THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY
R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2014-000594

The State, ...Respondent,

v.

Devatee Tymar Clinton, ...Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a timely Petition for Rehearing was made to the Court of Appeals on June 27, 2016, which Petition was finally ruled upon and denied by the Court of Appeals on August 22, 2016.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in refusing to consider the proffer of testimony made during a pre-trial motion *in limine* hearing in finding that an argument was not adequately raised to the trial court and therefore unpreserved for appellate review?

II. Whether the Court of Appeals' incorrect application of issue preservation violates Rule 18 of the South Carolina Rules of Criminal Procedure and imposes an impossible standard on practitioners?

III. Whether the Court of Appeals erred in failing to adequately consider the directed verdict issue in this case in light of recent opinions of this Court, notwithstanding the fact that the evidence and testimony in this case merely raised a suspicion, but failed to meet the elements of the charged crime?

STATEMENT OF THE CASE

This writ of certiorari seeks review of the Court of Appeals' unpublished opinion in this appeal, which affirmed the verdict against Petitioner Devatee Tymar Clinton. **(App. p. 1).** Petitioner was tried before a jury, along with co-defendant Al Martinez Green, in Lancaster, South Carolina, during the week of March 10-14, 2012. **(App. p. 32).** Following deliberations, Petitioner was found guilty of murder and thereafter sentenced by the trial court to life in prison, without parole.

Below, the Court of Appeals imposed an improper error preservation standard that conflated the general rules regarding renewal and sufficiency of an objection following a motion *in limine* hearing, with the adequacy of the proffer of testimony. The Court of Appeals' misapplication of the preservation rules resulted in its failure to reach the merits of the hearsay issue presented, which demonstrated the trial court's error in the application the binding precedent of this Court in the case of *State v. M. Sims*, 348 S.C. 16, 558 S.E.2d 518 (2002). *See* (Arguments presented on the merits, **App. pp. 750-65**). In addition, the opinion's relegation of Petitioner's directed verdict issue to a Rule 220 Opinion exhibits a continued misapprehension of the law on the issue of circumstantial evidence in the context of an appeal from the denial of a directed verdict motion, demonstrating that the recent opinions of this Court in, *inter alia*, *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) and *State v. Pearson*, 415 S.C. 463, 783 S.E.2d 802 (2016), have rendered consideration of a defendant's directed verdict issue on appeal a mere formality by the Court of Appeals warranting (less than) cursory review.

The facts of this case are lengthy and heart wrenching, but serve to frame the questions presented in this petition. Late in the evening on January 19, 2012, Jenika

Jones (Victim) was killed by a single gunshot wound. **(App. p. 112).** At the time of her death, Victim was in her home, a mobile home in a mobile home community located off of Highway 200 near Great Falls, South Carolina. **(App. p. 273).** Victim's three children, all under the age of four years old, were also in the home at the time she was killed. **(App. pp. 65-76).** Her oldest, a four year old boy, went next door to notify neighbors of the incident, which neighbors subsequently called 9-1-1. **(App. pp. 45; 51).**

Upon arrival, Lancaster County Sherriff's Officers found Victim, already deceased, laying on the couch in the mobile home's main, family room. **(App. p. 71).** The youngest two children, a girl, aged two, and a second boy, aged one, were found in the home; the oldest child remained with neighbors. **(App. pp. 65-76).** All three children had blood on their clothing. **(App. pp. 51-52; 87-88).**

Police arrived on the scene within minutes of the call to 9-1-1. **(App. pp. 47; 67).** Although the mobile homes in this particular community were very near to each other, the State produced no neighbors who heard the gunshot that killed Victim. **(App. pp. 80-83; 607-08).** Nor did the State produce any witness that saw someone entering or leaving Victim's mobile home. **(App. pp. 607-08).** Multiple officers and crime scene investigators, including a resident officer of the South Carolina Law Enforcement Division (SLED) responded to the scene. Evidence was gathered, the scene was dusted for fingerprints, and deoxyribonucleic acid (DNA) samples were collected.

