STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Hampton County
The Honorable Perry M. Buckner, III, Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals

Opinion No. 2018-UP-092 (S.C. Ct. App. filed February 21, 2018)

Dalonte Green, ... Respondent,

v.

State of South Carolina, ... Petitioner.

STATE'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner, State of South Carolina, hereby certifies that the petition for rehearing was made, and that the Court of Appeals ruled upon the petition on April 26, 2018. 2017. (Appendix p. 79.)

QUESTION PRESENTED

Whether the Court of Appeals decided an issue of relevance that was not raised or relied upon, and was rejected by, the defense for the admissibility of evidence. In so doing, the Court of Appeals misconstrued clearly established law of the Supreme Court of South Carolina.

STATEMENT OF THE CASE

In April 2013, a Hampton County Grand Jury indicted Respondent, Dalonte Green, for murder. (R. p. 182.) Green proceeded to a jury trial on May 4, 2015 before the Honorable Perry M. Buckner, III. Green was represented by Fourteenth Circuit Public Defender Robert Hughes. (R. p. 1.) Assistant Solicitor Steve Knight, of the Fourteenth Circuit Solicitor's Office, represented the State. (R. p. 1.)

The jury found Respondent guilty as charged on May 7, 2015. (R. p.174, lines 17-20.) Judge Buckner sentenced Green to thirty years' imprisonment for murder. (R. p. 179, line 23 – p. 180, line 1.)

Green appealed his convictions and sentences. (Appendix p. 1.) The Court of Appeals, in an unpublished Opinion, reversed, finding the trial court erred in refusing to allow testimony about the victim's final words on the basis of third party guilt. (Appendix p. 59.) The State filed a Petition for Rehearing. (Appendix p. 66.) The Court of Appeals denied the State's Petition on

April 26, 2018. (Appendix p. 79.) The State now files its Petition for Writ of Certiorari to review the Court of Appeals unpublished opinion.

SUMMARY OF ARGUMENT WHY CERTIORARI SHOULD BE GRANTED

The South Carolina Court of Appeals departed from established precedent by this Court when it overlooked the procedural bar concerning the relevance of the evidence offered by the defense before making a finding on admissibility pursuant to either a dying declaration or third party guilt. To reach this result, the Court of Appeals addresses the relevance argument raised on appeal, not the argument raised at trial, in violation of Supreme Court of South Carolina precedent. The Court then misconstrued the holdings of *Holmes v. South Carolina*, 547 U.S. 319 (2006) and *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), to preclude the courts from making any assessment of the evidence offered by the defense to support a third party guilt argument. This finding ignores the gatekeeping function of the trial court to make a threshold determination of the admissibility of the evidence, as mandated by *Gregory* and *Holmes,* when the defense invokes the theory of third party guilt by specifically naming a presumed third party.

Because the Court of Appeals ignored the procedural bar and misconstrued the holding of prevailing Supreme Court precedent, the State respectfully asks certiorari be granted.

STATEMENT OF FACTS

In the early morning hours of December 1, 2012, officers responded to a call of shots fired at Gray's Paradise Club in Varnville, South Carolina. (R. p. 8, lines 2-11; p. 16, line 24.) Varnville Officer Marion Chambers arrived on the scene and noticed the victim walking away from a residence on Tillman Avenue and walking into the roadway. (R. p. 17, lines 3-7.) The victim appeared to have an injury to his neck and face and was bleeding profusely. (R. p. 17, lines 19-22.) Because of the injury, the victim was unable to respond to Officer Chambers'

questions. (R. p. 17, lines 10-20.) Chambers testified at trial the victim never identified who shot him. (R. p. 18, lines 13-18.)

Varnville officer Teddy Scott also arrived on the scene and spoke to the owner of the club, then continued down Tillman Avenue approximately 500 yards where he observed Officer Chambers standing by the victim, who was sitting on the side of the officer's car. (R. p. 7, line 14 – p. 9, line 12; p. 12, lines 17-19.) Officer Scott testified the victim was bleeding from a gunshot wound to his mouth. (R. p. 11, lines 2-4.) Scott asked the victim who shot him, but the victim was mostly only able to "gurgle" his response. (R. p, 9, lines 19-24.) The victim was able to inquire about an ambulance, however. (R. p. 9, lines 23-24.) Scott was standing about twelve inches away from the victim, but he was unable to understand much of what the victim said. (R. p. 10, lines 2-25.) Scott then asked the victim if he could write the name of the shooter, but the victim was too weak to write anything, despite his attempts. (R. p. 11, line 14 – 23.) Scott said the victim could neither identify by name nor describe the person who shot him. (R. p. 12, lines 6-11.) Scott recalled Officer Chambers, Hampton Police Sargent Wells, Hampton County Sheriff Officer Michael Bridges and Hampton Police officer Troy Long were also standing near the victim, but were approximately four or five feet away. (R. p. 13, lines 2-9.)

