duce had made a statement to Investigator Crump. (App. 160–61).

Trial Counsel clarified his argument was the child's statement was admissible as an excited utterance under Rule 803(2), SCRE, to which the trial court stated, "I realize [under Rule] 803 [the] availability of a witness is immaterial, but you have to determine the competency of the

individual that made the statement. In this regard, I'm dealing with a four-year-old." (App. 161).

The State indicated that the child's competency was the basis for its objection. (App. 161–62).

Trial Counsel then argued Duce was four years old at the time of the murder, but almost immediately after the shooting, Duce:

[Went] to the next door neighbor's house and ask[ed] for help. They called 911. The police respond within 15 minutes. Because it was cold, D[uce] and his siblings were put in an ambulance. [D[uce] makes the comment Shi's daddy hurt my momma. Jamia's (phonetics) daddy hurt my momma. Jamia and Shi are the same person and 'daddy' they are referring to is Rashad Johnson. He makes this statement . . . to Investigator Crump. He makes it in the ambulance in front of some of first responders who are on the [State's] witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous[ly] to Christy Rogers who is a CSI officer that responds there on the scene.

(App. 162–63). Thereafter, Trial Counsel presented three cases to the trial judge supporting his argument that the admissibility of this declaration under Rule 803(2) did not depend upon the competency of the out-of-court declarant, and he asked the trial judge to consider these cases before ruling on the issue. Specifically, Trial Counsel relied upon State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) (the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness); State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002); and In Interest of Smith, 277 S.C. 187, 284 S.E.2d 586 (1981) (three-year-old victim's statements describing defendant's actions to mother immediately after the incident, while she was still crying and showing signs of pain, were admissible under *res gestae* exception to the hearsay rule in a case charging a juvenile defendant with criminal sexual conduct in the first degree). (App. 163).

The trial court noted factual distinctions between those three cases and the instant case and clarified the issue with the statement was that Trial Counsel had not laid the foundation for that

statement to come in. Specifically, the trial court stated that Trial Counsel needed to establish a "foundation of the personal knowledge of the hearsay declarant and then meet the three requirements within the rules." See Rule 602, SCRE. The trial court also observed that "[p]resence in the home doesn't mean observation of the fatal act. That's all I am saying. . . . That goes back to the [R]ule 600 or something." (App. 163–67). The trial court further stated, "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and . . . you all are welcome to do it in whatever manner you all so choose." (App. 168).

The following morning, the trial court re-stated Clinton did not have to show Duce's competency "for purposes of asking those questions, but they do have to lay the foundation under the excited utterance." The child's competency or incompetency, however, could be presented to the jury. (App. 178–79).

On cross-examination of Investigator Taylor, Trial Counsel established that Investigator Taylor saw the children at the crime scene on the night of the incident, all three children had blood on their clothing, and Investigator Taylor seized the children's bloody clothing. (App. 499–501).

Trial Counsel then asked Taylor:

Q Did you ever have any conversation with any of these children?

A Yes.

Q Which one?

A Oldest child.

Q Okay. Where did you have this conversation?

A In the EMS truck.

Q Do you recall about when you had this conversation? How long you [had] been on the scene?

A I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.

Q Do you recall the demeanor of this child?

A He seemed -- he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep [their] mind[s] off maybe their thoughts or whatever.

Q Okay. Did you take a statement from any of these children?

A No, I did not take a statement.

Q Was anything told to you?

(App. 501–02). The State immediately objected based on Trial Counsel eliciting an out-of-court statement. Trial Counsel responded, "I didn't ask what." The trial court sustained the State's objection. (App. 502).

Investigator Taylor later testified he had been in the ambulance with the children "[p]robably about ten minutes." (App. 517–18). Investigator Taylor also opined that based on the blood on the children's clothing, it appeared the children would have been physically close to the victim, and he stated Duce was able to see the blood on his siblings' clothing while he was in the ambulance. However, Duce appeared to be "happy-go-lucky" during the time Investigator Taylor was with him. (App. 518–21).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Certiorari is warranted to review the Court of Appeals' erroneous reversal of the post-conviction relief court and grant of a new trial to Respondent Devatee Clinton on the basis that the post-conviction relief court record was sufficient to determine Clinton established the requisite prejudice for reversal where trial counsel failed to proffer Investigator Taylor's testimony even though Clinton failed to proffer Investigator Taylor's testimony at the post-conviction relief evidentiary hearing and the record was the same record the Court of Appeals had before it on direct appeal where it found the record was insufficient.