Initially, Victim's children were secured by first responders in an ambulance at the scene. **(App. pp. 90-91).** There, the oldest child spontaneously stated (without provocation or questioning) to at least two police officers, as well as other EMS individuals on hand, that "Shi's Daddy shot my Momma." **(App. pp. 42-43).** Shortly

thereafter, the oldest child's exclamation changed slightly, becoming "Shortycake shot my Momma." **(App. p. 45).** This statement was repeated several times in the minutes following the first responders' arrival,[1] with all of these statements estimated to have occurred within thirty (30) minutes. **(App. pp. 42-59; 284-87).**

This issue was first brought to the trial court's attention by way of the State's motion *in limine*, prior to opening statements, seeking to exclude testimony of the statements from officers and first responders. **(App. pp. 42-64).** As described by Petitioner's counsel, police and investigators arrived on the scene of the mobile home community within minutes of the call to 9-1-1 by Victim's neighbors. **(App. pp. 42-59; 284-87).** Neighbors were notified of the situation by Victim's oldest son, who was four-years-old at the time, when he went next door to ask for help. **(App. pp. 47; 51).** Thereafter, in the presence of officers and first responders, and on multiple occasions, the oldest child spontaneously made the exclamations described above.

During this pre-trial discussion it was explained that "Shi" is a nickname for a boy whose first name is "Jamia." **(App. pp. 45-47).** It was also explained that Shi/Jamia's Daddy goes by the nickname "Shortycake," and Shortycake's actual name is Rashad Johnson.[2] *Id.* Substituting nicknames, the oldest child told officers and first responders on multiple occasions, within, at most, two hours of having been present inside the mobile home for his mother's killing, that Rashad Johnson shot my Momma; Rashad

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[1] Although the statements changed each time the oldest child made them, the *content* of the statements remained the same; each variation identified the exact same person, demonstrating that the child's statements were constant, consistent, and reliable.

[2] During the *in limine* hearing, the solicitor confirmed that "Your Honor, we did verify there is a child who goes by Shi, the nickname Shi ... And that child's daddy is in fact Rashad Johnson." **(App. pp. 45-46).** The trial court inquired: "Okay. And is Rashad Johnson known as Shortycake?" *Id.* To which the solicitor responded: "Yes, sir he is." *Id.* Thus, Shi = Jamia, while Shi's Daddy = Shortycake = Rashad Johnson.

Johnson hurt my Momma.[3] The State objected to Petitioner's counsel eliciting this testimony from officers and first responders on the grounds of hearsay. **(App. pp. 42-43).**

Counsel for the parties had a length colloquy with the trial court on this issue, lasting 22 pages of the transcript and record on appeal. **(App. pp. 42-64).** Initially, the trial court was concerned about the competency of the oldest child, stating that "I think you would have to determine although I realize 803 availability of a witness is immaterial but you have to determine the competency of the individual that made the statement." **(App. pp. 46-48).** The State adopted this argument, arguing that an additional element of competency should be added to the court's review of an exception to hearsay. **(App. pp. 46-47).** Ultimately, the trial court reserved judgment and took the matter under advisement overnight. **(App. pp. 52-53).**

The following morning of trial, the court made its ruling on the State's motion *in limine*. **(App. pp. 60-64).** The trial court indicated that it had read the case law submitted by counsel and no longer believed that there must be a finding of competency of the oldest child prior to the admittance of his statements. **(App. p. 62).** The court denied the State's motion and correctly ruled that, subject to the parties laying the proper testimonial foundation for the exception to the rule against hearsay, the child's statements were admissible. **(App. pp. 63-64).** Inexplicably however, during the cross examination at trial of one of the officers to whom these statements were made, the trial court reversed its ruling without explanation and sustained the State's renewed objection to the oldest child's statements coming into evidence. **(App. p. 287).**

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[3] Rashad Johnson was neither arrested to nor charged with Victim's murder.

This ruling occurred during the following colloquy between the officer and Petitioner's trial counsel:

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 there [sic] mind 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?

[SOLICITOR]: Objection.

[COUNSEL FOR PETITIONER]: I didn't ask what.

THE COURT: I will sustain the objection. You may ask your next question.

[COUNSEL FOR PETITIONER]: Thank you, Your Honor.

(App. pp. 286-87).

After briefing and oral argument the Court of Appeals entered an unpublished opinion on May 11, 2016, sustaining the verdict against Petitioner. **(App. p. 5).** The

Court of Appeals found that Petitioner's argument based on the trial court's exclusion of the oldest child's hearsay statements to first responders was unpreserved for appellate review.[4] The case law and explanatory parentheticals cited in the unpublished 220 Opinion suggest that the Court of Appeals determined that Petitioner's trial counsel did not adequately proffer the oldest child's statements, or explain the content thereof, during the trial, notwithstanding the lengthy *in limine* hearing presenting the statements and the trial court's clear and unequivocal ruling on the issue. Petitioner filed a Petition for Rehearing, which was denied on August 22, 2016. **(App. p. 8).**

