THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Opinion No. 2018-UP-031

Appellant Case No. 2018-000737

The State, Respondent,

v.

Arthur William Macon, Petitioner.

AMENDED PETITION FOR A WRIT OF CERTIORARI

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
Attorneys for Petitioner

Other counsel of Record:

Alan M. Wilson
J Benjamin Aplin
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-2508

Daniel E Johnson
Solicitor, Fifth Judicial Circuit
PO Box 192
Columbia, SC 29202
(803) 748-4785

Attorneys for Respondent

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Certificate of Counsel

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 22, 2018.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Woodberry's testimony was not improper character evidence and did not constitute bolstering.

2. Did the Court of Appeals err in holding that Woodberry's hearsay testimony was harmless and that the Petitioner was not harmed.

3. Did the Court of Appeals err in holding that the argument that Woodberry's testimony was outside the scope a lay witness was not preserved at trial.

STATEMENT OF CASE

On July 16, 2014, the Petitioner, Arthur William Macon, was indicted for Armed Robbery under SC Code §16-11-0330 (A). The case had the Docket No. 2013-GS-40-000579. [R pp 2-3] The robbery was alleged to have occurred on August 30, 2012, at a location of the TD Bank. [R pp 2-3] The allegation in the indictment was that the Petitioner planned the robbery and conspired with Jason Colon to rob the bank. An arrest warrant was issued on September 20. 2012. [R pp 4-5] The case was tried in the General Sessions Court of Richland County on September 29 through October 3, 2014, before the Honorable Deandrea G. Benjamin. The jury returned a verdict of Guilty and on October 3, 2014, the Petitioner was sentenced to twenty-three (23) years of imprisonment with the South Carolina Department of Corrections. [R p1] The appeal to the Court of Appeals followed. The Court of Appeals issued an unpublished opinion affirming the Court of Appeals on January 17, 2018. The decision was issued upon briefs without oral argument. [App pp 1-3]. On February 16, 2018, the Petitioner filed a Motion for Rehearing. [App pp 4-9]. The Court of Appeals denied the

Request for a Rehearing on March 22, 2018. [App 10]. The Petitioner hereby files this Petition for a Writ of Certiorari to the Court of Appeals on this even date.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE RULED THAT PRIMARY PORTION OF WOODBERRY'S TESTIMONY WAS IMPROPER CHARACTER EVIDENCE AND WAS USED PRIMARILY FOR BOLSTERING THE TESTIMONY OF COLON.

In its Opinion, the Court of Appeals ruled that the testimony of Woodberry was not improper character evidence and did not constitute bolstering. [App p 2]. While the Court cited three cases to support its conclusion, the Petitioner assets the Court improperly applied the law to these facts. The Court of Appeals stated that Woodberry did not vouch for Colon as he did not state he believed Colon and did not give an indication of the veracity of Colon. In fact the entire import of Woodberry's testimony was for the purpose of vouching for Colon. [App p 2].

The only evidence which directly connects the Petitioner to this robbery is the testimony of Jason Colon. [R pp 132 L 18 - 143 L 16].[1] He stated that Arthur Macon told him to go into the bank and that Macon had given him a fake gun to demand the money. [R pp 132 L 18 - 133 L 25]. He also testified that the Petitioner had talked to him about doing this a few months before the robbery. [R p138 L 1-11]. However, on cross examination Colon testified that he went into the bank to cash a check and that he decided to rob the bank after he was inside the bank. [R pp 140 L 12 - 142 L 3]. He also testified that Mr. Macon dropped him off at the Sonic, not the bank. [R p 143 L 13-16]. Thus the evidence that Macon was involved in this robbery is minimal at best and Jason Colon confessed to the armed robbery of the bank. [R pp 138 L 19 - 139 L 10].