In reversing the post-conviction relief court's denial of relief, the Court of Appeals erroneously found that Clinton suffered the requisite prejudice necessary for a grant of a new trial stemming from trial counsel's failure to proffer the testimony of Investigator Taylor at trial. Specifically, the Court of Appeals held that the "State's case turned on witness credibility, and the State failed to produce strong evidence other than Blakeney's testimony. Thus, because there is a reasonable probability that the outcome of [Clinton's] trial would have been different if the excited utterances naming another person as the perpetrator had been admitted (or properly proffered)." State v. Clinton, Op. No. 2024-UP-129 (S.C. Ct. App. filed April 17, 2024). However, the Court of Appeals decision disregards Clinton's complete failure to proffer the testimony of Investigator Taylor and runs in contravention to the decision of the Court of Appeals on Clinton's direct appeal. State v. Clinton, Op. No. 2016-UP-206 (S.C. Ct. App. filed May 11, 2016). This Court should grant certiorari and ultimately reverse the Court of Appeal's erroneous grant of the post-conviction relief.

To establish ineffective assistance of counsel, the applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for

effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, applicant must prove "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. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added).

For an applicant to show prejudice where he alleges that counsel was ineffective for failing to proffer a witness's testimony, they must present what helpful testimony that witness would have provided had counsel made the proffer. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding an applicant could not establish prejudice based on a claim that counsel was ineffective for failing to present an alibi witness where applicant failed to "produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) ("This Court has *repeatedly* held a PCR applicant *must produce the testimony of a favorable witness* or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis added); See Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (holding that pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different).

During his direct appellate review, Clinton argued that the trial court erred in excluding the hearsay statements of the victim's son, wherein the declarant stated a person other than Clinton or his co-defendant had shot the victim, as the statements were admissible as excited utterances or as present sense impressions. In response, the State argued the issue was not preserved for appellate

review as Clinton failed to make an adequate proffer after receiving a favorable ruling on the State's motion *in limine*, citing State v. Trotter, 322 S.C. 537, 543, 473 S.E.2d 452, 455 (1996) ("Inasmuch as petitioner was granted the relief he sought, but failed to take advantage of it, there was actually no issue to be decided on appeal"), and State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (where defendant received the relief requested from the trial court, there is no issue for the appellate court to decide).

During his direct appellate review, the Court of Appeals agreed with the State, holding the issue was not properly preserved for appellate review, citing State v. Simmons, 360 S.C. 33, 45-46, 599 S.E.2d 448, 454 (2004) (finding an issue unpreserved where the State objected to a witness's testimony, the objection was sustained, and the defendant failed to raise his argument regarding the trial court's exclusion of the testimony or proffer what that witness's testimony would have been had the witness been allowed to continue testifying). Clinton sought rehearing, arguing the Court of Appeals misapplied the preservation standard and the record was sufficient to show what the content of the oldest child's statement would have been from the discussion in the State's motion *in limine*, citing Jamison v. Ford Motor Co. 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) ("[T]his rule regarding proffers has been relaxed where the appellate court is able determine from the record what the testimony was intended to show and that prejudice clearly exists."). The Court of Appeals summarily denied Clinton's petition for rehearing.

Clinton then sought certiorari pursuant to Rule 242, SCACR, arguing that the Court of Appeals had misapplied the preservation standard. The State maintained its position that the issue was not preserved for appellate review and further argued the trial court did not abuse its discretion in ruling Clinton had failed to establish the foundation necessary to admit the hearsay statements,

as no evidence was presented to support the position that the minor child witnessed the shooting. This Court denied the petition for writ of certiorari.

Thereafter, Clinton sought post-conviction relief, arguing in part that trial counsel was deficient for failing to preserve for appellate review the issue of the exclusion of the hearsay statements from the minor child. At his evidentiary hearing, Clinton testified on his behalf and presented testimony from trial counsel. Crucially though, Clinton, who firmly had the burden of proof to establish his claims, failed to present any additional witnesses or otherwise offer evidence of any additional testimony in accordance with the South Carolina Rules of Evidence. Thus, Clinton, while raising a claim that trial counsel was ineffective for failing to make a proffer at trial, failed to make the exact proffer he asserted trial counsel was constitutionally ineffective for failing to make.

At the hearing, trial counsel explained why he did not proffer testimony at trial, stating that he "did not think it would be fruitful to argue anymore at that point. The Judge had clearly decided he wasn't going to let it in at that point." (App. p. 1051, ll. 15-18). The post-conviction relief court denied relief, finding Clinton failed to meet his burden of establishing any constitutional deprivations entitling him to relief, including the claim trial counsel was ineffective for failing to make a proffer.

Thereafter, Clinton sought appellate review of the denial of his post-conviction relief action pursuant to Rule 243, SCACR, arguing the post-conviction relief court erred by failing to find trial counsel ineffective for failing to proffer Investigator Taylor's testimony because the Court of Appeals held the issue was not preserved for direct appellate review.