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER THE PROFFER OF TESTIMONY MADE DURING A PRE-TRIAL MOTION *IN LIMINE* HEARING, ERRONEOUSLY FINDING THAT THE ARGUMENT WAS UNPRESERVED FOR APPELLATE REVIEW DESPITE THE RECORD'S REFLECTION THAT THE TESTIMONY WAS FULLY PRESENTED *IN LIMINE* AND THEREAFTER PROFFERED AND EXCLUDED BY EXPRESS RULING ON THE RECORD DURING THE TRIAL.

a. The Court of Appeals conflated the general rule regarding the renewal and sufficiency of an objection following a motion *in limine* hearing with the adequacy of a proffer of testimony.

In finding Petitioner's arguments regarding the trial court's erroneous exclusion of certain hearsay statements at trial was unpreserved for appellate review, the Court of Appeals misapprehended and misconstrued the issue of the adequacy of a proffer of testimony, instead substituting the standard for the adequacy of a renewed objection to testimony in its place. This misapprehension caused the Court of Appeals to misapply the preservation standards to a situation and context where preservation has no

[4] The Court of Appeals also summarily rejected Petitioner's directed verdict argument.

application. In doing so, the Court of Appeals overlooked Petitioner's proffer of the disputed hearsay statements, the State's indisputable objection to those statements, and, most importantly, the trial court's explicit ruling that improperly excluded those statements. **(App. pp. 286-87).** With a clear and unmistakable ruling on the admissibility of the testimony in question, Petitioner's challenge to the trial court's exclusion of the testimony is preserved and the Court of Appeals' holding regarding preservation was incorrect as a matter of law and constitutes a solution begging for a problem that does not exist.

As described above, this issue was first raised to the trial court through the State's motion *in limine*, which sought to exclude the recounting of these statements through the testimony of the officers and first responders to whom these statements were made. **(App. pp. 42-64).** During this pre-trial discussion, the statements—and the circumstances in which they were made—were described in explicit detail. *Id.* After explaining the content and the context of the statements, the State objected to Petitioner's counsel eliciting this testimony from officers and first responders on the grounds of hearsay. **(App. pp. 42-43).** Ultimately, the trial court denied the State's motion and correctly ruled that the child's statements were admissible.[5] **(App. pp. 63-64).**

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[5] It is worth noting here that the situation posed by this hearsay statement is somewhat atypical. In most criminal trials, the State is the proponent of incriminating hearsay statements that implicate the Defendant. In those cases, the Defendant is the party moving *in limine* to exclude the admittance of the hearsay statements. Further, more often than not, the objections to the statements by the Defendant are overruled by the trial court, which preliminarily allows the hearsay statements to be introduced later at trial. In those circumstances, in order to preserve the Defendant's objection to the admittance of the hearsay statements, our appellate court case law has consistently held that the Defendant must lodge a contemporaneous and adequate objection to the statements when they are proffered during the trial and in a manner that provides a reviewing appellate court with a sufficient record to determine the basis, or ground, for

Thereafter, one of the officers to whom the oldest child made these statements was called as a witness, and as demonstrated in the above-cited colloquy, counsel for Petitioner attempted to solicit the child's statements (which the trial court had already fully considered *in limine* and determined were admissible). **(App. pp. 286-87).** The State renewed its objection, as it must in order for its objection to be preserved, and the trial court—without explanation—reversed its prior ruling and excluded the statements. *Id.* On this record, it cannot be fairly said that any further explanation of the content of the oldest child's statements was required to apprise the trial court, and now this Court on appeal, about the statements. *See, e.g., Jamison v. Ford Motor Co.*, 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) (in finding that an argument as to excluded testimony was adequately proffered and preserved by reference to the discussion about that testimony that occurred during the *in limine* hearing, this Court held that "[i]t is well settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been ... [h]owever, **this 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.**") (emphasis added) (internal citations omitted).[6] The State was on notice as to the content of the statements, having presented

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the objection. Typically the trial court does not reverse the decision it reached *in limine* without any explanation on the record. This case is different. While not an anomaly, it is somewhat unique in the context of criminal law. Here, as the moving party, it was incumbent upon the State to renew its objection to the hearsay statements with adequate sufficiency, which it did. Because these typical roles were reversed, the Court of Appeals appears to have confused the principles requiring application.

[6] *See also State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) ("Moreover, 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

the statements itself during its objection *in limine*. And the trial court was clearly not laboring under any misapprehension as to the content of the statements, having overseen an in-depth discussion *in limine* and then taking this specific issue under advisement—*overnight*—to consider case law precedent about the statements' admission.