EMS paramedic Renatta Ford responded to scene. (R. p. 20, line 25 – p. 21, line 21.) Ford testified when she first assessed the victim he had apneal (slow and labored) breathing with "a lot of blood around him." (R p. 21, line 23 – p. 22, line 1.) The victim pointed to his mouth, and Ford noticed all his teeth on the right side of his mouth were shattered. (R. p. 22, lines 8-12.) Ford testified the victim could communicate by pointing, but was unable to verbalize anything. (R. p. 22, lines 13-19.) Ford also testified the victim was agitated because he could not breathe, and the paramedics had to suction his mouth and airway to allow him to breathe. (R. p. 22, line

20 – p. 23, line 18.) Once EMS moved the victim to the ambulance and suctioned out his airway, his condition temporarily improved. (R. p. 25, lines 3-10.)

Markeisha Smith was a patron of Gray's Paradise and was celebrating her birthday that night. (R. p. 27, lines 7- 24.) Smith and a few of her friends arrived at the club between 10:00 and 11:00 pm. (R. p. 28, lines 7-10.) A friend of Smith took several pictures at the club with her IPad, and Smith later emailed those photos to law enforcement. (R. p. 29, lines 22-24; p. 33, lines 9-13; State's Exhibit 9.) Included in the photos was a picture of Green and his girlfriend, both of whom Smith identified. (R. p. 29, lines 4-13.) Green's girlfriend was a friend of Smith's younger sister, and they came to Smith's party together. (R. p. 30, line 23 – p. 31, line 4.) Smith also identified Green as wearing a plaid shirt in the photo. (R. p. 31, lines 16-17.)

Chief Tyrone Smith, of the Varnville Police Department, identified a photograph of a man wearing a plaid shirt. (R. p. 37, lines 3-18; State's Exhibit 10.) Chief Smith also testified he found the same plaid shirt ten days later in an overgrown area[1] behind an abandoned residence, approximately seventy-five feet from Gray's Paradise club. (R. p. 37, line 16 – p. 38, line 4; p. 38, lines 15-22; p. 40, lines 16-23.)

Taylor McQuire, who went to school with Green, was at the club with his cousin on December 1, 2012. (R. p. 48, lines 1-25.) McQuire parked beside the club, and he was in his car when he saw Green about fifteen or twenty feet away. McQuire asked Green for a cigarette and noticed Green was holding a gun. (R. p. 49, lines 4-24; p. 53, lines 5-6.) Although he did not see the shooting, McQuire said he drove off once he heard the gun go off. (R. p. 52, lines 7-10.)

Clarence Riley testified he also went to the club that night with Green. (R. p. 55, line 18 –

[1] Chief Smith testified the discarded plaid shirt was found in some hedge bushes near an abandoned house, and the wooded area surrounding that location contained thorns that stuck to his clothing. (R. pp. 39-40.)

p. 56, line 1.) Riley testified he gave Green a gun that night "because he asked for it." (R. p. 56, line 22 – p. 57, line 1.) When Riley gave Green the gun, he was standing by a van parked outside the club. (R. p, 62, lines 10-15; State's Exhibit 5.) After Riley gave Green the gun, he went back into the club. (R. p. 57, lines 6-9.) Riley said Green was wearing a white shirt with another plaid shirt, which Riley identified as State's Exhibit 11, around Green's shoulders. (R. p. 57, lines 10-21; State's Exhibit 11.) When Riley came out of the club minutes after the shooting, Green was only wearing the white shirt. (R. p. 58, lines 15-25.) Riley, Green, and two females left the club to go to McDonalds following the shooting. (R. p. 59, lines 1-5.) Riley said Green was out of breath in the car on the way there, as if he had been running. (R. p. 59, lines 6-14.) Green's girlfriend, who was also in the car, was picking something off his white shirt. (R. p. 59, lines 15-22.)

At some point that evening, Green returned the gun to Riley. (R. p. 60, lines 8-9.) After the group left McDonalds, Riley dropped Green and his girlfriend off at his house and went home. (R. p. 60, lines 4-7.) The next day, Riley "got rid of" the gun "because I heard that he did something with the gun that I had in my hand." (R. p. 60, lines 15-17.) Riley buried the gun in the woods near his grandmother's house. (R. p. 60, line 16 – p. 61, line 3.) Riley was later unable to locate the gun. (R. p. 66, lines 15-17.)