Following briefing and oral argument, the Court of Appeals reversed the post-conviction relief court, finding that Clinton met his burden of establishing both that trial counsel was deficient

and that this deficiency resulted in the requisite prejudice necessary for the grant of a new trial. Specifically, the Court of Appeals found: (1) the trial court's ruling that the hearsay statements were admissible as excited utterances was proper; (2) the statements themselves inferred the declarant had witnessed the shooting; (3) the post-conviction relief court erred in finding trial counsel was not deficient as he failed to provide an objectively reasonable strategic reason for his failure to make a proffer; and (4) Clinton suffered the necessary prejudice to warrant relief because the "State's case turned on witness credibility, and the State failed to produce strong evidence other than Blakeney's testimony. Thus, because there is a reasonable probability that the outcome of [Petitioner's] trial would have been different if the excited utterances naming another person as the perpetrator had been admitted (or properly proffered)."

The Court of Appeals ruling on Clinton's direct appeal and the ruling from his post-conviction relief appeal are incongruent, offering contradictory rulings based on a nearly identical record and ignoring the complete failure of Clinton to proffer the allegedly helpful testimony. At the evidentiary hearing, Petitioner merely presented new testimony concerning trial counsel's strategy, which enabled the Court of Appeals to conduct a meaningful review of the post-conviction relief court's finding concerning deficiency. Critically though, Clinton utterly failed to present any testimony or evidence whatsoever as to what helpful testimony Investigator Taylor would have provided had trial counsel made a proffer during his trial. Because Clinton continued to fail to present this crucial evidence at the evidentiary hearing, it is axiomatic that the record before the Court of Appeals on post-conviction relief review is the same as it was on direct appeal as to this issue. Despite this same record, the Court of Appeals perplexingly speculated that the previously insufficient record was now sufficient enough to allow a determination on the

admissibility of the minor child's out-of-court statements. Based on that determination, the Court of Appeals rejected the post-conviction relief court's ruling and granted a new trial.

The Court of Appeals decision on Clinton's direct appeal was sound, properly finding the issue unpreserved and refusing to analyze error and prejudice where the evidence and testimony presented at trial did not allow them to. See Vause v. Mikell by Solomonick, 290 S.C. 65, 348 S.E.2d 187 (Ct. App. 1986) ("Even if a trial judge errs in excluding evidence, the case cannot be reversed on this basis unless the appellant shows prejudice."); see also Honea v. Prior, 295 S.C. 526, 534, 369 S.E.2d 846, 851 (Ct. App. 1988) ("Because Prior made no offer of proof, we do not know whether Burns' evaluation of Honea's psychiatric condition would have been favorable to Prior or not. Unless a party includes an offer of proof in the record, there is nothing for us to review."). Now, without Clinton offering more proof, the Court of Appeals rejects their own sound decision on Clinton's direct appeal, erroneously finding that a proffer of Investigator Taylor's testimony would have resulted in the admission of the hearsay statements and exonerated Clinton. A proffer could have resulted in favorable testimony—as the Court of Appeals presumes—but it just as likely could have resulted in unfavorable testimony that would have been harmful to Clinton's case. Indeed, it appears quite telling that Clinton—aware the absence of a proffer was the basis of the denial of relief on his direct appeal—elected not to make the necessary proffer at the evidentiary hearing.

Without the benefit of a proffer, which Clinton unquestionably had multiple opportunities to present, the Court of Appeals could not determine if Clinton suffered prejudice, just as the Court of Appeals determined in their previous opinion in Clinton's case. State v. Clinton, Op. No. 2016-UP-206 (Ct. App. filed May 11, 2016); Rental Unif. Serv. of Greenville, S.C., Inc. v. K & M Tool & Die, Inc., 292 S.C. 571, 357 S.E.2d 722 (Ct. App. 1987) ("K & M's failure to object at that time

constitutes a waiver of its right to raise on appeal any question concerning the propriety and prejudicial effect of opposing counsel's argument.""). Nonetheless, the Court of Appeals now claimed to have found prejudice in Clinton's case, relying on nothing more than speculation to fill in the evidentiary gaps left by the absence of the necessary proffer.

Thus, to support its reversal of the post-conviction relief court's denial of relief, the Court of Appeals had to—and did—infer facts not present in the record before them. For example: the Court of Appeals concluded that the trial court correctly determined the minor declarant's statements met the admissibility requirements for an excited utterance exception to the hearsay rule¹; concluded the minor declarant's statements were made under the stress of excitement²; and inferred the minor declarant had witnessed the shooting based on the fact the minor declarant identified the shooter³. To make these conclusions, the Court of Appeals had to construe and infer

¹ In the State's motion in limine, the trial court said, "*Depending on how it develops, I think is admissible,*" and thus, made clear Clinton would need to establish a foundation for admission. (App. pp. 177, l. 21; 177–179) (emphasis added). At no point did the trial court make specific findings that the minor declarant's statement amounted to an excited utterance, seeing as the foundational requirements of personal knowledge were not even met. Therefore, the Court of Appeals erroneously concluded the trial court correctly determined the statement was an excited utterance.