In order to bolster the testimony of Colon, the State presented Colon's father to testify

[1] The evidence is clear that he dropped Jason Colon off in the area. However, this is no evidence he was involved in the robbery other than Colon's testimony.

regarding the fact that Macon had manipulated Colon into the robbery and that Colon was not capable of planning and executing the robbery. The Petitioner's lawyer objected to this testimony and a proffer was made to the court. [R pp 112 L 19- 118 L 19]. In summary, the proffered testimony was that while living in Brooklyn, Jason Colon had been caught in a shoot out and his brain was damaged, specifically his frontal lobe. Woodberry testified that as a result of the lobotomy, Colon became Schizophrenic[2], very passive with the mind of a 13-year-old and he was easily led by others. [R pp 115 L 4- 116 L 8]. On cross examination Woodberry admitted he had no personal knowledge of any of the events or whether Colon and the Petitioner had ever worked together. All of Woodberry's testimony was hearsay and he "only [knew] what he had been told." [R P 119 L 1-13]. The State's attorney expressly stated that Woodberry was offered by the State to testify regarding Mr Colon's medical condition, his mental capacity and his relationship to [Macon]." [R pp 118 L 25 - 119 L 3].

Petitioner's attorney objected to Woodberry's testimony on the grounds the testimony was hearsay, improper evidence of character of a witness and was not relevant. [R pp 119 L 9 - 120 L 12]. S.C.R.E. Rule 401. The State argued it was not character evidence and it was only evidence of Colon's medical condition.[3] [R pp 120 L 15 - 121 L 4]. Whether you consider the proffered testimony character evidence or evidence of a medical condition, allowing the testimony is both an error of law and an abuse of discretion which was more prejudicial than probative. *State v. Sims*,

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[2] Clearly the witness was not competent to make this diagnosis and there was no medical evidence to support this declaration. The testimony itself is incorrect and not reliable. Further, it was irrelevant as the behavior discussed about Mr. Colon was not consistent with schizophrenia. Therefore Woodberry's testimony was not factually correct and should not have been admitted.

[3] This argument by the State essentially admits that the testimony was improper hearsay which Woodberry was not qualified to give.

387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

In order to testify a witness must be competent. S.C.R.E. Rule 601. A witness is disqualified only if the witness can not express himself concerning the matter to be understood or is incapable of understanding the duty of a witness to tell the truth. *Id.* In *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606(S.C., 2009), a witness was allowed to testify about the need for a victim to have a medical exam based upon her personal observations. However, she was not allowed to give her opinion about her interview. Opinion by a lay witness is only admissible if the opinion does not require any special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). A witness is presumed to be competent, even if mentally ill (schizophrenic) and the illness would only affect the credibility of the witness. *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (S.C., 2005).

Jason Colon entered into a plea bargain and testified in the case. Thus, it can not be argued that he was not a competent witness pursuant to Rule 60. The only rational assumption is that he was qualified under Rule 601 to be a witness. Accordingly, there was no need for Woodberry's testimony as he had no personal knowledge of the facts in this case. Therefore any evidence he was allowed to give hearsay and improper opinion evidence. He testified regarding complex medical issues which he was not qualified to render an opinion upon.[4] The testimony was hearsay as the statement, if it happened at all, was made by a doctor who was not present to give an opinion or a diagnosis. S.C.R.E. 801. A review of Woodberry's testimony shows that all of it was hearsay and was inadmissible.

Direct examination by Mr. Cathcart on behalf of the State:

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[4] He testified that Colon was schizophrenic even though he had no qualifications to make such a diagnosis. Further, all competent evidence is that Colon was not schizophrenic.

Q. And where did the bullet exactly hit him?
A. In his temple in his head, frontal lobe.
Q. Okay. And when – – did the bullet stay in there?
A. No, it went in and came out the other side.
Q Through the Temple lobe?
A Yes.
Q Frontal lobe?
A Yes.
Q So he basically got a lobotomy from the bullet?
A Yes.
Q Did the doctors indicate – – well, did that change him in any way?
A Yes, it did.
Q Okay. Did it make camp in what way? How – – did he become what?
A He was diagnosed with schizophrenia. He started talking to his self. He became passive.
Q Did the doctors indicate his mind would be that of what?
A A 13 year old.
Q Okay. And he is how old now?
A He is 28.
Q And has he improved in the past couple of years?
A No. No. While he is on medication he has gotten a little better.
Q Okay. But he still has the mind of 13 year old?
A Yes, he does.