By holding that Petitioner's trial proffer of the hearsay statements was inadequate, the Court of Appeals reached one of two conclusions regarding the detailed discussion and proffer of the statements at the *in limine* stage: either (1) it ignored that discussion altogether, or (2) it determined that it was unable to refer to the *in limine* discussions in determining whether testimony had been adequately proffered and was preserved for appellate review. Either alternative is incorrect and a misapplication of rules regarding preservation. In doing so, it appears the Court of Appeals conflated the rule regarding renewal and adequacy of an objection following a motion *in limine* hearing, with the adequacy of a proffer of testimony that was presented during that same *in limine* hearing. That misapprehension and subsequent conflation of the two concepts amounts to an error of law. The Court of Appeals' opinion appears to be alone in holding that an appellate court may not take into consideration the discussion of an issue during the *in limine* stage in its determination of the adequacy of a subsequent proffer. The reason there are no reported cases reaching that conclusion is that it is an incorrect statement of the law according to the contrary holdings of *Jamison* and *Santiago*, *supra*.

Indeed, the Court of Appeals' application of error preservation principles to this situation begs the following questions: if the State was unaware of the content of the

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alleged in the exclusion of testimony **unless the record on appeal shows fairly what the excluded testimony would have been**.") (emphasis added).

statements that Petitioner's counsel was attempting to elicit from the Officer, **what was the basis for the State's objection**? No foundation for the objection was laid and no explanation was provided by the solicitor, because it is patently obvious from the transcript which statements were being elicited. And the logical follow-up question would, of course, be: if the trial court was unaware of the content of the statements that Petitioner's counsel was attempting to elicit, **on what basis did the trial court sustain the State's objection** (which likewise had no accompanying explanation)? The only logical response to both of these questions necessarily implies the adequacy of the proffer of the testimony which the Court of Appeals incorrectly criticizes in finding it unpreserved for appellate review.

b. The case law cited by the Court is inapposite to the facts and procedural occurrences of this case, demonstrating a misapprehension by the Court of the arguments advanced by Petitioner.

The Court of Appeals' mistaken application of the preservation rules to this case is further demonstrated by the three primary cases cited in the unpublished opinion to support its conclusion. For example, the Court of Appeals cites *State v. Howard*, 384 S.C. 212, 219, 682 S.E.2d 42, 46 (Ct. App. 2009) for the proposition that the "finding an exclusion of evidence issue unpreserved where the State objected to testimony, the trial court sustained the objection and asked the jurors to disregard the testimony, and the appellant made no objections or arguments regarding the trial court's instruction to the jury to disregard the testimony." But the facts and holdings of *Howard* bear no correlation to the facts presented in this case.

Here, Petitioner was the proponent of the oldest child's statements to first responders, and while the trial court sustained the State's renewed objection to

admittance of the statements during the trial, the statements were never presented to the jury and therefore no instruction to the jury was required, much less made. The implication of the opinion's citation to *Howard* is that Petitioner was somehow required to "object" to the Court's ruling which sustained the State's objection to the proffered testimony. But such analysis is fundamentally flawed. Simply put, the concept of "objecting" to testimony has zero relevancy to the position advanced by Petitioner, as no corrective instruction was provided. Certainly Petitioner, as the proponent of evidence, does not have an obligation to "object" to the trial court's ruling on the State's initial objection; the trial court's ruling constitutes a holding that should have preserved Petitioner's argument on appeal. Consequently, the Court of Appeals' citation to *Howard*, as well as the explanatory parenthetical, demonstrates a clear misapprehension of the rules of preservation in this context.

Similarly, the opinion's citation to *State v. Stokes*, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000) is inapt. In *Stokes*, the Defendant sought to present impeachment evidence of a testifying expert.[7] The trial court excluded the evidence at the *in limine* stage, and this Court found the appellant's argument on appeal unpreserved because he had not raised the issue again at any time during the trial. *Id.* The Court of Appeals' citation to *Stokes* for this proposition overlooks three crucial occurrences in this case subsequent to the *in limine* stage which unmistakably distinguish the result. Unlike *Stokes*, Petitioner's counsel proffered the oldest child's hearsay statements during the trial through the cross examination of Officer Ken Taylor. **(App. pp. 286-87).** This point

[7] The opinion is not clear on this point, but it can be presumed that the State moved to exclude this impeachment evidence; otherwise, it would not have been raised at the *in limine* stage of the trial.

alone renders citation to *Stokes* inapposite. But even more surprising is the Court of Appeals' complete disregard of the State's renewed objection to the admittance of the hearsay statements, and the trial court's ruling that the statements could not come in. *Id.* ("Solicitor: Objection. ... Trial Court: I will sustain the objection. You may ask your next question."). The Court of Appeals' holding that, notwithstanding the subsequent proffer, objection by the State, and ruling by the Court, the hearsay statements are unpreserved for appellate review, does nothing short of stand the concept of error preservation on its head. For these reasons, the opinion's citation to *Stokes*, as well as the explanatory parenthetical, demonstrate a further misapprehension of the arguments by the Court of Appeals.

