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**Oct 16 2024**

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
ON PETITION FOR WRIT OF CERTIORARI

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Appeal from Lee County  
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge  
Appellate Case No. 2024-001498

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The State,

Respondent,

vs.

Kevin Herriott,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. The Court of Appeals appropriately found Petitioner's issue concerning indictments was not properly preserved for review.
- II. Whether the Court of Appeals properly found the State presented sufficient evidence to survive a motion for directed verdict.
- III. Whether Petitioner established the State suppressed exculpatory evidence and if other matters should be addressed in post-conviction relief.

## STATEMENT OF THE CASE

Following a conviction for voluntary manslaughter, Petitioner was incarcerated at Lee Correctional Institute. As the result of an incident that occurred during his incarceration, the Lee County Grand Jury returned indictments for assault and battery of a high and aggravated nature (ABHAN), attempted armed robbery, and possession of a weapon by an inmate. (Indictments). Petitioner proceeded to trial before the Honorable R. Ferrell Cothran, Jr. The court directed a verdict as to the ABHAN charge, but not the lesser-included offense of assault and battery first degree. (Appx. 141-143). Petitioner was acquitted of the assault and battery charge but convicted on the attempted armed robbery and the possession of a weapon charges. (App. 176-177). Judge Cothran sentenced Petitioner to six years' for attempted armed robbery and five years' for the possession of a weapon charge, each served concurrently. (App. 179). Petitioner filed a Notice of Appeal and subsequently moved to relieve appellate counsel and proceed pro se. The Court granted the motion to proceed pro se. The Court of Appeals affirmed Petitioner's conviction on May 29, 2024, in opinion number 2024-UP-190. Petitioner's petition for rehearing was denied on August 12, 2024. This return to petition for writ of certiorari follows.

## STATEMENT OF FACTS

On May 10, 2018, Petitioner, an inmate at Lee Correctional Institute, got into an altercation and attempted to stab his roommate with a handmade knife, also referred to as a shank. (Appx. 116-118). Lieutenant Bethea arrived at the cell and, through the window of the cell door, witnessed the incident. (Appx. 117). He called for assistance and then asked Petitioner to slide him the shank. (Appx. 117-118). After a while, Petitioner slid him the knife. (Appx. 117-118). Bethea ordered both inmates to get on their knees. (Appx. 118). Instead, Petitioner climbed to the light fixture and retrieved two more hidden shanks. (Appx. 117-119).

Lieutenant Lucky arrived to assist along with other officers and a nurse. (Appx. 119-121). After the officers decided to open the door to the cell and remove Petitioner, he pushed Lucky in the back, which knocked him to the floor. (Appx. 127). As Lucky was on the ground, Petitioner climbed on top of Lucky and attempted to obtain Lucky's chemical munition. (Appx. 126-127). Sergeant Coaxum discharged chemical munition on Petitioner to neutralize the situation. (Appx. 126-128). During this time, Petitioner still had the two shanks in his hands that he had retrieved from the light fixture. (Appx. 118-119). The prison's video system captured much of the incident outside the prison cell. (Video State's Exhibit 1).

## STANDARD OF REVIEW

**I. The Court of Appeals appropriately found Petitioner’s arguments regarding his indictments were not properly preserved for review.**

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). “An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

**II. The Court of Appeals properly found the State presented sufficient evidence to survive a motion for directed verdict.**

“On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State.” State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992).

**III. Petitioner failed to establish the State suppressed exculpatory evidence and other matters should be addressed in post-conviction relief.**

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). “An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

## ARGUMENT

### **I. The Court of Appeals appropriately found Petitioner's arguments regarding his indictments were not properly preserved for review.**

Petitioner contends the Court of Appeals erred in finding the issues relating to Petitioner's indictments were not preserved for review. These issues were not preserved because they were not properly raised through counsel.

Initially, there is no right to hybrid representation, and because Petitioner was represented by trial counsel, the Court of Appeals properly found his arguments not preserved for appellate review. See Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially pro se and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed pro se by a person represented by counsel are not to be accepted unless submitted by counsel.”) (citing State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)); State v. Devore, 416 S.C. 115, 120–21, 784 S.E.2d 690, 693 (Ct. App. 2016) (observing there is no right to hybrid representation under either the United States or South Carolina constitution and explaining substantive documents submitted pro se by litigants who are represented by counsel should not be accepted by the clerk of court for filing). Additionally, counsel cannot act as a mere conduit for Petitioner's various arguments and complaints. See Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517–18 (2002) (holding “counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client”). As the Supreme Court explained: “[t]ails should not wag dogs. Merely because an appellant believes that the irrelevant is relevant is no reason to turn the system on its head and solemnly contemplate the wisdom of a person who does not have the sense to be guided by

experts in an area where he himself possesses no expertise.” Id. (quoting Commonwealth v. Ellis, 626 A.2d 1137, 1140 (Pa. 1993)).

Before trial Petitioner argued that the indictments should be quashed because they were not “issued in discovery” and not presented “in its proper form.”<sup>1</sup> (Appx. 99). Counsel specifically indicated he believed Petitioner’s complaints were without merit. (Appx.98). Nonetheless, Petitioner raised and argued the issues at the hearing. (Appx. 98). Counsel did not participate other than to indicate he did not believe they had merit and that he submitted discovery requests pursuant to Rule 5 and Brady. (Appx. 98-103). See, e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.”); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal). Consequently, this Court should not consider arguments made by Petitioner that are not properly raised through counsel.