[R pp 128 L 19 - 129 L 20]. There is nothing within his testimony which is not hearsay and it all is submitted to prove of the truth of the matter -- that Jason Colon was mentally ill, was easily led and had the mind of a thirteen (13) year old. Woodberry was not competent to testify that a gunshot wound performed a lobotomy on Colon as this is a medical opinion requiring knowledge beyond that of the lay witness.

The straightforward definition of hearsay is set forth in *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

> "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible evidence "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE."

Id at 694 SE2nd at 13. Almost every word of the testimony of Ricky Woodberry is in fact hearsay as defined by the rule. He testified about a shooting he never witnessed and stated he was told medical facts about Colon's condition by a medical doctor who was not in court. If the doctor had been in court he would have testified as an expert witness. S.C.R.E. 702. No expert witness was called to testify to the underlying hearsay in Woodberry's testimony. An expert witness is allowed to assist the trier of fact to understand the evidence or to determine a fact in issue. *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003). However, a lay witness may not testify about a matter which requires special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). While a witness may testify regarding impressions drawn from an observed fact, the testimony by Woodberry was not related to any fact he observed.

In *Williams* the Supreme Court addressed this issue and stated:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. Rule 602, S.C.R.E. The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Rule 701, S.C.R.E.

Id. at 54. It was not asserted by the State that Colon was not competent to testify or that any of his supposed deficiencies would have prevented him from testifying. According to all evidence, Colon was competent to testify. His testimony is the only evidence linking Macon to the bank robbery. The jury should have been allowed to evaluate his testimony without the bolstering from Woodberry.

In this case, Woodberry's testimony was given to show that Colon was lead by Macon into committing the crime. It was implied to the jury that Colon was lead into the commission of the crime because he had received a lobotomy and was schizophrenic Woodberry's testimony clearly

was related to the character of Colon, and indirectly the character of Macon and was inadmissible pursuant to Rule 404 of the Rules of Evidence.

The courts have differentiated between a fact and an opinion by pointing out that there is a difference in the degree of concreteness. *Supra, Williams* at 469 S.E.2d 54. The court stated that:

> The terms "fact" and "opinion" denote merely a difference of degree of concreteness[321 S.C. 464] of description. *McCormick on Evidence*, § 12 (3rd Ed.1984). Some statements are not mere opinions but are impressions drawn from collected, observed facts.

In this instance it is clear that the testimony allowed was not a fact based upon personal observation but was an opinion based upon hearsay evidence provided as an opinion from an unknown doctor. It is clear Woodberry's testimony was character evidence offered to inform the jury on both the character of Colon and the Petitioner.

> The term `character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness. Generally speaking, character refers to an aspect of an individual's personality which is usually described in evidentiary law as a `propensity.' " (Citations and internal quotation omitted). ... Such evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged. Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted.

State v. Nelson, 331 S.C. 1, 6-7 501 S.E.2d 716 (S.C., 1998). *Accord, State v. Holder*, 676 S.E.2d 690, 382 S.C. 278 (S.C., 2009). The character traits involved Colon's personality, including his propensity to act as instructed by others, together with his physical injuries and supposed mental illness. The jury should have been allowed to assess the credibility of Colon's testimony without the improper bolstering by Woodberry offering his opinions about Colon's character. *State v. Brown*, 411 S.C. 332, 339, 768 S.E.2d 246, 250 (S.C. App., 2015). Thus, Woodberry's testimony had the effect of improper bolstering evidence regarding Colon's character and to convince a jury

that Colon was not capable of making his own decisions.

This case is similar to the case of *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003), where the trial court did not allow an actual expert witness to use hearsay as the basis of the opinion proffered to the trial court. The hearsay was in the form of a log which was "replete with subjective opinions and judgments and therefore is inadmissible hearsay." *Id.* at 62.