Likewise, the opinion's citation to *State v. Simmons*, 360 S.C. 33, 45-46, 599 S.E.2d 448, 454 (2004), also misses the mark and is easily distinguishable. In *Simmons*, this Court found the appellant's due process argument regarding certain excluded impact testimony was unpreserved. *Id.* The Supreme Court first noted that the due process issue was never raised at trial, but then also held that, because there was no proffer of the impact testimony made during the trial, there was no evidence on the record from which the Supreme Court could determine the content of the excluded testimony. *Id.*

But, as discussed above, the circumstances in *Simmons* are vastly different than the situation presented in this case. Upon the motion *in limine* of the State, the parties discussed—at length—both the content of the oldest child's statements and the context in which they were given. The record is clear and unambiguous on this point. Yet, the import of the opinion's holding on preservation grounds is that Petitioner was required to re-lay the entire foundation of the hearsay statements during the trial. Short of a request

by the trial court that such an exposition take place again outside of the presence of the jury, no mechanism was available to trial counsel to do so. However no such request was made by the trial court and, as described above, the only reasonable inference to be drawn from the colloquy at trial is that the trial court was fully apprised of the impending testimony.

Instead, this Court has previously observed that "it may be good practice for [appellate courts] to reach the merits of an issue when error preservation is doubtful." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012). "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part). Moreover, the rules of appellate procedure should not be interpreted to create a trap for the unwary. *Clark v. Aiken Cty. Gov't*, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005) (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004)). The Court of Appeals did not abide by the guiding principles, but Petitioner respectfully requests this Court to remain faithful to these consistent themes and holdings in reviewing the preservation issue presented herein.

c. <u>This Court should grant a writ of certiorari in order to clarify the application of issue preservation in the context of a question of significant importance to South Carolina appellate courts and practitioners.</u>

In accordance with Rule 242, SCACR, this Court may, in its discretion, grant a writ of certiorari to address "special and important reasons." The rules of issue preservation serve as the foundation for appellate jurisdiction in this State. The issue presented by the Court of Appeals' misapplication of these rules of preservation,

although contained in an unpublished opinion, is no less troubling or significant, because, in addition to the fact that it reaches an incorrect result and negatively impacts Petitioner's defense, it also signifies a fundamental misapprehension of preservation concepts that could impact other, published case law going forward. This case does not present a judgment call where reasonable minds would disagree as to whether Petitioner's hearsay argument is raised to and ruled upon below. Instead, the Court of Appeals' opinion represents a fundamental misapprehension of the impact of *in limine* testimony, which potentially has wide-reaching implications. Moreover, the Court of Appeals' holding in this case signals a departure from the Court of Appeals' previous established precedent of, *inter alia*, *Jamison* and *Santiago*, *supra*, which therefore necessitates review by this Court. The issue of whether an appellate court may look to the record developed *in limine* for the purposes of establishing the adequacy of a proffer impacts civil and criminal cases alike, and it is imperative not only to Petitioner, but to all courts and practitioners, that courts in this State apply this rule consistently and justly. Petitioner therefore respectfully requests this Court to once again clarify the rule of law on this issue of preservation.

II. THE COURT OF APPEALS' INCORRECT APPLICATION OF ISSUE PRESERVATION PRINCIPLES VIOLATES RULE 18 OF THE SOUTH CAROLINA RULES OF CRIMINAL PROCEDURE AND IMPOSES AN IMPOSSIBLE STANDARD ON PRACTITIONERS.

In addition to misapplying the preservation standard in this context, the Court of Appeals' opinion is also directly contradicted by the oft-forgotten Rule 18 of the South Carolina Rules of Criminal Procedure (SCRCrimP), which provides in pertinent part that:

> (a) Argument After Ruling. Counsel **shall not attempt to further argue** any matter after he has been heard **and the ruling of the court has been pronounced**.

