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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lancaster County
Honorable Paul M. Burch, Circuit Court Judge

Opinion No. 2024-UP-129 (S.C. Ct. App. Filed April 17, 2024)
Lower Court Case No. 2018-CP-29-00110

DEVATEE TYMAR CLINTON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2024-001261

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

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

Is certiorari 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?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES

Whether the Court of Appeals in its unanimous, unpublished opinion correctly reversed the PCR court's denial of relief by finding that trial counsel was deficient and that Clinton suffered the necessary prejudice to warrant a new trial where trial counsel failed to preserve for direct appellate review the trial court's exclusion of spontaneous statements made by the victim's four-year-old son naming another individual as the person who shot his mother?

STATEMENT OF THE CASE

During the late evening hours of January 19, 2012, Jenika Jones was killed by a single gunshot wound to the head. App. 217, ll. 3-11; App. 364, ll. 21-22. At the time of the shooting, Jones was in her small mobile home located in a trailer park off Highway 200 near Great Falls, South Carolina. App. 194, ll. 14-16. Unfortunately, Jones' three minor children were also in the home when she was shot. App. 158, ll. 1-2. The oldest child, a four-year-old boy known by the nickname "Duce," went next door crying and upset to get help from the neighbors who promptly called 911. App. 162, ll. 13-17; App. 166, ll. 18-23.

Deputies with the Lancaster County Sherriff's office were dispatched at 10:09 P.M. and arrived on the scene within minutes of receiving the call. App. 217, ll. 3-11. Officers entered the mobile home to "clear the residence." Upon entering the residence, the officers observed Jones laying on the couch and her two youngest children in the living room area next to her. The children were secured, and officers confirmed that Jones was deceased. App. 221-222. All three children had their mother's blood on their clothing and child-sized bloody footprints were found throughout the home. App. 237-238; App. 257, ll. 8-11; App. 416, l. 19-App. 417, l. 9; App. 500, ll. 3-9

Multiple officers and crime scene investigators with the Lancaster County Sherriff's Office processed the scene. Despite the close proximity of the trailers to one another, officers were unable to find any neighbors who heard gun shots or saw anyone entering or leaving the victim's home. App. 230-233; App. 922, ll. 1-8. Evidence was collected, DNA swabs were taken from various locations in the mobile home, photographs were taken of the scene, and various surfaces were dusted for fingerprints. App. 464-472.

The children were initially secured by first responders in an ambulance at the scene. While in the ambulance, the eldest child, Duce, spontaneously stated "Shi's[1] daddy shot my momma." His statement then changed to "Shortycake shot my momma." App. 158, l.15-App. 160, l. 25. He repeated this spontaneous statement to various officers and emergency medical workers on the scene. The investigation revealed that "Shi" was Duce's younger half-brother. Shi's father was Rashad Johnson, whose street name was "Shortycake." App. 158-168. Despite these statements by Duce, the investigation focused on Clinton, Al Martinez Green, and Wayne Blakeney – all three were ultimately charged with the murder of Jones.

Prior to the start of the trial, Solicitor Barfield objected to the defense attempting to bring in Duce's spontaneous statements under a hearsay exception. App. 158, ll. 1-13. Counsel Frick noted that while the State had initiated the motion, it was a defense motion *in limine* to determine the admissibility of the statements made by Duce to law enforcement and EMS personnel regarding the identity of the shooter. App. 162, l. 11-App. 163, l. 16. Counsel Frick argued that the statements made by Duce should be admissible under Rule 803(2), SCRE, as excited utterances. App. 161. The State argued that, even if a hearsay exception applied, the defense had to show the minor child was competent at the time of the statements. App. 161-162. The trial court ruled that, based on the current case law, the competency of a minor child did not have to be established for a hearsay exception to apply. The trial court further stated that the admissibility of the statement would depend upon how the testimony developed. Mainly, the court was concerned with whether defense counsel would be able to lay the proper foundation for a hearsay exception. App. 177-179.

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1 Duce also stated "Jamia's daddy hurt my momma." Shi and Jamia are the same person, Duce's younger half-brother. App. 162, ll. 19-23.

At trial, the State put forth the theory that Jones died during an attempted robbery organized by Petitioner. The key evidence relied upon by the State was the testimony of co-defendant Blakeney. Blakeney had provided inconsistent statements to the police during the investigation of the case. Blakeney originally told police that there were two other people in the car with him the night of the incident and then changed it to three other people. He said that Petitioner was driving the car and then later admitted he was the driver. Additionally, he changed the caliber of the gun from a nine-millimeter to a .380. App. 759-761; 770-771. He stated that Petitioner asked him to hold onto a gun for him and that he had buried that gun in the woods. He later admitted that he had not buried the gun but instead sold it to a relative. App. 775, ll. 15-19.