Additionally, the testimony of Woodberry was a back door attack on the credibility and character of the Petitioner. The logical implication of this testimony was that Colon was incapable of deciding to rob the bank on his own and therefore only the Petitioner could have coaxed Colon into so acting. In general, it is improper to attack the character of the Petitioner by showing he is a "bad person". While the State did not introduce any direct evidence regarding the Petitioner, the clear implication is that he was the "mastermind". As such, in addition to the other arguments set forth above, this evidence as more prejudicial than probative. *See*, *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (S.C., 1987); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (S.C., 1989) and S.C.R.E. 403. The bolstering of testimony and the attack on Petitioner's character as well as testimony regarding Colon's character is clearly shown by the State's examination of Woodberry.

Direct Examination of Woodberry by the State's attorney Mr. Cathcart:

Q Do you know Arthur Macon?
A Yes, I do.
Q Okay. How do you know him?
A He is a cousin of Jason's mother.
Q Okay. And y'all moved down here 11 years ago?
A Yes, we did.
Q How long before this incident -- well, did they hang out before this incident occurred?
A They only started hanging out like two months before the incident.
Q So y'all had been here like 11 years before hand. And so two months before this occurred, they started hanging out together?

A Yes.
Q Okay. About how much?
A Mabel twice a week, three times a week he would come by.
Q And would he ever take Jason off to?
A Yes, he would.

[R p 130 L 4-22]. Woodberry's testimony was offered to show that the Petitioner manipulated Jason Colon. The purpose of the testimony was to prove the truth of the matter asserted.

The testimony of Ricky Woodberry was hearsay, improper character evidence and was not relevant to the issues before the court. It was used to bolster the testimony of Colon. The jury received improper hearsay evidence and did not make a direct decision regarding the testimony of Colon. The opinion that he was mentally ill and had the mind of a thirteen (13) year old was not probative of any relevant fact and was in fact extremely prejudicial to the Petitioner as Colon's testimony is the only testimony linking him to the bank robbery. The evidence should not have been allowed at trial and is both an abuse of discretion by the trial court and an error of law. As such, this conviction should be reversed.

This is a classic case of bolstering as Woodberry was allowed to give his improper and unfounded opinion in order to take the assessment of Colon as a witness out of the province of the jury. *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (S.C. App., 2013). The testimony was a back door attack on Macon in order to make Colon to be a more sympathetic witness who was under the control of Macon. While Woodberry never testified directly that he believed Colon, the clear and only implication was that Colon was a simple minded, mentally ill person, who was lead astray by Macon. The instant case should be controlled by *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (S.C. App., 2012), as Woodberry's testimony "included comments on the credibility of the victim's account of the [bank robbery], the trial court erred in admitting it." Id at 397 SC at 465,

725 SE2d at 142. The entirety of Woodberry's testimony was a comment on the credibility of Colon. The State submitted the purpose of the testimony was to show how Macon used Colon. [R 294 l 18-22]. The Petitioner objected to all of this testimony on the grounds that it was improper character evidence. [R pp 291 L 25 - 296 L 11].

2. WOODBERRY'S TESTIMONY WAS IMPROPER HEARSAY AND WAS THE LINCHPIN TO THE CASE AGAINST THE PETITIONER AND THEREFORE WAS NOT HARMLESS.

In its opinion, the Court of Appeals found that at least a portion of Woodberry's testimony was inadmissible hearsay but the admission of the hearsay was not prejudicial. It relied upon *State v. Garner*, 389 S.C. 61, 697 S.E.2d 615 (S.C. App., 2010) and *State v. Motley*, 251 S.C. 568, 164 S.E.2d 569 (S.C., 1968), and ruled that if the evidence is insignificant and it was not prejudicial to allow the testimony. Additionally, it stated that the burden was on the Petitioner to show the error had prejudiced him. The Court of Appeals also cited the case of *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (S.C. 1973), which should control the result in this case. In *Bottoms*, the State used a prior inconsistent statement of a witness as substantive evidence and not simply to impeach a witness. This Court properly ruled the admission of the evidence was prejudicial evidence which could not be cured by a brief charge. It was noted that the Solicitor published a great portion of the prior statement which was "not competent as substantive evidence of the facts to which the statements relate." Id. 195 SE2d at 118. *Bottoms* should control the result of this case. The Petitioner asserts that the prejudicial effect of allowing Woodberry to testify and give evidence regarding Colon's medical condition so bolstered Colon's testimony that the effect was actual prejudice which prevented Macon from receiving a fair trial.