(b) Argument on Objection. **No argument shall be made on objections to admissibility of evidence** or conduct of trial **unless specifically requested by the court**.

(Emphasis added).

Each of the above-recited provisions of Rule 18, SCRCrimP expressly forbid making the very arguments that the Court of Appeals implicitly criticizes trial counsel for not making, in finding the hearsay argument unpreserved. For point of reference, at the end of the colloquy between the Officer and Petitioner's counsel in which the oldest child's statements were raised and excluded by the trial court, the record contains following exchange between counsel and the trial court:

[SOLICITOR]:	Objection.
[COUNSEL FOR PETITIONER]:	I didn't ask what.
THE COURT:	I will sustain the objection. You may ask your next question.
[COUNSEL FOR PETITIONER]:	Thank you, Your Honor.

(App. pp. 286-87).

Of course, this colloquy must be placed in the context of the motion *in limine* argument prior to trial. **(App. pp. 42-64).** During that hearing, it is undeniable on this record that both the content of the child's statements, as well as the context in which they were made, was fully explored, discussed and debated. Therefore, it is indisputable that the trial court and the parties were fully apprised on the statements that Petitioner's counsel attempted to elicit in the colloquy (included in its entirety, above).

Critically, as it pertains to the express prohibitions of Rule 18(a) and (b), SCRCrimP, once the trial court sustained the State's objection, Petitioner's counsel was not permitted to argue the point any further. Notwithstanding, the clear ruling of the trial

court and Rule 18's restriction on further inquiry, the Court of Appeals' opinion and preservation holding would impose an impossible requirement to achieve by conscientious trial counsel.[8] Contrary to the trial court's unequivocal direction to "ask your next question," the Court of Appeals would require counsel to both further argue its position (after the trial court had already ruled), as well as argue its position on an objection to the admissibility of evidence without a specific request of the trial court and over a specific direction to the contrary. Respectfully, that is an untenable position in which to put practitioners. Because the Court of Appeals overlooked the application of Rule 18, SCRCrimP in its analysis of the adequacy of Petitioner's proffer of the hearsay statements, this Court should for this further reason grant Petitioner's writ of certiorari and either address the hearsay issue itself in the first instance, or remand the case to the Court of Appeals with direction that it do so.

III. THE COURT OF APPEALS ERRED IN FAILING TO ADEQUATELY CONSIDER THE DIRECTED VERDICT ISSUE IN THIS CASE IN LIGHT OF RECENT OPINIONS OF THIS COURT, NOTWITHSTANDING THE FACT THAT THE EVIDENCE AND TESTIMONY IN THIS CASE MERELY RAISED A SUSPICION, BUT FAILED TO MEET THE ELEMENTS OF THE CHARGED CRIME.

In recent opinions of this Court, the Court of Appeals has been criticized for its application of the standard of review to challenges to a trial court's failure to direct a verdict in criminal cases. *See, e.g., State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) and *State v. Pearson*, 415 S.C. 463, 783 S.E.2d 802 (2016). The genesis for

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[8] *See also State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (recognizing the well-settled rule that "[s]o long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again") (international quotations omitted); *State v. Liberte*, 336 S.C. 648, 652 n.1, 521 S.E.2d 744, 746 n.1 (Ct. App. 1999) (holding that once a trial judge has overruled an objection, there is no need to renew objections to preserve the issue for appeal).

these issues is likely this Court's opinion in *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408-09 (2013), which interpreted the standard under which a trial court should evaluate a defendant's motion for directed verdict under Rule 19, SCRCrP. The standard set forth by the Supreme Court dictates that where the State has failed to present any direct evidence or insufficient circumstantial evidence reasonably tending to prove the guilt of the accused, a verdict of not guilty should be directed in favor of the accused. *Hepburn*, 406 S.C. at 429, 753 S.E.2d at 409 (citing *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004); *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

However, the effect of this Court's recent reversals of the Court of Appeals on this issue is that the pendulum of analysis has swung in the opposite direction, leaving the Court of Appeals unwilling to engage on the issue or conduct any meaningful analysis. Simply put, the Court of Appeals has misapprehended recent Supreme Court case law on directed verdicts to imply that its review of the denial of a directed verdict motion should result in mere cursory review and a rubber stamp affirm. This is a particularly harsh result for Petitioner, as the State presented no direct evidence and the circumstantial evidence presented did not come close to rising to the level of being substantial and reasonably tending to prove his guilt. The Court of Appeals did not disagree that the State failed to produce any direct evidence of his involvement in Victim's murder, *see* 2016-UP-206 at 1-2, yet its reluctance to engage on the issue overlooks the shear dearth of evidence presented by the State. That error was compounded by the fact that the principal circumstantial evidence relied upon by the State was a hearsay comment itself,

admitted against Petitioner as an admission by a party-opponent.[9] Here, the circumstantial evidence presented by the State did nothing more than raise a mere suspicion of Petitioner's involvement in Victim's murder, which is insufficient under the established case law of this state. *See, e.g., State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) ("Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty.") (citing *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000)).