At trial, Blakeney directly implicated Petitioner, Green, a third individual named Delrico McDow, and himself in the murder of Jones. Blakeney's trial testimony also contained details and statements not mentioned in his prior statements to police. App. 1057, ll. 11-15. To rebut the State's theory and highlight the inconsistent, biased testimony of Blakeney, Counsel Frick sought to elicit the statements made by Duce through crime scene Investigator Ken Taylor. During the cross-examination of Investigator Taylor, the following exchange occurred:

> Mr. Frick: Did you ever have any conversation with any of these children?
>
> Investigator Taylor: Yes.
>
> Mr. Frick: Which one?
>
> Investigator Taylor: Oldest child.
>
> Mr. Frick: Okay. Where did you have this conversation
>
> Investigator Taylor: In the EMS truck.
>
> Mr. Frick: Do you recall about when you had this conversation? How long you have been on the scene?

> Investigator Taylor: I had probably been there about maybe 20 minutes, 30 minutes. So[,] it was probably shortly before midnight, maybe.
>
> Mr. Frick: Do you recall the demeanor of this child?
>
> Investigator Taylor: **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 off maybe their thoughts or whatever.**
>
> Mr. Frick: Okay. Did you take a statement from any of these children?
>
> Investigator Taylor: No, I did not take a statement.
>
> Mr. Frick: Was anything told to you?
>
> Solicitor Barfield: Objection.
>
> Mr. Frick: I didn't ask what.
>
> The Court: I will sustain the objection. You may ask your next question.

App. 501, l. 25-App. 502, l. 24 (emphasis added).

Counsel Frick did not return to that line of questioning, and at no other point during the trial did Counsel Frick move to proffer any testimony regarding the statements Duce made identifying Rashad Johnson as the person who killed Jones. Defense Counsel Raney also inquired about the general demeanor of the children on the night in question. Regarding Duce, Investigator Taylor **changed his description of the child's demeanor stating, "the older boy, again, he was somewhat being entertained by the EMS workers so he seemed kind of happy go lucky, if you will."** App. 518, ll. 7-9 (emphasis added).

After three and a half days of trial the jury found both Clinton and Green guilty as charged. App. 988-989. Clinton was sentenced to life without the possibility of parole. App. 1011. Clinton appealed his conviction and sentence arguing that the trial court erred in excluding Duce's statements to first responders that implicated someone other than Clinton in the charged crime. Following oral argument, the Court of Appeals affirmed Clinton's conviction

finding that the issue of the admission of the excited utterance or present sense impression statements had not been preserved for appellate review. State v. Clinton, 2016-UP-206 (S.C. Ct.App. May 11, 2016); App. 1092-1094. The Court of Appeals denied rehearing. This Court subsequently denied certiorari on August 4, 2017. App. 1021-1022.

Clinton filed an application for post-conviction relief on February 6, 2018. App. 1014-1020. The State filed a return dated June 11, 2018. App. 1021-1039. PCR Counsel Donae Minor filed an amended PCR application dated December 4, 2018, raising three grounds for relief. Notably, all three grounds centered on trial counsel's failure to have the hearsay statements of Duce admitted or the exclusion of the statements preserved for appellate review. App. 1040-1042. An evidentiary hearing was convened on January 23, 2019, before the Honorable Paul M. Burch. The State was represented by Samuel Key. App. 1043.

During the PCR hearing Counsel Frick testified that he had been practicing law for about thirteen years at the time of Clinton's trial and had handled numerous murder cases as both a prosecutor and defense attorney. App. 1047-1048. Frick stated that the strategy at trial was to get the statements from Duce admitted through a hearsay exception. Counsel Frick thought that the excited utterance exception applied to the facts of Clinton's case. App. 1050, ll. 20-25. Counsel Frick conceded that it was also possible that the present sense impression exception would have applied but that he did not raise that as a ground for admitting Duce's statements. Id.

Counsel Frick testified that he disagreed with the ruling from the Court of Appeals and thought that he had preserved the record for appeal. Frick argued it was the state's motion *in limine* to exclude the statement made by Duce and stated that he did not know how he was supposed to protect an objection that he did not make. Notably, at trial, Counsel Frick argued that it was the defense motion *in limine* to admit the statements. App. 162, ll. 11-12. Counsel

Frick admitted that he did not proffer any testimony or attempt to argue for the admission of the statements by Duce after the State objected during Taylor's testimony. He conceded that the Court of Appeals ruled that he had in fact failed to preserve the record. App. 1051-1055.