It is clear that Woodberry's testimony was improper character evidence. The State justified

its submission of the evidence by claiming it was evidence of Colon's medical condition. [R pp 120 L 15 - 125 L 7]. Despite the objection of the attorney for the Petitioner Woodberry was allowed to testify and give evidence regarding medical issues which required expert testimony. Woodberry was allowed to testify on matters which required particular medical knowledge and which he did not have the proper special knowledge, skill, experience or training to give competent testimony. The medical testimony was that Jason Colon was shot in the head in the temporal lobe, Colon received a lobotomy from this gun shot, and Colon was schizophrenic and passive. [R pp 128 L 19 - 129 L 20]. Under S.C.R.E. Rules 701 and 702, this testimony was improper hearsay and could only be provided by a qualified expert who could testify regarding the brain damage and resulting mental disability and mental illness. First, Woodberry had no first hand knowledge of the facts. [R pp 128 L 5 - p 303 L 22]. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). It was clear legal error for the trial court to allow this testimony. A witness can not testify about matters regarding a medical condition unless the witness is an expert who possesses the necessary scientific, technical, or other specialized knowledge that will assist the trier of fact. *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003).

Second, a witness giving opinion testimony may not do so from inadmissible hearsay. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). Clearly this was inadmissible hearsay as the basis of the testimony of Woodberry was facts he supposedly was told by an unknown doctor. [R p 129 L 2 - 20]. There was no proper foundation introduced to allow this testimony.

Third, the nature of the testimony is such that an expert must be called to testify on the issue. Woodberry testified that a doctor told him that Colon received a "lobotomy" from a bullet wound. However, there was no proper foundation laid for this testimony. A lobotomy is a medical term and

it relates directly to a medical procedure. A review of the dictionary definition shows that medical testimony is required to give this opinion. The definition of a lobotomy is "surgical severance of nerve fibers connecting the frontal lobes to the thalamus performed especially formerly for the relief of some mental disorders." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/lobotomy. It is clear Woodberry lacked the actual or medical knowledge to testify on Colon's medical condition and his testimony was inadmissible hearsay. This testimony was medical in nature and not based upon matters which are based upon his perception. *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (S.C. App., 2012); *State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (S.C. App., 2012). Woodberry was not competent to testify that Colon had received a lobotomy. Nor, was there any evidence this was Colon's actual medical condition. A lobotomy is an operation preformed by a surgeon for the purpose of the relief of certain disorders. There is no credible evidence that the nerve fibers of the frontal lobes to the thalamus where surgically severed, or that the bullet wound had that effect. Finally, the testimony is unreliable because Woodberry testified that a doctor told him the wound gave Colon schizophrenia. A lobotomy is performed to relieve certain existing mental disorders, it does not cause schizophrenia. Therefore, it is clear that this testimony was not only improper, but was highly prejudicial.

Woodberry was also not competent to testify that the bullet wound gave Colon schizophrenia and caused him to be passive. There is no evidence Colon has schizophrenia, and even if he did, there is no evidence that Colon was incapacitated to the point he was incapable of making a decision.[5]

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[5] If Colon was schizophrenic he was not competent to testify, or at least, expert testimony was necessary to show that his testimony was reliable. *State v. Douglas*, 380 S.C.

Schizophrenia is a medical term which describes a particular mental illness. A literal definition of schizophrenia is found in the dictionary. The actual definition is not in accord with the general public perception of schizophrenia. Technically, schizophrenia is "a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as delusions), perception (as hallucinations), and behavior....".Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/schizophrenia..