A more fulsome explanation of the State's circumstantial evidence, and its failure to rise to the level of being substantial, is included in Petitioner's brief to the Court of Appeals, enclosed in the Appendix to this Court at **App. pp. 734-74.** Briefly, however, the Lancaster Sherriff's Office developed leads in this case based on the evidence collected at the scene of Victim's murder. Ultimately, the investigation centered upon three individuals, Petitioner, co-defendant Green, and a third individual, Wayne Blakeney, all three of whom were charged with Victim's murder. **(App. pp. 41; 57).** The linchpin of the State's case was the testimony of Blakeney, who provided a statement to police and ultimately testified against Petitioner and Green at trial.[10] **(App. pp. 430-83).**

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[9] Which makes the Court of Appeals' ruling on the preservation of Petitioner's legitimate hearsay argument—which was decided contrary to this Court's precedent—even more egregious.

[10] Blakeney was also charged with Victim's murder, initially. **(App. p. 431).** However, the State consented to Blakeney being bonded out of jail and he provided incriminating testimony against Appellant and Green during the trial. **(App. pp. 430-83).** Although Blakeney testified that he had received neither a deal nor promise of one in exchange for his testimony, the Court may take judicial notice of the fact that, following his testimony in this trial, Blakeney's murder charged was reduced to Accessory After the Fact under the Youthful Offender Act. See http://publicindex.sccourts.org/lancaster/publicindex/ (Under search "Blakeney Jr, Wayne

On the night of the murder, Blakeney testified that he took Petitioner, Green, and another individual (who was neither arrested nor charged with Victim's murder),[11] to the mobile home community in which Petitioner lived in order get some money.[12] Blakeney testified that he stayed in the car, while Petitioner, Green, and the third individual exited the car and "disappeared" amongst the mobile homes. **(App. p. 448).** Blakeney said that he did not know, and could not see, where the three went, if anywhere, or whether one or all three went to the same place. **(App. pp. 448-49).** They were gone for approximately ten (10) minutes. **App. p. 449).** During that time, Blakeney testified he saw no one, including his three passengers, heard nothing, and was unaware of their destination or purpose. **(App. pp. 449; 468-69; 478-81).**

Ten minutes after they exited the vehicle, the three returned. **(App. pp. 449; 480).** The four left the mobile home community and returned to a bar. **(App. p. 450).** Later that evening, Blakeney drove Petitioner back to his Grandmother's mobile home. **(App. pp. 452-54).** During this car ride, Blakeney testified that Petitioner told him that

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Anthony); see also Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("[A]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable."); *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984); *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) ("A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records."). Blakeney pled guilty to this reduced charge, and was sentenced to six years, suspended for time served and eighteen (18) months' probation.

[11] In fact, although Blakeney testified that the third individual was present at the scene that night, during the sentencing phase of the trial, it was represented on the record that the third individual, Delrico McDow, was on probation at the time of Victim's murder and was wearing a GPS tracking device which, when checked by the police, revealed that McDow was nowhere near the scene of the crime on that evening. **(App. pp. 690-91).**

[12] The evidence demonstrated the Petitioner lived in the mobile home next door to the Victim, with his Grandmother. **(App. pp. 446; 483; 590).**

"I killed that bitch," although he did not elaborate and Blakeney had no idea to whom he was referring. **(App. pp. 454-55).** Investigators recovered little physical evidence at the mobile home of Victim. Swabs were taken of entry door handles, but nothing matched Petitioner. **(App. pp. 207; 216-17; 220-22).** Additionally, although the master bedroom of the mobile home appeared to have been ransacked, nothing was ever identified by police as having been stolen, and no fingerprints or "touch" DNA were recovered from the home. **(App. pp. 199-202).** An autopsy of Victim recovered the bullet that caused her death, and a bullet casing was recovered from the mobile home. **(App. pp. 247-49; 419-20).** However, a SLED ballistic expert testing of both the bullet and the casing was inconclusive; neither item revealed a link to Petitioner, and the expert could not even definitively state, with any degree of scientific certainty, that the recovered bullet came out of the recovered casing. **(App. p. 420).** Moreover, despite Blakeney's apparent cooperation, the murder weapon was never recovered. **(App. pp. 483-84).**