In the order denying Clinton's PCR application, the PCR court found that Counsel Frick had employed a valid trial strategy in attempting to have the statements of Duce admitted at trial through a hearsay exception. The PCR court stated that because counsel had articulated a valid trial strategy that Clinton had received effective assistance of counsel. The PCR court stated that "[w]hile trial counsel arguably needed to proffer the child's testimony to preserve the issue for appellate review, the Court will not second-guess trial counsel's decision to move on with his questioning." App. 1080.

Clinton filed a timely notice of appeal from the order dismissing his PCR application. A petition for writ of certiorari was filed on March 4, 2020. The State filed a return to the petition for writ of certiorari on August 10, 2020. This Court transferred the case to the Court of Appeals on August 25, 2020. By order dated January 9, 2023, the Court of Appeals granted certiorari. The brief of petitioner was filed on February 8, 2023. The State filed the brief of respondent on June 12, 2023. The parties appeared before the Court of Appeals on February 2, 2024, for oral argument. On April 17, 2024, the Court of Appeals issued an unpublished, *per curiam* opinion reversing the PCR court and granting Clinton a new trial. The State filed a petition for rehearing and suggestion for rehearing *en banc* on May 2, 2024. A return was filed to the petition for rehearing on May 16, 2024. The State filed a reply to the return to the petition for rehearing on May 21, 2024. On July 3, 2024, the Court of Appeals denied the State's petition for rehearing and petition for rehearing *en banc.* The State filed a petition for writ of certiorari to the Court of

Appeals on August 2, 2024. This return to the petition for writ of certiorari to the Court of Appeals follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

ARGUMENT

The Court of Appeals in its unanimous, unpublished opinion correctly reversed the PCR court's denial of relief by finding that trial counsel was deficient and that Clinton suffered the necessary prejudice to warrant a new trial where trial counsel failed to preserve for direct appellate review the trial court's exclusion of spontaneous statements made by the victim's four-year-old son, Duce, naming another individual as the person who shot his mother.

The State asserts that prejudice cannot be established in this matter and that the opinions from the Court of Appeals in this case on direct appeal and PCR appeal are incongruous. Respectfully, the Court of Appeals holding on both direct appeal and PCR appeal are the same – that Counsel Frick did not preserve the issue of the admissibility of Duce's statements for appellate review. Despite the repeated assertions to the contrary by the State, the Court of Appeals has never ruled that the record in this matter was insufficient for review.

The direct appeal opinion found only that Counsel Frick had not met the numerous procedural steps necessary to persevere the matter for appellate review. Because the matter was not preserved for appellate review, the Court of Appeals never addressed the merits of the issue or the sufficiency of the record. Clinton has shown both deficient performance by Counsel Frick in failing to perverse the matter for appellate review and prejudice because the contents of Duce's statements, which the State conceded to at trial, were of such a highly exculpatory nature that had the jury heard them (or had they been preserved for direct appeal) there exists a reasonable probability that the result of the proceeding would have been different. *See* Strickland v. Washington, 466 U.S. 668 (1984).

Direct Appeal and Deficiency

In the unpublished string-cite opinion affirming Clinton's conviction, the Court of Appeals did not address the merits of the exclusion of Duce's statements because it found the issue unpreserved. Based on the case law cited by the Court of Appeals in the direct appeal opinion, that Court concluded that the issue was unpreserved because Counsel Frick had 1) only raised the issue *in limine*,[2] 2) failed to raise any arguments regarding the trial courts exclusion of the testimony after the State's objection was sustained,[3] 3) failed to proffer the testimony of the officer,[4] and 4) failed to get a final ruling on the matter that would allow appellate review.[5] The decision by the Court of Appeals during Clinton's direct appeal did not hinge solely on the failure to proffer the testimony of Investigator Taylor, but on numerous preservation errors.

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2 State v. Clinton, Op. No. 2016-UP-206 (Ct. App. filed May 11, 2016) *citing* State v. Stokes, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct.App.2000) (holding an issue regarding exclusion of evidence was unpreserved, stating "the record reflects that this issue was only raised and ruled on *in limine*. Stokes never raised the issue again at any time during the trial. Merely raising an argument *in limine* does not preserve the issue for appellate review").

3 Id. *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).

4 Id.

5 Id. *citing* State v. Atieh, 397 S.C. 641, 646, 725, S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); State v. Hicks, 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (holding matters not raised to or ruled upon by the trial court are not preserved for appellate review); State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct.App.2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed.2002))).