Tevin Rashad Platts was also in the club with Riley and Green. (R. p. 68, line 11 – p. 69, line 5.) Platts is Green's cousin and he is also a cousin of the victim. (R. p. 69, lines 12-17.) As Platts left the club, he saw Green and Riley outside in the parking lot. (R. p. 69, lines 20-23.)

Dr. Lee Marie Tormos, the State's pathologist, testified the victim sustained two gunshot wounds, one to the right arm above the elbow and the other to the face. (R. p. 85, line 6 – p. 86, line 18.) The bullet that struck the victim's face entered the lower right lip, fractured the victim's

teeth, traveled across the tongue, and then lodged into the back of his throat, lacerating his jugular vein. (R. p. 85, line 9 – p. 86, line 2.) Dr. Tormos said she found soot in the wound to the face and particles consistent with soot on the tongue. (R. p. 88, lines 6-14.) Based on these findings, Dr. Tormos opined the muzzle of the gun was very close to the victim's face when it was fired. (R. p. 88, lines 14-16.)

Dr. Tormos further testified the severance of the jugular vein could cause a person to bleed to death for a period of several minutes to even an hour. Although she would not be surprised to know the victim walked 500 yards after being shot, Dr. Tormos did testify she would be surprised if the victim was able to talk to anyone, considering the wounds to his tongue and mandible. (R. p. 89, lines 5-25.) Dr. Tormos said, "... if he talked, then he could very well have uttered sound, but he might not have been easy to understand because of the trauma to the tongue and to the lip." (R. p. 89, line 24 – p. 90, line 2.)

SLED analyst Agent Jennifer Stone found particles of gunshot residue on the right sleeve of the plaid shirt recovered by law enforcement. (R. p. 91, lines 9-25; p. 97, line 19 – p. 98, line 1.) Agent Stone also found gunshot residue and particles consistent with residue[2] on the shirt's right chest, left chest, and left sleeve. (R. p. 98, lines 1-9.) In her opinion, the plaid shirt was close to a weapon when it discharged. (R. p. 98, lines 10-12.)

Dontae Collins gave a statement to Police Chief Smith on December 8, 2012, in which he told Chief Smith he saw Green with a gun, crouched down by a van. Collins heard the gun shot go off, saying no one else in the parking lot could have shot the victim. (State's Exhibit 12.) Collins later recanted his statement at trial. (R. p. 116, line 8-14.) Similarly, Joseph Smoaks gave

[2] Agent Stone testified gunshot residue contains three elements of barium, antimony, and lead. Particles "consistent with gunshot residue" means two of the three elements are found, but not the third. (R. p. 98, lines 3-6.)

a statement to Chief Smith which he also recanted. Smoaks was an inmate at the Hampton County Detention Center at the same time as Green. Smoaks told Chief Smith on January 17, 2013, that one day in the recreation yard Green told him Riley gave him a gun and he shot the victim. (R. p. 76, line 17 – p. 77, line 7.) Smoaks recanted his statement to Chief Smith before the jury, but the solicitor played the recorded statement to the jury to refresh Smoak's recollection. (R. p. 78, line 17 – p. 79, line 24.) The recording was published but was not entered into evidence. (R. p. 2.)

How the Issue Was Presented at Trial

Following the conclusion of the State's case and after Green elected not to testify on his own behalf, the defense requested an *in camera* hearing of Johnny Wells, an officer with the Hampton Police Department. (R. p. 117, line 12; pp. 119-122; p. 122, line 9 – p. 123, line 12.) Wells testified he responded to the call about the shots fired at Gray's Paradise club, but he waited for other officers to arrive on scene so he had back up. (R. p. 123, lines 11-17.) Wells said he noticed the victim walking down the street and saying he was shot. (R. p. 124, lines 8-10.) Other officers were with the victim, as well, asking who shot him. The victim began to fall to the ground, and Wells grabbed him. (R. p. 124, lines 10-14.) Wells said the victim "was bleeding all over the place." (R. p. 124, lines 14-15.) Wells testimony continued as follows:

> Q: Did he answer the question of who killed him?
> A: Well, I do believe he said a name.
> Q: Do you recall that name?
> A: Yes, I do.
> Q: What was it?
> A: The name I heard him say at that time was Douglas.
> Q: And you were sure enough to write that time in an incident report?
> A: Yes, sir, I did.