Petitioner moved for a directed verdict at the close of the State's case-in-chief. **(App. pp. 532).** Additionally, Petitioner renewed his motion prior to closing statements, **(App. p. 554)**, as well as in a post-trial motion for a new trial. **(App. pp. 680-81).** None of the evidence put forward by the State qualified as direct evidence, and the circumstantial evidence presented failed to rise to the level of substantial circumstantial evidence. The inadequacy of the State's evidence is demonstrated by pointing out what the State failed to show in this case:

- The State produced no evidence that Petitioner was present inside Victim's mobile home.
    - DNA swabs from the underside of the mobile home's storm door did not contain Petitioner's DNA. **(App. pp. 373-76; 714-28).**

- DNA swabs from the main door knob of the mobile home do not indicate the presence of Petitioner's DNA. **(App. pp. 373-76).**
- Blakeney testified he has no idea where Petitioner went upon exiting the vehicle, and did not see Petitioner, Green, or McDow enter or even approach Victim's mobile home.
  - By contrast, testimony demonstrated that Petitioner lived in that same mobile home community with his Grandmother. **(App. pp. 446; 483; 590).**

- The bullet casing did not contain the DNA of the Victim, and no one else, including Petitioner. **(App. pp. 371; 714-28).**
- No murder weapon was ever retrieved. **(App. pp. 483-84).**
- None of the DNA samples collected from the vehicle driven by Blakeney on the night of the murder could be connected to Petitioner (or anyone else in this case). **(App. pp. 362-93; 714-28).**
- Blakeney's testimony of Petitioner's alleged statement that "I killed that bitch" is purely circumstantial hearsay and proves nothing.
  - Blakeney testified that Petitioner did not identify Victim when he made his statement and he did not know to whom Petitioner was referring. **(App. p. 455).** This makes Petitioner's alleged statement, even if believed, merely circumstantial evidence.[13]
- Testimony placed Petitioner at the bar on the night of the murder.

None of the "evidence" presented by the State in this case places Petitioner in Victim's mobile home with a motive to commit murder. The State's case below was built around the self-serving testimony of Blakeney, who was also charged with Victim's murder and stood to gain (and did subsequently gain) significant favor by

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[13] *Compare State v. Phillips*, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014) (wherein the Court found testimony about the appellant's statements to be direct evidence, where the statement identified "the child" in question and thus required no further fact or inference). The Court of Appeals in *Phillips* found the identification of the child in the statement conclusive, as it could not have referred to anyone else. Petitioner's alleged statement here, while unquestionably callous, requires additional information in order to determine the subject, as confirmed by Blakeney. This conclusively restricts the alleged statement from qualifying as direct evidence and instead renders it merely circumstantial in nature.

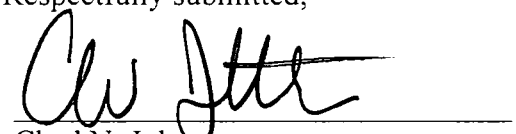
providing incriminating testimony about Petitioner and Green. However, while Blakeney testified regarding his supposed first-hand, actual knowledge, which would ordinarily qualify as direct evidence, Blakeney's testimony did not establish any precise fact that impacts an element of the murder charge against Petitioner. *See State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013) ("Direct evidence is based on personal knowledge or observation and ..., if true, proves a fact ***without inference or presumption***.") (emphasis added); *see also State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955) ("It is not sufficient that they create a probability, though a strong one....."). Indeed, Blakeney was witness to no crime. Taken as a whole, the State's evidence did not rise to the level of substantial circumstantial evidence required to overcome Petitioner's motion for a directed verdict. Moreover, cases cited by the Court of Appeals in its unpublished opinion are easily distinguishable from the facts of this case, where no evidence presented by the State placed Petitioner in Victim's home with a motive to commit murder, and the State relied exclusively on the self-serving testimony of a co-defendant.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully asks this Court to grant this writ of certiorari and review the Court of Appeals' decision affirming his conviction.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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Columbia, South Carolina
September 21, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY
R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2014-000594

The State, ...Respondent,

v.

Devatee Tymar Clinton,.....Petitioner.

Certificate of Service

This is to certify that I, a legal assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of a **Petition for Writ of Certiorari of Appellant Devatee Clinton** to the following:

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Columbia, South Carolina
This 21st day of September, 2016