The Court of Appeals made no rulings on the admissibility of Duce's statements or the sufficiency of the record regarding the content of Duce's statements in the opinion from Clinton's direct appeal. The unpublished opinion made no factual findings and did not address the merits of the issue. Curiously, the State now infers that the Court of Appeals ruled on direct appeal that Duce's statements were inadmissible and that the record was not sufficient for review. Such an inference goes far beyond the holding of the Court of Appeals on direct appeal. The only holding from the Court of Appeals on the issue of Duce's statements in Clinton's direct appeal was that the matter was not properly preserved for appellate review. Incidentally, the holding from Clinton's direct appeal established the deficiency prong for his PCR appeal. The unpublished direct appeal opinion is not in conflict with the unpublished opinion from Clinton's PCR appeal. The two opinions are in harmony as both found the evidentiary issue of the admission of Duce's hearsay statements unpreserved.

Additionally, it must be noted that the State has not appealed the Court of Appeals holding that Counsel Frick was deficient in his failure to properly preserve the exclusion of Duce's statements for appellate review. Therefore, the Court of Appeals holding that Clinton received deficiency representation is the law of the case. *See* State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (holding an unchallenged ruling, right or wrong, becomes the law of the case and will not be considered by the appellate court); State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct.App.2012) (stating the appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case); State v. Black, 319 S.C. 515, 518 n. 2, 462 S.E.2d 311, 313 n. 2 (Ct.App.1995) ("[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief.").

Prejudice

The State argues that prejudice cannot be determined from the record because the testimony of Investigator Taylor was never proffered at the PCR hearing. This argument overlooks the fact that the excluded testimony Clinton sought to have admitted were the **exculpatory statements made by Duce**, not any specific testimony of Inv. Taylor. The issue before the Court of Appeals, and now this Court, is whether trial counsel provided constitutionally ineffective assistance when he failed to preserve the issue of the admission of **Duce's statements** for direct appellate review. The testimony by Inv. Taylor's about the statements, while necessary to procedurally preserve the matter for direct review, was not necessary for a determination of prejudice at the PCR stage. This is particularly true considering that the State conceded the contents of Duce's statements and the circumstances under which those statements were made at trial.

When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (*quoting* Strickland, 466 U.S. at 686; *see* Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, an applicant must show that counsel's performance was deficient and that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (*quoting* Strickland, 466 U.S. at 688).

Generally speaking, a proffer serves two purposes – it preserves the record for appellate review and informs the appellate court of the substance of the excluded testimony. *See* State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct.App.2006) (holding a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been). The excluded testimony at issue in this case was not that of Inv. Taylor, but of Duce. The proffer of Inv. Taylor was only necessary to preserve the matter for direct appellate review. The Court of Appeals was aware of the excluded testimony, the circumstances under which the statements were made, and the evidence introduce at trial. The record in this matter is more than sufficient for a determination of prejudice.

To determine prejudice in this case, the Court of Appeals considered whether the excluded statements made by Duce immediately following the shooting death of his mother reasonably would have impacted the outcome of the trial had they been presented to the jury. Reviewing the record in the matter *sub judice* reveals that: 1) the State conceded that Duce made the statements "Shi's/Jamia's daddy" or "Shortycake" shot his mother; 2) Shi and Jamia are the same person--Duce's younger half-brother, and Shi's father, Rashad Johnson, is known by the nickname "Shortycake"; 3) the statements were made to various law enforcement and first responders who were all on scene within minutes of being dispatched; 4) Duce and his siblings all had blood on their clothing from their mother; 5) Duce went to the neighbors in bloody clothing, upset and crying to get help; 6) Duce and his siblings were in the home when their mother was shot; 7) Duce identified a person that was known to him as the individual who killed his mother; 8) Duce correctly identified that his mother was shot to death; and 9) Duce did not

seem "too upset to a great extent" because he was being actively entertained by EMS responders when Inv. Taylor spoke to him. App. 158-168; App. 194, ll. 14-16; App. 217, ll. 3-11; App. 364, ll. 21-22; App. 500, ll. 3-9.

These facts allowed the Court of Appeals to review the excluded testimony and the circumstances surrounding the testimony to determine if Clinton suffered prejudice. All of these facts were established during the *in limine* hearing and trial. These facts have never been contested by the State. It is disingenuous to argue that the record does not contain sufficient facts for a determination of prejudice at the PCR stage. There is **no speculation or conjecture** as to what the excluded testimony would have been because the State confirmed that the statements were made by Duce and acknowledge the circumstances surrounding their making during the *in limine* hearing.