² As noted, the trial court never determined the minor declarant's statement was an excited utterance. Notably, the evidence presented by Investigator Taylor established the declarant was being treated and entertained by EMS, his bloody clothes had been taken off him, and he did not appear upset when he made the statement. (App. pp. 500–502).

³ Personal knowledge was not established at Clinton's trial. The minor declarant's statement merely identifies Rashad Johnson, but the statement itself does not establish the minor witnessed the shooting and the minor did not testify at trial. Additionally, Investigator Taylor could not establish personal knowledge based on his investigation of the blood spatter at the scene. (App. pp. 503-509). As facts do not exist establishing personal knowledge, the Court of Appeals inferred it through the statement itself. State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006) (Statements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule.); See State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) (citing State v. Kent, 157 Mich.App. 780, 404 N.W.2d 668 (1987), for principle that the declarant must have had the opportunity to personally observe the matter of which he speaks)). As the trial court astutely noted, "*Presence in the home*

facts that were not present in the record on direct appeal, on post-conviction relief, and before them in Clinton's post-conviction relief appeal. The opposite of these facts can just as likely be true based on the insufficiencies in the record due to the lack of a proffer. The only new facts that were presented on post-conviction relief that could shed some light was trial counsel's testimony that the State investigated Rashad Johnson, the subject of the four-year-old declarant's statement, and found that Johnson had an alibi. (App. pp. 1050; 1064).

Moreover, contrary to the Court of Appeals' holding, the State's case against Clinton did not merely turn on the credibility of Clinton's co-defendant, Blakeney. Multiple witnesses testified to the relationship between Clinton and Blakeney and testified that Clinton and Blakeney expressed their intention to commit a robbery a day before the Victim's death and that Clinton had a gun. (App. pp. 261–67; 271–79; 282–89; 291–94; 725–29). There was testimony that two individuals borrowed a white Cadillac, testimony and forensic evidence placed that Cadillac on the road to the trailer park the night of the murder, and the jumpsuit Clinton was wearing the night of the murder was found in that same Cadillac the next day. (App. pp. 242–52; 295–301; 380–401; 535–40; 546–47; 731–43; 391–401). A DNA analysis was done on Clinton's jumpsuit, and Clinton and the Victim could not be excluded as contributors to the mixture of several individuals found on the jumpsuit—corroborating Blakeney's testimony. (App. pp. 534–47; 597–615). Additionally, testimony was presented that upon hearing about the Victim's death the same night, Clinton said nothing and walked away—Clinton was wearing the jumpsuit when he heard this. (App. pp. 625-31). All of this was presented in addition to Blakeney's testimony.

doesn't mean observation of the fatal act. That's all I am saying." (App. p. 167, ll. 14-15) (emphasis added)

Additionally, the Court of Appeals opinion disregards the fact that no credible evidence was presented at Clinton's trial or the evidentiary hearing, aside from the limited information available about the four-year-old's statement itself, implicating Rashad Johnson. See, e.g., State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) ("[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; *evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible* ... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party") (emphasis added); See also State v. Brown, 437 S.C. 550, 878 S.E.2d 364 (Ct. App. 2022), reh'g denied (Oct. 20, 2022), cert. denied (May 24, 2023). Notably, as mentioned *supra*, trial counsel testified at the evidentiary hearing that Johnson was investigated prior to trial, and he had an alibi. (App. pp. 1050; 1064).

Based on the foregoing, the Court of Appeals erred in reversing the post-conviction relief court's denial of relief. Certiorari is warranted to correct the Court of Appeals' erroneous reliance on a record where the testimony the Court of Appeals relied on was never proffered at trial or at the evidentiary hearing. Therefore, the State respectfully requests this Court to grant certiorari and ultimately reinstate the lower court's denial of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for writ of certiorari and reverse the Court of Appeals' reversal of the post-conviction relief court's denial of relief. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

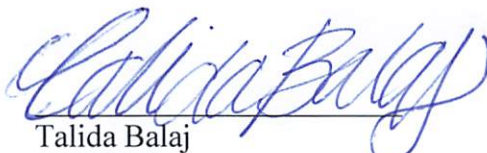
Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Assistant Attorney General

TALIDA BALAJ
Assistant Attorney General



Talida Balaj
Assistant Attorney General
S.C. Bar No. 105228

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

ATTORNEYS FOR PETITIONER