Accordingly, this Petition for Writ of Certiorari should be denied.

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<sup>1</sup> The trial court granted Petitioner’s motion for a directed verdict as it relates to his ABHAN charge. Accordingly, any issue related to that indictment is moot. State v. Green, 337 S.C. 67, 71, 522 S.E.2d 602, 604 (Ct. App. 1999) (noting “When judgment on an issue can have no practical effect upon an existing case or controversy, the issue is moot”).

**II. The Court of Appeals properly found the State presented sufficient evidence to survive a motion for directed verdict.**

Petitioner maintains the trial court erred in denying his motion for a directed verdict. The Court of Appeals properly affirmed because the State presented video evidence of Petitioner armed while incarcerated and testimony that Petitioner attacked an officer, while attempting to take his property.

The trial court did not err in denying Petitioner's motion for directed verdict as it relates to his attempted armed robbery and possession of a weapon by an inmate charge.<sup>2</sup> The motion failed to properly preserve the issue. Nonetheless, there was sufficient evidence to warrant sending the charges to the jury. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992). Here, the State produced sufficient evidence to support such a conclusion by introducing both video evidence and testimony from the guards on duty.

First, Petitioner did not raise any specific grounds for his motion for directed verdict. As a result, any arguments raised on appeal are not preserved. "In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below." State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998).

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<sup>2</sup> The trial court granted Petitioner's motion for a directed verdict as it relates to the ABHAN charge. He proceeded to the jury on a charge of assault and battery first degree but was acquitted. As a result, this charge is not before this Court.

Nonetheless, the Court of Appeals properly found sufficient evidence to submit the charges to the jury. The testimony by Lieutenant Lucky and Lieutenant Bethea established that Petitioner, after knocking Lieutenant Lucky to the floor, climbed on top of him and attempted to remove his canister of chemical munitions. (Appx. 126-127). At the time he did this, Petitioner was armed with handmade knives, recovered from the light fixture of his cell. (Appx. 116-127). The video further provides evidence sufficient to warrant sending the charge of attempted armed robbery to the jury. See S.C. Code Ann. § 16-11-330(B) (Supp. 2019) (“A person who commits attempted robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.”).

Additionally, because the testimony and video evidence established Petitioner was clearly an inmate in Lee Correctional Institute and on multiple occasions was in possession of handmade knives there was reason to believe he violated section 24-13-440 of the South Carolina Code and deny his motion for directed verdict. See S.C. Code Ann. § 24-13-440 (Supp. 2019) (“It is unlawful for an inmate of a state correctional facility or of a local detention facility to carry on his person or to have in his possession a dirk, slingshot, metal knuckles, razor, firearm, or an object, homemade or otherwise, that may be used for the infliction of personal injury upon another person, or to willfully conceal any weapon within any Department of Corrections facility or other place of confinement.”).

Accordingly, this Court should deny this petition.

**III. Petitioner failed to establish the State suppressed exculpatory evidence and other matters should be addressed in post-conviction relief.**

Any other claims regarding the failure of his counsel to present defenses or evidence are not properly preserved, not properly raised in direct appeal, and should be addressed in Post-Conviction Relief if at all.

First, the Court of Appeals properly found Petitioner failed to identify what evidence was withheld and how it would have been favorable to his defense. A true Brady violation requires three elements: the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Strickler v. Greene, 527 U.S. 263 (1999). Prior to trial, Counsel requested all exculpatory material. (Appx. 100). In a pretrial hearing the State noted it was not in possession of any exculpatory material. (Appx. 98-102). After this, Petitioner was unable to identify any exculpatory evidence in the State's possession. (Appx. 100). Petitioner has failed to establish any of the three elements necessary to show a Brady violation.

Next, Petitioner raises the Court of Appeals denial to grant his motion to compel Counsel to "surrender the case/work file." Under Rule 241 (a), SCACR, "[p]etitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." The order denying Petitioner's motion was issued on April 30, 2024. Petitioner responded with a letter entitled "Appellant's written objections" on May 16, 2024<sup>3</sup>. The Court noted the letter appeared to request a rehearing which

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<sup>3</sup> Petitioner's letter which appeared to request a rehearing was untimely pursuant to Under Rule 241 (a), SCACR.

the Court denied pursuant to Rule 221(c), SCACR. The rule notes “[t]he appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party’s appeal. Rule 221(c), SCACR. The Court of Appeals properly found that the order of denial did not have the effect of dismissing or deciding Petitioner’s appeal.

Lastly, Petitioner seems to argue that counsel erred in failing to raise several alleged defenses and in failing to present additional evidence. These issues were never raised to the trial court and are not preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised and ruled upon by the trial court). Further, the issues are not appropriate for direct appeal but are better considered in a Post-Conviction Relief action. See e.g., S.C. Code Ann. § 17-27-20 (Supp. 2019) (setting forth grounds for post-conviction relief).

Accordingly, this Court should not address Petitioner’s remaining issues and should deny this petition

## CONCLUSION


For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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