In further analyzing the prejudice suffered by Clinton, the Court of Appeals found that there was not overwhelming evidence of guilt in the case. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) *citing* Strickland, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." Id. *citing* Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury."); *see also* Strickland 466 U.S. at 696 (stating "a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). "In general, the stronger the evidence

presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Id. *citing* Strickland, 466 U.S. at 696.

As the Court of Appeals properly determined, the State's case relied heavily on the credibility of the witnesses. There was no forensic evidence linking Clinton to the crime. Importantly, the only person directly tying Petitioner to the shooting of the victim was his co-defendant Blakeney. Not only was the testimony of Blakeney highly inconsistent throughout the investigation and trial, but Blakeney received a great benefit for his testimony. At the time of trial Blakeney was charged with murder. He asserted that, outside of being granted a personal recognizance bond, he had not been promised any help on his pending charge for his testimony. However, Blakeney also testified that he was enrolled in college at the time of trial and did not plan on spending the next thirty years incarcerated. App.757, l. 16-App. 758, l. 2. Blakeney ultimately pled guilty to accessory after the fact to murder under the Youthful Offender Act for a term of imprisonment not to exceed six years, suspended upon time served and eighteen months' probation.[6] Without the highly biased, inconsistent testimony of Blakeney, the State would not have been able to prosecute Clinton.

In Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999), this Court found trial counsel ineffective for failing to subpoena medical records of the victim and introduce them at trial. Dove was accused of murdering his wife and asserted that she had committed suicide. The medical records at issue confirmed that Dove's wife suffered from depression and suicidal

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6 See, https://publicindex.sccourts.org/Lancaster/PublicIndex/ (search case number 2014GS2900566); See also Wise v. Wise. 394 S.C. 591, 601, 716 S.E.2d. 117, 122 (Ct. App. 2011) (noting an appellate court can take judicial notice of a fact that was not before the lower court if the fact is indisputable); Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) (stating a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records).

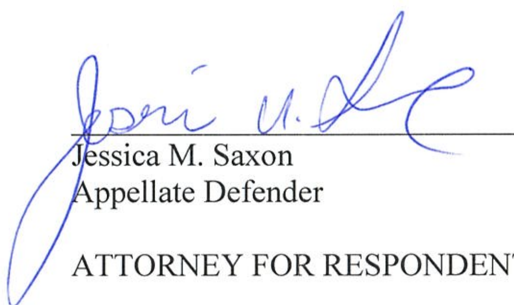
ideations. Dove at 303, 523 S.E.2d at 461. This Court held that trial counsel was deficient because the medical records were "replete with evidence" about the victim's past suicidal tendencies and depression which was evidence that "would have been crucial in trying to prove the victim committed suicide." Id. This Court held that the defendant was prejudiced because "he was unable to present relevant and important evidence supporting his assertion that his wife committed suicide" to the jury. Dove at 303, 523 S.E.2d at 461.

Much like the defendant in Dove the jury in Clinton's trial never had a chance to consider crucial, relevant, and exculpatory evidence that supported his assertion of actual innocence. Clinton could have used Duce's statements to cast doubt on the highly biased and inconsistent testimony of Blakeney. The State's case was almost entirely circumstantial and without the testimony of Blakeney there was nothing connecting Clinton to the murder. The fact that the jury never had the opportunity to consider the statements of Duce that directly inculpated another person in the murder of his mother undermines the confidence in the outcome of Petitioner's trial.

As the Court of Appeals concluded, if the jury had heard the spontaneous statements made by Duce to various first responders, there exists a reasonable probability that the result of Clinton's trial would have been different. *See* Strickland v. Washington, 466 U.S. 668 (1984). Furthermore, had Counsel Frick successfully preserved the record for appellate review, it is highly probable that the appellate court would have ruled the exclusion of the evidence was improper and reversed Clinton's conviction. Clinton was undoubtedly prejudiced because he was unable to present relevant exculpatory evidence to the jury that supported his assertion of innocence. He was further prejudiced when the appellate court was precluded from reviewing the exclusion of that evidence because the issue was not properly preserved.

CONCLUSION

Based on the foregoing argument, Respondent Clinton respectfully requests that this Court deny the State's Petition for Writ of Certiorari to the Court of Appeals and affirm the unanimous, well-reasoned opinion of the Court of Appeals reversing the improper denial of relief by the PCR court and remanding Clinton's case for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR RESPONDENT

This 3rd day of September, 2024.