THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions
The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No.: 2021-001176

The State, ...Petitioner,

vs.

Randy Collins, ...Respondent.

RESPONDENT RANDY COLLINS'S RETURN TO THE STATE'S PETITION FOR WRIT OF CERTIORARI

E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Court Appointed Lead Counsel for Respondent Randy Collins

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211
Telephone: (803) 734-1330
Facsimile: (803) 734-1345
rdudek@sccid.sc.gov

Co-counsel for Respondent Randy Collins

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COUNTER-STATEMENT OF THE CASE

On June 5, 2014, arrest warrants were issued for Respondent Randy Collins on charges of arson, first degree, and criminal conspiracy in connection with a fire that burned a mobile home near Andrews, Georgetown County, and resulted in the death of David Coombs. (App'x pp. 841-842.) The grand jury for Georgetown County issued indictments against Collins on August 20, 2014 for criminal conspiracy; arson, first degree; and murder. (App'x pp. 843-847.)

A trial was held at the Georgetown County Courthouse in Georgetown, South Carolina, from November 5, 2018 through November 9, 2018, with the Honorable Larry B. Hyman, Jr., presiding. Prior to the beginning of trial, Judge Hyman held a competency hearing pursuant to *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981). (App'x pp. 23-132.) Judge Hyman ruled that Collins was competent to stand trial. (App'x pp. 130-132.)

After ruling that Collins was competent to stand trial, Judge Hyman held a hearing to determine the voluntariness of Collins's confession under *Jackson v. Denno*, 378 U.S. 368 (1964). (App'x pp. 132-160; App'x pp. 167-296.) At the conclusion of the hearing, Judge Hyman ruled that the state had proven by a preponderance of the evidence that Collins's confession was voluntarily given. (*Id.*)

On November 9, 2018, the jury convicted Collins of criminal conspiracy in violation of S.C. Code Ann. § 16-17-410 and arson in the first degree in violation of S.C. Code Ann. § 16-11-110(A). (App'x pp. 816-817.) Judge Hyman then sentenced Collins to 30 years in prison for the arson conviction and 5 years in prison for the

conspiracy conviction to run concurrently with the arson sentence. (App'x pp. 819-823.; App'x. pp. 857-858.)

Collins timely filed a notice of appeal on November 16, 2018. (App'x p. 12.) On May 4, 2021 oral argument was held, and on September 8, 2021, the Court of Appeals issued Opinion No. 5861 reversing Collins's convictions and remanding for a new trial. (App'x pp. 933-950.)

COUNTER-STATEMENT OF THE FACTS

I. Fire.

In February 2014, Marissa Cohen obtained property insurance in the amount of $25,000 on a mobile home she rented near Andrews, South Carolina. (App'x pp. 349-353; App'x pp. 824-825.) About a month later, Cohen rented a storage unit and began moving furniture and household appliances out of the home. (App'x pp. 362-373.) To assist her in moving, Cohen enlisted the services of Benjamin "Mano" Brown. (App'x pp. 380-382; App'x pp. 387-388.) According to Brown, Cohen stated her intent to burn the home, but she did not identify anyone else involved in her plans. (*Id.*) On the same day that Cohen was moving items out of her home, she purchased kerosene from a nearby convenience store. (App'x pp. 375-379.)

Shortly after Cohen moved her furniture out of the home, a fire was reported at the home on the morning of March 29, 2014. (App'x p. 315-317; App'x pp. 826-835.) When firefighters arrived on the scene, they forcibly entered the home and found a deceased child inside. (App'x pp. 315-323.) The child turned out to be Cohen's twelve-year-old son, David Coombs, who was walking home from a birthday party that night

and apparently entered the abandoned trailer to escape the rain and fell asleep. (App'x pp. 305-308; App'x pp. 343-346; App'x p. 838, State Ex. 3)

II. Investigation.

SLED and the Georgetown County Sheriff's Office initiated an investigation into the fire and death of Coombs. The SLED investigators quickly concluded that the fire was intentionally set and investigated it as possible arson. (App'x p. 675.) The investigators received an anonymous tip that Cohen had purchased kerosene just prior to the fire, and they began investigating her connection to the fire. (App'x p. 675-676.)