(R. p. 125, lines 11-19.) On cross examination, the solicitor questioned Wells in more detail:

> Q: Mr. Wells, you said he was mumbling and he was spitting up blood; is that

correct?
A: I said – – yes, I did say that.
Q: So he was mumbling and spitting up blood, and who was the other officer who was there at the scene when you got there?
A: I don't know. There were several officers. The particular officer that I recall who asked him to question was Officer Teddy Scott.
Q: Teddy Scott. And when Teddy Scott asked him to question, where was Teddy Scott at in relation to where Mr. Rood was at?
A: We were all within an arm's reach of him.
Q: Arm's reach? Was Mr. Scott standing up or kneeling down?
A: He was standing at one point, and then he asked him, "Who shot you?" And he said, "Douglas," and then Teddy said, "What?" He said, "Douglas." He said, "What did you say?"
Q: Did repeat himself? "Douglas" more than once?
A: Yes, he did.
Q: Even though he is spitting out blood in mumbling?
A: Yes.
Q: Okay. Where were you at, at this time?
A: I was holding Mr. Rodd in my hand.
Q: In your hand. So you were actually, physically holding him?
A: Yes, his blood was on my hands in my body.
Q: Did he scream out, "Douglas," or just say, "Douglas," mumble. Can you describe in the mumbling tone that you previously testified to how he said Douglas?
THE COURT: Repeat the question.
ASST. SOL. KNIGHT: I would ask him to describe – – he said the victim was mumbling. I want him to describe the mumbling and the word Douglas in one sentence.
Q: How did he do that?
A: I don't know how he do that.
Q: But he was mumbling, correct?
A: He wasn't really mumbling. He answered the question. He was saying, "My mouth, my mouth." I know he said, "Douglas," and he also said, "I don't want to die." That's what I recall.

(R. p. 125, line 25 – p. 127, line 15.)

The solicitor initially objected to the testimony on the grounds there was no evidence the victim believed his death was imminent. (R. p. 127, line 22 – p. 128, line 4.) The court questioned the solicitor whether the testimony elicited evidence of third party guilt, and the solicitor agreed, further objecting to the testimony because the criteria for third party guilt had not been met. (R. p. 128, lines 7-19.) The court then turned to Green for his response. Green

appeared to recognize the problem with the testimony, and significantly, admitted he had no other information about "Douglas" or indicating this person was the guilty party:

> MR. HUGHES: Your Honor, **I cannot identify who Douglas is because of the one witness I have as to who Douglas was.**
> THE COURT: Now, don't get into something that hasn't been testified. We base it on the evidence in this case and not what you think you could have done.
> MR. HUGHES: Well, Your Honor, I have a dying declaration.
> THE COURT: You agree that I also have to evaluate not only—you agree that its hearsay?
> MR. HUGHES: It's hearsay.
> THE COURT: And you believe that it comes under 804(b)(2), which says that in prosecution for homicide, a statement made by the declarant while believing that the declarants death was imminent concerning the cause and circumstances of what declarant believe to be impending death, it falls within the exception or an exception to the hearsay rule. Is that your position?
> MR. HUGHES: That is my position.
> THE COURT: Doesn't the Court have to also evaluate the evidence under South Carolina's third party guilt evidence rule?
> MR. HUGHES: Well, Your Honor, **I'm not exactly saying that the third party did it.** I'm just wanting the jury to hear the victim's final words.

(R. p. 128, line 21 – p. 129, line 19 (emphasis added).) Petitioner submits Green's offer of admissibility as a dying declaration was merely a red herring because he knew the statement was inadmissible.

The Court's Ruling on Evidence of Third Party Guilt

The trial court anticipated the issue concerning the admissibility of Wells' testimony because, as the court noted, the judge had researched the issue in the days before the testimony. (R. p. 132, lines 14-15.) Judge Buckner clearly understood the testimony had greater implications for third party guilt than whether the statement was a dying declaration, despite Green's argument he sought to admit the testimony only for the purpose of allowing the jury to hear the victim's final words. The court viewed Green's argument for the statement as a dying declaration as merely one factor to consider, but ultimately irrelevant. Judge Buckner expressed the following concern:

THE COURT: I understand you do, but it also generates the issue of third party guilt. Since you don't know who Douglas is there's been no evidence about a Douglas at the scene. What you seek to admit, Mr. Hughes, and I certainly will allow you to call Mr. Wells as a witness since he certainly can testify to what he observed, where he was, who was with them, anything you choose to seek. The question is the question of hearing this statement of Douglas. You seek to admit hearsay evidence under 804 (b) (2), which says as I told you, the statement made by declarant while believing that declarants death was imminent concerning the cause or circumstances of what declarant believed to be impending death.

The statement can be admissible as a dying declaration as an exception to the hearsay rule. It does not make any difference, Mr. Hughes, for my research, the length of time the declarant lives after making any declaration. That is immaterial.

There's a case on that, the Hall case; it's an old one, 1926. The problem I see here is that I also have to evaluate in under third-party guilt. Evidence that is offered by you, and that's what you're doing in your case, offered by the accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with the defendant's own guilt, and as such facts as raised a reasonable inference or presumption as to his own innocence.

