

# The Grose Law Firm, LLC

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December 23, 2014

The Honorable Jenny Abbott Kitchings  
Clerk of Court, S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**RECEIVED**  
DEC 29 2014  
**SC Court of Appeals**

Re: State v. Donna Lynn Phillips  
Appellate Case Number: 2012-212663

Dear Ms. Kitchens:

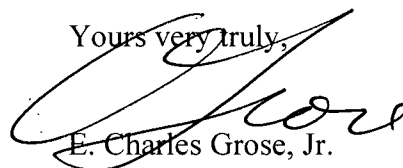
Enclosed please find the original and six copies of Ms. Phillips Reply to the State's Return to her Petition for Rehearing.

By copy of this letter to Mr. Aplin, I am serving copies of these pleadings on the State

Thank you for your attention to this matter.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Ms. Donna Lynn Phillips  
J. Benjamin Aplin, Esquire

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM PICKENS COUNTY

D. Garrison Hill, Circuit Court Judge

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Appellate Case Number: 2012-212663

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**SC Court of Appeals**

The State

Appellant.

v.

Donna Lynn Phillips,

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Respondent

Reply to State's Return to Petition for Rehearing

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Counsel for the appellant, Donna Lynn Phillips, replies to the State's return to her petition for rehearing as follows:

1) The State argues *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), the "waiver rule," and the exceptions to that doctrine of law have "nothing to do with the standard of review in regard to directed verdict motions." Return, p. 4. The *Hepburn* opinion refutes this contention. 406 S.C. at 442, 753 S.E.2d at 416 ("While we are mindful that the net result of our decision is to overturn a jury verdict reached with all due deliberation and diligence, we are called by our *standard of review* to consider the evidence as it stood after the State presented its case, and we are not satisfied that the evidence was sufficient to sustain the State's ultimate burden of proof in this case." (emphasis added)).

2) The State's primary argument is that Ms. Phillips did not properly call this Court's attention to *Hepburn*.<sup>1</sup> This argument overlooks four important facts that are beyond dispute. First, Ms. Phillips properly moved for a directed verdict at trial. Second, she sought review of the trial court's denial of directed verdict. Third, she called this Court's attention to *Hepburn*. Fourth, this Court was aware of *Hepburn* when it issued the opinion. These four facts create a sufficient record for this Court to reconsider and reverse the trial court. As discussed in the Petition for Rehearing and paragraph 3, *infra*, Ms. Phillips' record on appeal is very similar to the *Hepburn* record on appeal.

3) The State argues the trial court did not rule on the "waiver rule." Return, pp. 2, 4. In this respect, Ms. Phillips' case is no different than *Hepburn*. The applicability of the waiver rule, and the exceptions to the rule, were raised for the first time during Ms. Hepburn's appeal. See Record on Appeal in *Hepburn*, Directed Verdict Motions, Volume III, at pp. 786-809, and Volume IV, at pp. 1336-38.<sup>2</sup> After all, the "waiver rule" and the exceptions to that rule concern "what evidence [the appellate courts] deem appropriate for consideration at the appellate stage of review." *Hepburn*, 406 S.C. at 429-30, 753 S.E.2d at 409 (emphasis original).

4) The State argues that even if this Court considers *Hepburn*, it should still consider Ms. Phillips' testimony. As outlined in the Petition for Rehearing, the State's argument does not recognize the exceptions to the "waiver rule."

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<sup>1</sup> The State might be trying to push this issue into post-conviction relief, which would only result in additional delay. This Court, however, has an adequate record to determine the applicability of *Hepburn*. Ms. Phillips should get the benefit of this case, decided during the pendency of her appeal.

<sup>2</sup> Found at <http://ctrack.sccourts.org/public/caseView.do?csiID=49979> (last viewed December 23, 2014).

5) Finally, the State takes one quote from the Petition for Rehearing out of context and argues Ms. Phillips did not cite the “correct standard of review at the directed verdict stage.” Return, p. 6. Both Ms. Phillips and the State agree that the standard set forth in *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 572 (2000) applies. Brief of Appellant, p. 15; Petition for Rehearing, p. 12; and Return to Petition for Rehearing, p. 6. The only disagreement concerns whether this Court should consider the impact of *Hepburn* on Ms. Phillips’ appeal. Additionally, as the Chief Justice pointed out, the “traditional circumstantial evidence charge” was useful as it “illustrate[d] the lack of evidence against Petitioners” in *State v. Hernandez*, 382 S.C. 620, 626, 677 S.E.2d 603, 606 (2009). The same can be said here. *See also State v. Palmer*, 408 S.C. 218, 236, 758 S.E.2d 195, 205 (Ct. App. 2014), *cert. granted* (Sept. 24, 2014) (Konduros, J., concurring) (“I also would find there was insufficient evidence of the codefendants’ guilt for homicide by child abuse and unlawful conduct toward a child because the State did not present any direct or substantial circumstantial evidence to reasonably prove which codefendant harmed the child.”) (citing *State v. Lane*, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct.App.2013) (“The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes.”))).

### **Conclusion**

This Court should rehear Ms. Phillips appeal, apply the “waiver rule” and exceptions to that rule as outlined by our Supreme Court in *Hepburn*, reverse the trial court judge, and direct a verdict of acquittal.

(signature on next page)

Respectfully Submitted,

By 

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*Attorney for Appellant*

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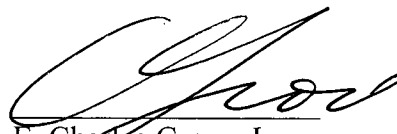
Respondent

Certificate of Service

I certify that I have served the Petition for Rehearing on the South Carolina and the S.C. Commission on Indigent Defense Appellate Division, by mailing a copy, on the date reflected below, to the physical addresses of:

J. Benjamin Aplin, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

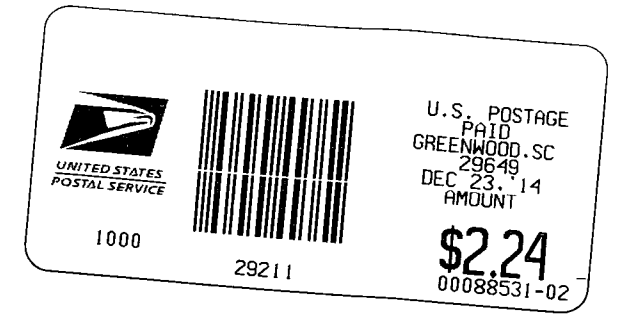
**Attorney for Respondent**



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