The sheriff's office also interviewed Collins a couple weeks after the fire upon receiving an anonymous tip about his alleged involvement. (App'x pp. 676-677; App'x pp. 707-708.) Collins informed the investigator that he had been at a club with his nephew on the night of the fire and that he had nothing to do with it. (App'x pp. 677-678; App'x p. 836.) The investigator then drafted Collins's statement in his own handwriting. (App'x p. 677; App'x p. 707, lines 9-22; App'x p. 836.)

The investigators later obtained a search warrant for Collins's phone. (App'x p. 682.) After searching the phone, an investigator arranged for Collins to retrieve his phone at the Andrews Police Department on June 4, 2014. (App'x p. 682.) When Collins arrived to get his phone, the investigators requested that he participate in an interview. (App'x p. 683.) Collins agreed to answer their questions and they took him into a room, where they began interrogating him. (App'x p. 682.)

The investigators recorded the interrogation on a personal camcorder. (App'x p. 684; App'x p. 838, State Ex. 3, DVD 1, 1:00-1:10.) Although the investigators read Collins his *Miranda* rights prior to starting the interview (App'x pp. 148-149; App'x pp. 197-198; App'x p. 837.)[1], they later promised him that whatever he told them would not leave the room:

Q: Do you … Not digging into what we've already said. What do you think? Do you think this was, this fire was start, was it started intentionally, do you think somebody might've started that fire or do you think it was a bad accident?

A: I don't, I can't say, I ain't know nothing like about that. I can't really say about that. I can't even say. I ain't one to say the wrong thing. I don't know.

Q: Well you're not going to say the wrong thing.

A: Uh huh.

Q: Whatever you tell me it ain't going to leave this room. This tape is going into my file.

A: Yes, sir.

Q: I'm going to burn a copy for him.

A: Mmmhhmm.

Q: And we'll have a copy of this tape. It ain't going to go any further than this room. That's why we have the door shut, blinds pulled …

A: Yes, sir.

Q: … there's no sound device in here. I want you to be honest with me and tell me what you think.

[1] The investigators did not record the *Miranda* warning provided to Collins. (App'x pp. 197-198.)

(App'x p. 838, State Ex. 3, DVD 1, 21:00-21:30; App'x pp. 245-246.)[2]

Collins began by explaining that he was in physical discomfort from a prior car accident and that he had suffered a stroke about a year earlier. (App'x p. 838, State Ex. 3, DVD 1, 3:00-4:30.) He further stated that he had not eaten since the previous night and had problems getting to bed. (App'x p. 838, State Ex. 3, DVD 1, 4:30-5:30.)

When questioned about the fire at the beginning of the interrogation, Collins consistently and repeatedly denied having any involvement in the fire. (App'x p. 838, State Ex. 3, DVD 1; App'x pp. 201-202.) He explained his whereabouts on the night of the fire, which was consistent with the explanation that he had previously provided to law enforcement. (App'x p. 838, State Ex. 3, DVD 1, 8:15-12:00.)

After the questioning had continued for approximately 30 minutes, Collins stated that he didn't know that he "had to answer" questions when he came to the police station that morning and that he was not feeling well. (App'x p. 838, State Ex. 3, DVD 1, 29:00-30:00; App'x p. 207-208.) Nevertheless, the investigators continued interrogating him, claiming that they needed to get to the bottom of the truth so that they could inform members of the community that Collins was innocent. (App'x p. 838, State Ex. 3, DVD 1, 30:00-31:00.) And Collins continued to insist that he was not involved in the fire. (App'x p. 838, State Ex. 3, DVD 1, 30:00-31:30; App'x p. 201-202.)

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[2] The investigator making this statement admitted that this representation was not true. (*Id.*)

The investigators then explained to Collins their theory of the case that Cohen had obtained insurance on the mobile home with the plan to burn it and collect the insurance proceeds. (App'x p. 838, State Ex. 3, DVD 3, 15:00-23:47.) They also stated their belief that no one knew that Coombs would be in the trailer and that no one intended for him to die, but that Cohen failed to make sure that he did not go to the home before the plan to burn it was executed. (App'x p. 838, State Ex. 3, DVD 3, 15:00-23:47.)