Evidence which can have no other effect other than to cast a bare suspicion upon another or to raise a conjectural inference as to the commission of the crime by another is not admissible under our rules for third party guilt. I've looked at a number of third party guilt cases, including the case you provided to me in a number of cases that my law clerk provided to me.

The case my law clerk provided to me was Lorenzo v. State, where the victim's father who was not the defendant, was on the sex offender registry in a criminal sexual conduct with a minor case, and it was held inadmissible under the rule that was pronounced in the Gregory case, which is the oldest case on third-party guilt in South Carolina. It's 198, South Carolina 98, 1941. They applied it in the Lorenzo case, 2008. I also looked at the Swafford case, which is 2007, evidence that another person was driving the defendant's vehicle hours before an accident resulting in death was held to be inadmissible as well. The Court, I believe, correctly applied the rule that was established in Gregory.

I believe this testimony, Mr. Hughes, the proffered testimony that is being offered by you on behalf of the accused, raises the bare suspicion of third-party guilty without any other evidence to support that conclusion.

And this Court, following the rule that was announced – – and that assumes you're correct that this is a dying declaration. But the rule announced in Gregory says that "Evidence offered by the accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with his own guilt, and as such facts as raised a reasonable inference, or presumption, as to his own innocence. Evidence which can have no other affected," in this case the word 'Douglas,' than to cast a bare suspicion upon another or to raise a conjectural inference as to the commission of the crime by another is not admissible.

There should have been for me some proof of circumstances with it. Some

> train of facts or circumstances which tend clearly to point out that such other person as the guilty party. Here, I don't have that, and for that reason, Mr. Hughes, the State's objection as to the admission of the testimony is sustained.

(R. p. 129, line 20 – p. 132, line 12.) After the court issued its lengthy and thoughtful ruling, defense counsel asked if he could argue further. (R. p. 132, line 13.) The court declined, noting the argument had been well researched, the defense had proffered its witness, and the court had listened to argument from the solicitor and the defense. (R. p. 132, lines 14-20.) The court offered to allow the defense to call the witness to testify about the victim's other dying declarations, but would not allow the any testimony of the name "Douglas." (R. p. 132, line 20-22.) The court also noted Green's objection for the record. (R. p. 132, line 23 – p. 133, line 1.) In light of the ruling, Green elected not to call any witnesses and obtain the benefit of the last closing argument. (R. p. 133, lines 15-17.)

STANDARD OF REVIEW

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The standard of review is limited to determining whether the trial court's ruling is supported by any evidence. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added). Because the trial court applied the correct prevailing law on third party guilt, despite Green's failure to argue the relevance of the testimony, there was no abuse of discretion in refusing its admission.

ARGUMENT

The procedural bar overlooked by the Court of Appeals concerns the relevance of the evidence offered by the defense, not its admissibility pursuant to either a dying declaration or third party guilt. For purposes of issue preservation, the Court of Appeals misconstrued the argument before the trial court on the basis for admission of the testimony. The trial court initially understood the testimony of Sergeant Wells was only relevant to the identity of the killer. Indeed, it is hard to imagine another basis for relevance. Nonetheless, when asked by the trial court whether the admission of the victim's statement "Douglas" shot him was in the implicated third party guilt, trial counsel rejected that argument, saying, "I'm not exactly saying that the third party did it." (R. p. 129, lines 17-19.)

Although the Court of Appeals noted this rejection of relevance in the opinion, the Court ultimately adopted the argument presented on appeal for the first time by ruling on third party guilt and refusing to conduct a harmless error analysis. The Court's opinion addresses the relevance argument raised on appeal, not the argument raised at trial, in violation of Supreme Court of South Carolina precedent. *See TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (an issue conceded in the trial court cannot be argued on appeal); *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995)(a party cannot argue one ground below and then argue another ground on appeal); *State v. Benton*, 338 S.C. 151, 156–57, 526 S.E.2d 228, 231 (2000) (finding Green could not argue a palm print was direct evidence at trial and then argue the print was circumstantial evidence on appeal).

The Court of Appeals found the statement admissible as a dying declaration, but the statement's qualification as a hearsay exception does not end the analysis of admissibility. Admissibility must be consistent with all the Rules of Evidence to ensure fairness in the

proceedings for all parties. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). Moreover, Rule 103, SCRE, provides the following:

> (a) Effect of Erroneous Ruling. **Error may not be predicated upon a ruling which** admits or **excludes evidence unless** a substantial right of the party is affected, **and**
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> (2) Offer of Proof. In case the ruling is one excluding evidence, **the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court** by offer or were apparent from the context.