To know if a person suffers from the disease of schizophrenia the diagnosis must be made in accord with the *DSM -5 American Psychiatric Association* (2013). The criteria for a diagnosis of schizophrenia must be made by a competent medical doctor skilled as a psychiatrist and must comport with the stated definition:

> Schizophrenia Diagnostic Criteria 295.90
>
> A. Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated). At least one of these must be (1), (2), or (3):
>
> 1. Delusions.
> 2. Hallucinations.
> 3. Disorganized speech (e.g., frequent derailment or incoherence).
> 4. Grossly disorganized or catatonic behavior.
> 4. Negative symptoms (i.e., diminished emotional expression or avolition).

Id. The definition requires a diagnosis that two of the five conditions set forth are present. Additionally, there must be evidence that at least one of the first three conditions is also present. Those three are delusions, hallucinations or disorganized speech. There is no evidence even one of these three conditions are present, much less a required additional condition. As stated above, the

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499, 671 S.E.2d 606(S.C., 2009).

statement by Woodberry was inadmissible hearsay and clearly was irrelevant and should never have been admitted.

The prejudicial impact of this testimony is evident. The jury was presented evidence that Colon had suffered a lobotomy and suffered from schizophrenia. This allowed the jury to form opinions regarding his competency and whether or not he could be controlled by the Petitioner. Essentially, it allowed the jury to disregard Colon's direct testimony that he went in the bank to cash a check and decided on his own to rob the bank. By allowing this testimony of Woodberry, the testimony of Colon was bolstered as the jury was lead to believe he had received a lobotomy, was schizophrenic and passive. As the attorney for the Petitioner argued at trial the sole purpose of this improper testimony was to bolster the testimony of Colon. *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (S.C. App., 2015). The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003).

In order for evidence to be admitted, it must be reliable and it must be relevant. S.C.R.E. Rule 401. There is no evidence or testimony given by Woodberry which is reliable. Rather there is only an inadmissible hearsay statement by Woodberry. And, the definition of both a lobotomy and schizophrenia in the most basic meaning indicate the evidence medically was not reliable. There is no evidence which comports with the plain meaning, nor the clinical meaning of the medical conditions which are the subject of this testimony. It was error for the trial court to allow this testimony and the case law on relevance is clear on this issue. *State v. Page*, supra and *State v. Lyles* supra.

The Opinion of the Court finds that the testimony of Woodberry was hearsay, but limits the application of hearsay argument to the testimony regarding how Colon was shot. It is the argument

of the Petitioner that all Woodberry's testimony regarding any kind of medical condition, such as schizophrenia is hearsay and the allowance of that testimony was in fact prejudicial. The Petitioner objected to this testimony at trial. [R pp 292 L 8 - 299 L 12]. The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). As stated in *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013), when the evidence is highly prejudicial and is improper hearsay, the error is not harmless and the case should be reversed. The evidence was prejudicial as it was the lynchpin to the entire case of the State as it was used to show that Macon "controlled" Colon, a young man who had a lobotomy, was schizophrenic and had a lobotomy. The only reasonable conclusion after this testimony was that the Petitioner controlled Colon and therefore was guilty.

3. THE ARGUMENT THAT WOODBERRY'S TESTIMONY WAS OUTSIDE THE SCOPE OF A LAY WITNESS WAS PRESERVED AT TRIAL AND IS PROPERLY BEFORE THE COURT.

In its briefs before the Court of Appeals the Respondent argues the issues raised by the Petitioner were not preserved for review by this Court. The argument, briefly stated, is that the objection made on Page 301 of the Record was insufficient to preserve any issues for trial. [R, p 128 L 15-17]. This argument is incorrect. Macon did not concede to the admission of the evidence regarding Colon's medical condition.