Then, one of the investigators said that he wanted Cohen to go to jail for 34 years for her role in the fire but that he would settle for anyone. (App'x p. 838, State Ex. 3, DVD 3, 17:20-17:30.) He repeated that he "wanted" Cohen but, if Collins was not truthful in the interview, he would come back to get Collins and that Collins would likely die in prison. (App'x p. 838, State Ex. 3, DVD 3, 21:00-21:45; App'x p. 209-210.) The investigator then assured Collins: "It's not you I want; it's Marissa. I promise my right hand to God." (App'x p. 838, State Ex. 3, DVD 3, 22:10-22:20.)

The recording of the interview stopped approximately an hour and a half after the interrogation began. (App'x pp. 236-237.) According to the investigators, the battery on the camcorder died, unbeknownst to them. (App'x pp. 236-237.) As a result, the interrogation continued without being recorded. (*Id.*) Once they discovered that the camcorder was not recording, the investigators replaced the battery and resumed recording the interrogation. (*Id.*)

The video of the interrogation recommences with Collins speaking mid-sentence, confessing to his partial involvement in the fire and stating that his cousin

James started the fire. (App'x p. 838, State Ex. 3, DVD 2, 0:01-1:30.) However, he denied seeing James start the fire. (App'x p. 838, State Ex. 3, DVD 2, 0:01-1:00.) The investigators then told Collins if the solicitors thought he was lying they would push for 34 years in prison. (App'x p. 838, State Ex. 3, DVD 2, 1:30-2:00.) After that, Collins explained that Cohen had approached him and offered him $5,000 to burn the trailer. (App'x p. 838, State Ex. 3, DVD 2, 4:00-5:15.) He also told the investigators that he told James about Cohen's offer, and James agreed to burn the trailer. (App'x p. 838, State Ex. 3, DVD 2, 5:15-6:30.)

At that point, the investigators expressed disbelief in Collins's account and told him that he needed to start worrying about himself. (App'x p. 838, State Ex. 3, DVD 2, 7:00-8:00.) One investigator exclaimed, "Save yourself!" (App'x p. 838, State Ex. 3, DVD 2, 7:00-8:00.) When Collins failed to provide a satisfactory explanation of the events of the fire to the investigators, the investigator told Collins that the investigator was not going to speak up for him if he wasn't being totally honest. (App'x p. 838, State Ex. 3, DVD 2, 8:00-8:30.) Collins then provided the investigators more information. (App'x p. 838, State Ex. 3, DVD 2, 8:30-9:30.) As the investigators continued to press for more details, they told Collins that he couldn't save anybody but himself. (App'x p. 838, State Ex. 3, DVD 2, 13:10-13:20.)

Although Collins tried to satisfy the investigators by providing more information, he continued to get confused about the details. He expressed uncertainty about what James had used to start the fire, alternating between a lighter, a match, and a lit piece of paper. (App'x p. 838, State Ex. 3, DVD 2, 13:30-

16:00.) Collins also provided inconsistent statements about where he was standing when the fire started as he tried to comply with the investigators' requests for more information. (App'x p. 838, State Ex. 3, DVD 2, 13:30-17:00.) The investigators repeatedly told Collins that they were going to let him go home after the interview. (App'x p. 838, State Ex. 3, DVDs 1, 2, 2B, 3.)

Throughout the interview, the investigators expressed disbelief in Collins's account. When that would happen, the investigators would suggest answers to their questions and get Collins to agree to what they believed happened. (App'x p. 838, State Ex. 3, DVD 2.) In fact, the investigators even suggested at one point that Collins was attempting to tell the investigators what he believed they wanted to hear. (App'x p. 838, State Ex. 3, DVD 2, 22:55-23:20.)

As Collins attempted to answer their questions, the investigators told him that Cohen was setting him up. (App'x p. 838, State Ex. 3, DVD 2, 32:30-33:00.) At which point, Collins again tried to explain the events that led to the fire and his participation in it. (App'x p. 838, State Ex. 3, DVD 2, 33:00-40:43.) Collins gave a rambling account in which he admitted to participating in setting the fire, but his timeline was inconsistent with when the fire was actually set and reported. (App'x p. 838, State Ex. 3, DVD 2, 37:30-38:00.) In response to this inconvenient fact, the investigators then convinced Collins that he was not sure of the timeline. (App'x p. 838, State Ex. 3, DVD 2, 38:00-38:30.)