(emphasis added).

The defense is obligated to present its case within the confines of these rules. Green told the trial court he was not offering Wells' testimony to show a third party shot the victim. If the defense was not offering the statement for the identity of the shooter, then there was no clear relevance offered. The opinion says "Green did not have a burden to establish Douglas' identity or the likelihood that Douglas, and not Green, was the actual shooter." (Appendix p. 64.) Green did, however, have a burden to show the relevance of his proffer of admission in accordance with Rule 103. If the defense sought to offer the statement to show the identity of the killer, as conceded on appeal (Appendix, p. 18), then Green was required to argue identity as the basis for admission to the trial court, particularly when the court questioned admissibility under Rule 403.

Green never proffered a basis for admission, and he declined to offer relevance. Further, when pressed by the Court of Appeals at oral argument, appellate counsel could not explain why trial counsel did not argue admissibility to show the identity of the killer.

Nonetheless, after suggesting the trial court's consideration of admissibility beyond a dying declaration was improper, the Court of Appeals then appeared to assume relevance and assessed the testimony pursuant to the third party guilt standard. Thus, even though the Court of Appeals misconstrued the holding in *Holmes*, as will be discussed in the following section, the Court's finding on the merits of the third party guilt argument ignored the procedural bar forbidding the merits consideration of an unpreserved claim. The statement's relevance is not preserved for review and should not have been addressed by the Court of Appeals. Accordingly, the Court of Appeals' opinion should be vacated to the extent it addressed an issue that was not preserved. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (*citing Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995)).

I. Prior to Any Admission, the Trial Court Must Subject Third Party Guilt Evidence to Some Scrutiny, As Required by *Gregory*[3] and *Holmes*.[4]

Next, the Court of Appeals misconstrued the holding of *Holmes v. South Carolina* to preclude the courts from making any assessment of the evidence offered by the defense to support a third party guilt argument, instead finding the evaluation of the evidence to be within the exclusive province of the jury. The Court found the following:

> Green did not have a burden to establish Douglas's identity or the likelihood that Douglas, and not Green, was the actual shooter. Green's right to present witnesses in his own defense was fundamental, and the jury had a right to evaluate the strength of both parties' evidence. *See Holmes,* 547 U.S. at 331 ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached

[3] *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).
[4] *Holmes v. South Carolina*, 547 U.S. 319 (2006).

> regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.").

(Appendix, p. 64.) This finding ignores the gatekeeping function of the trial court to make a threshold determination of the admissibility of the evidence, as mandated by *Gregory* and *Holmes,* when the defense invokes the theory of third party guilt by specifically naming a presumed[5] third party. Respectfully, the State submits this finding is in error.

In *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004), the Supreme Court of South Carolina evaluated the strength of the State's case against Holmes in determining whether the evidence of another perpetrator was admissible as third party guilt. The Supreme Court concluded Holmes could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." *State v. Holmes*, at 343, 605 S.E.2d at 24. The Supreme Court of the United States vacated and remanded the state court's decision, finding the state court the erroneously considered the strength of the prosecution's case in determining admissibility. *Holmes v. South Carolina*, 547 U.S. at 329. Despite the state court's error, *Holmes* confirmed the *Gregory* standard for third party guilt as the controlling standard. *Gregory* said "before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose." *Gregory*, at 104-105, 16 S.E.2d at 534-35.

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[5] Because the issue of identity was not developed, we do not necessarily know if the name "Douglas" was, in fact, a third party. "Douglas" could have been a mishearing of "Dalonte," Green's first name. In other words, this testimony could have been beneficial to the defense or the State. The victim's statement is uncertain, in light of the testimony of the injuries to his mouth, and the lack of evidence pointing to an identifiable third party named Douglas. However, the Court of Appeals erroneously assumed this was an identification of a third party.

In its opinion, the Court of Appeals noted the U.S. Supreme Court's additional warning in *Holmes* that "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes* at 331. The Court of Appeals misconstrued this holding to suggest the trial court has no role in the evaluation of the defense's proffer of third party evidence. The Court's finding Green has no burden to establish Douglas' identity is incorrect. If Green attempts to introduce evidence of a presumed third party's guilt, *Holmes* and *Gregory* make it clear he does have some burden to establish a "proof of connection" "before the testimony can be received."