First, the Petitioner made the Motion in Limine concerning Mr. Woodberry's testimony prior to the beginning of the Court and it was known that the Petitioner objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The Court ruled that

Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13 year old, but could not testify that he was easily led. The objection during the actual testimony by Petitioner's attorney was to the testimony regarding the original shooting and the Court sustained the objection. That objection was to testimony which contradicted the ruling of the Court. The Record confirms the issues were preserved for this appeal.

In fact, as set forth in Rule 17 *S.C.R.Crim.P.* once evidence has been objected to, it is no longer necessary to object:

> If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.

Further, pursuant to Rule 18 *S.C.R.Crim.P.*, it would have been improper for the Petitioner's lawyer to continue to argue these issues as they were expressly dealt with in the Motion in Limine. This is set forth within the rule.

> (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

Once a Court's ruling is settled, the Petitioner does not have to continue to object to preserve the issue. This issue was discussed at length in *State v. Humphries*, 346 S.C. 435, 551 S.E.2d 286,(S.C. App., 2001), rev. on other grounds 354 S.C. 87, 579 S.E.2d 613 (S.C., 2003), wherein the Court stated that when a trial court is clear that a ruling on a Motion in Limine is final, the opposing party need not continue to object. Once a court has made a final evidentiary ruling, there is no need to continue to object to preserve the right to appeal. *State v. Mitchell*, 330 S.C. 189, 498 S.E.2d 642

(S.C., 1998).[6] This case is one in which the Court made its ruling immediately prior to the testimony and therefore it is clear that a further objection would not only have been in violation of the Rules, but it would have been futile and no further objection was necessary. *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (S.C., 1994).

First, the Petitioner discussed the Motion in Limine concerning Mr. Woodberry's testimony prior to the beginning of the Court and it was known that the Petitioner objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The Court ruled that Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13-year old, but could not testify that he was easily led.

The testimony of Woodberry was that Colon got a lobotomy from the gunshot and was left as a schizophrenic person with the mind of at 13-year old. The testimony was based on what the doctors had told Woodberry. [R. P 302 L 2-20]. When giving his testimony, he based all his opinions on what the doctor had told him. [R p 302 L 4-10, L 11-20]. Thus all of the testimony was based on the information he received from the doctors, not his observations.

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[6] In *Mitchell* the Court discussed this issue in footnote 3 and pointed out that a Motion in Limine is not final because the Court may change its point of view. In this instance the Court's ruling directly addressed the issues and was made immediately after the proffer and prior to the testimony. There was nothing which occurred at the trial between the ruling and the testimony which required a further objection.

CONCLUSION

The Court of Appeals failed to properly apply the law regarding whether the admission of evidence is inadmissible hearsay to the facts in this case. The evidence admitted was inadmissible hearsay and was improper character evidence submitted to bolster the testimony of Colon. The record shows that the Petitioner properly objected to the improper testimony which was outside the scope of a lay witness. Further a Motion in Limine was heard and ruled upon. Therefore all issues were preserved. The Court of Appeals committed at least three errors of law and the Petitioner is entitled to a Writ of Certiorari in order that this court might address these errors of law and improper application of the facts which actually are in evidence.

Respectfully submitted, this the 3rd day of May, 2018, at Orangeburg, South Carolina.

Glenn Walters, Attorney at Law, PA
R. Bentz Kirby
Glenn Walters
Post Office Box 1346
Columbia, SC 29116

(803) 531-8844

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State,Respondent,

v.

Arthur William Macon,~~Appellant~~ Petitioner

CERTIFICATE OF SERVICE

On the 3rd day of May, 2018, the undersigned served a copy of the Appellant's Amended Petition for a Writ of Certiorari to the Court of Appeals upon counsel for the Respondent and the Court of Appeals by either hand delivery or placing a copy in the United States Mail, postage fully paid, to the following address:

J Benjamin Aplin
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

Daniel E Johnson
Solicitor, Fifth Judicial Circuit
PO Box 192
Columbia, SC 29202

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

Glenn Walters, Attorney at Law, PA

R. Bentz Kirby
Glenn Walters
Post Office Box 1346
Columbia, SC 29116
(803) 531-8844
Attorneys for Appellant