Holmes did not forbid the trial court from examining the defense's third party guilt evidence. Instead, *Holmes* found the trial court erred by considering the strength of the State's case rather than determining the corroboration of the third party guilt by the defense. *Id.* at 328–29. Indeed, by affirming the *Gregory* standard, the U.S. Supreme Court **necessarily required** the trial court to make a threshold evaluation of the third party guilt evidence to determine whether "the proof of connection" exists. The Court of Appeals' holding that this evaluation is within the exclusive province of the jury misunderstood the *Holmes* finding and would otherwise mandate the admission of any evidence of third party guilt, regardless of whether it cast only a bare suspicion of third party guilt. The opinion is also inconsistent with the Court of Appeals' holding in *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007), overruled on other grounds by *State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011), in which it found the trial court properly excluded evidence of third party guilt when the witness had given an inconsistent statement to a fellow inmate naming an unknown third party as the perpetrator of the crime. The Court of Appeals cited *Holmes* and *Gregory* and said the following:

> The trial court adhered to the *Gregory* rule and applied the proper standard for admission of third-party guilt evidence—there must be such proof of connection

> with the crime, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. The evidence Rice asserted in support of introducing the third-party guilt testimony implicated Nikki at times, and Tiki at times, with no clarification as to whether they were the same individual. The record is void of facts or circumstances, other than Bryant's inconsistent statements, linking anyone other than Rice to Brennan's murder. The proffered evidence casts a mere "bare suspicion" on Nikki or Tiki and fails to connect either to the murder by way of the facts and circumstances surrounding the crime.

Rice, at 322, 652 S.E.2d at 419. In *Rice*, the Court of Appeals affirmed the trial court's ruling on its threshold determination of the admissibility of the evidence, yet its opinion in the instant case appears to abandon the *Rice* line of reasoning.

Holmes also held that though the trial court erred in denying the admissibility of the statement, the limitations on the admissibility of third party guilt as outlined in *Gregory* do not deny a defendant his right to present evidence. *Id; see also*, *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (2010); *Miller v. State*, 379 S.C. 108, 114, 665 S.E.2d 596, 599 (2008). *Holmes v. South Carolina* preserves *Gregory* as the appropriate standard for evaluating the admissibility of evidence of third-party guilt. In other words, Green's offer of third party guilt evidence is subject to scrutiny by the trial court **before** its credibility falls within "the exclusive province of the jury." (Appendix p. 64.)

To be clear, the State does not suggest it is relieved of its burden to prove the identity of the perpetrator. Nor is the defense hamstrung from offering evidence that suggests the defendant **is not** the perpetrator. For example, in a six person photo lineup, if a witness chose photograph 1 and the defendant was pictured in photograph 5, the defense would be entitled to offer evidence the witness could not identify him at the perpetrator. Similarly, if fingerprints were found at a crime scene that did not match those of the defendant, a jury would be entitled to hear such evidence offered by the defense. In the instant case, however, Green did not argue the evidence was admissible to show the victim did not identify him as the shooter. As noted before, he

argued no relevance at all. The testimony offered, however, specifically named an individual. When a presumed third party is specifically named in evidence offered by the defense,[6] the limitations of *Gregory* and *Holmes* are necessarily implicated. The Supreme Court of South Carolina and the Supreme Court of the United States have affirmed the trial court's determination of some proof of connection to a third party. The Court of Appeals' finding the statement is entitled to be submitted to the jury renders the holding in *Gregory* and *Holmes* meaningless. If the statement is not properly excluded here, when counsel denies its relevance to a third party, when would third party guilt evidence ever be excluded?

The trial court properly made a threshold determination of Green's proffer in accordance with prevailing case law. In reversing the trial court, the Court of Appeals erred.

II. There Was No Abuse of Discretion Pursuant to the *Holmes* and *Gregory* Standard.

Further, the Court of Appeals failed to show how the trial court abused its discretion when it found Green failed to argue relevance by offering sufficient "proof of connection" "or circumstances, as tends clearly to point out such other person as the guilty party" for Wells' testimony to be admissible. Again, the trial court repeatedly questioned Green on the relevance of his offer of evidence pursuant to third party guilt, and Green declined to make that offer. Green admitted he could not identify who "Douglas is because of the one witness I have as to who Douglas was." (R. p. 128, lines 21-22.) Thus, unlike in other cases in which the third party was an identifiable person, in the instant case no other evidence was offered to show the third party actually exists. Even Green acknowledged this. As the trial court found, the mere mention

[6] Using the photo lineup and fingerprint examples, a defendant could certainly offer the testimony of the officer or the witness to show the defendant was not the individual chosen by the witness. This offer would not be in violation of Rule 403. The defense would not, however, be allowed to name the party identified in the lineup and argue that person's guilt without further proof of a connection of that third party to the crime.

of a name cannot give rise to a "reasonable inference or presumption as to [Appellant's] innocence." *Gregory*, 198 S.C. 98, 16 S.E.2d at 534. The opinion fails to acknowledge and give appropriate deference to the factual findings of record. The record fully and fairly supports Judge Buckner's findings. To hold the trial court abused its discretion in refusing to admit the statement, when the record is replete with evidence supporting the trial court's efforts and failure to elicit an argument on relevance from Green, is improper.

III. Because the statement was not offered for identity, it was not relevant. Because it was irrelevant, its exclusion was harmless. The Court erred in assuming relevance and failing to conduct a proper harmless error analysis.

The Court of Appeals adopted appellate counsel's new argument on appeal that the statement is clearly relevant to the identity of the killer, despite trial counsel's apparent rejection of that argument. The Court assumed relevance despite the trial court's findings no other evidence supports the existence of a third party named Douglas. That assumption of relevance is not supported by the record because the identity of Douglas was never developed by the defense. It would be a harsh result to indemnify a murderer by construing the victim's last words as an identification of a third party, when in actuality the declaration could be an error in hearing or a mistake in name.

Further, the Court offers no explanation why the failure to admit the testimony, even if considered error, was not subject to a harmless error analysis. The opinion cites only to *State v. Hester* , 137 S.C. 145, 161, 134 S.E. 885, 890 (1926) (providing the jury is entitled to hear all competent testimony presented, and the failure to give it such opportunity is generally prejudicial error) for its conclusion Green was prejudiced by the refusal to allow Wells' testimony. The Court neglected to weigh the evidence excluded against the other evidence admitted at trial. *See State v. Byrd*, 318 S.C. 247, 250, 456 S.E.2d 922, 924 (Ct. App. 1995)("where the error may be

weighed against the other evidence properly admitted during a trial, the Court must conduct such a weighing, rather than merely reversing the decision below wholesale.") Had the Court of Appeals conducted a prejudice analysis specific to this case, the Court's erroneous conclusions on the admissibility of the statement would have been revealed.

For the failure to admit the evidence to have prejudiced Green in any way, the testimony must have been relevant pursuant to third party guilt, an argument flatly rejected by Green at trial. Arguably, Green offered a limited basis of relevance as the context of the victim's last words, but he certainly never argued the words were relevant to identity. If the testimony were only offered as a dying declaration and nothing more, as repeatedly asserted by Green, there is no prejudice in trial court's discretion to preclude the testimony. The Court's citation to *Hester* assumes the testimony is "competent" without explaining how it is competent exculpatory evidence Green was entitled to admit. The Court did not consider the statement in light of the State's case against Green. Had the Court done so, it would have reached the same conclusion as that of the trial court – no other evidence connected a third party, much less a man named Douglas, to the crime. Error is harmless when it "could not reasonably have affected the result of the trial." *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971). The admission of an assertion of one witness who believed he heard the victim say the name "Douglas," when the victim was shot in the mouth and the defendant's first name was "Dalonte" cannot be said to have reasonably affected the outcome of the trial. Taking trial counsel at his word, the statement was merely the victim's last words, not an assertion of the identity of the killer. The Court of Appeals misconstrued prevailing case law in disregarding the procedural bar to Green's unpreserved claim of relevance, assuming the relevance asserted by appellate counsel, and finding the trial court's ruling prejudicial without weighing the evidence in this case.

CONCLUSION

For all the foregoing reasons, Petitioner submits the Court of Appeals overlooked the procedural bar and ignored a critical concession made at trial about relevance that undermined the findings supporting relief. Further, the Court of Appeals then misconstrued the prevailing law on third party guilt and failed to address several crucial points raised by the parties which bear directly upon its ultimate conclusion the trial court impermissibly refused to allow the admission of Sergeant Wells' testimony, and that the error was not harmless. Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

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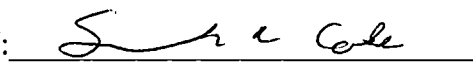
BY: 
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May 21, 2018.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Hampton County
The Honorable Perry M. Buckner, III, Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals

Opinion No. 2018-UP-092 (S.C. Ct. App. filed February 21, 2018)

S.C. Court of Appeals
Appellate Case No. 2015-001059

THE STATE,

Petitioner,

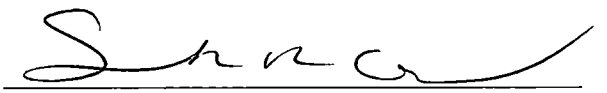
v.

DALONTE GREEN,

Respondent

CERTIFICATE OF SERVICE

I, Susannah R. Cole, hereby certify that I have served the Petition for Writ of Certiorari by State of South Carolina and the Appendix in the foregoing action by depositing copies in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, 1330 Lady Street, Ste. 401, Columbia, SC 29201 this 21st day of May, 2018.



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