As the interrogation continued, the investigators continued to tell Collins that they were there to "help" him. (App'x p. 838, State Ex. 3, DVD 2B, 1:25-1:45; App'x

p. 209.) They then told him that Cohen had more money than they did, thereby falsely implying that she had received insurance proceeds from the fire, and that she was going to hire lawyers to defend her and blame Collins for the fire. (App'x p. 838, State Ex. 3, DVD 2B, 1:45-3:00.)

At that point, the investigators ended the interrogation and stated that they wanted Collins to write a statement. (App'x p. 838, State Ex. 3, DVD 2B, 3:30-4:00.) Collins requested that the investigators write the statement and that he be allowed to sign it because he could not "spell too good." (App'x p. 838, State Ex. 3, DVD 2B, 3:30-4:30.) The investigators agreed that they would write the statement but that it would be a verbatim transcription of what Collins said. (App'x p. 838, State Ex. 3, DVD 2B, 4:30-5:00.) They then requested that Collins provide a verbal statement for the investigators to transcribe. (App'x p. 838, State Ex. 3, DVD 2B, 4:00-4:30.)

Collins's oral statement began, "I did not do it." (App'x p. 838, State Ex. 3, DVD 2B 4:30-4:45.) The investigators then interrupted Collins and coached him on what to write. (App'x p. 838, State Ex. 3, DVD 2B, 4:45-5:00.) On instruction from the investigators, Collins stated that "Tina" approached him about burning the home. (App'x. p. 838, State Ex. 3, DVD 2B, 5:00-5:30.) The investigators interrupted Collins again and asked if he knew "Tina's" real name. (App'x p. 838, State Ex. 3, DVD 2B, 5:00-5:30.) Although there had been repeated references and discussions about Cohen's name being "Marissa," Collins explained that "Tina" was the only name he knew. (App'x p. 838, State Ex. 3, DVD 2B, 5:00-5:30.) Then, at the prompting of the investigators, Collins stated that James had agreed to burn the home and that he

was with James when James lit the fire. (App'x p. 838, State Ex. 3, DVD 2B, 5:30-17:00.) Then he stated that "Marissa" had called him later in the night, just minutes after not being able to remember Marissa's name. (App'x p. 838, State Ex. 3, DVD 2B, 15:00-15:15.) Collins then signed the statement that had been transcribed by the investigator. (App'x p. 838, State Ex. 3, DVD 2B, 19:00-19:25.)

At the conclusion of the interrogation, the investigators repeated what they had previously said, which was that Collins had gotten himself on the track to "save" himself by confessing to his participation in the fire. (App'x p. 838, State Ex. 3, DVD 23:30-24:05.) One investigator added further that "if you're helping us, we're helping you." (App'x p. 838, State Ex. 3, DVD 2B, 28:30-28:40.) The interrogation concluded approximately 3 ½ hours after it began. (App'x p. 838, State Ex. 3, DVD 2B, 30:45-30:58; App'x p. 213.)

On June 5, 2014, arrest warrants were issued for Collins on charges of arson, first degree, and criminal conspiracy. (App'x pp. 841-842.) The grand jury for Georgetown County issued indictments against Collins on August 20, 2014 for criminal conspiracy; arson, first degree; and murder. (App'x pp. 843-847.)

III. *Jackson v. Denno* Hearing

After the *Blair* hearing, Judge Hyman held a hearing under *Jackson v. Denno* to determine the voluntariness of Collins's statements provided to law enforcement. During the hearing, Collins's counsel cross-examined the law enforcement officers on the circumstances of their interrogation of Collins and their interrogation techniques,

including their promise of confidentiality to Collins. (App'x pp. 189-225, 240-248, 250.)

Collins also testified during the hearing. (App'x pp. 250-273) He testified that he didn't get past 7th or 8th grade in school and was in special education classes. (App'x p. 254.) He also testified that he did not understand that he did not have to talk to the police and that he believed that he had to stay at the police station for the interrogation. (App'x pp. 256-259.) Although the officers gave him a bathroom break, he stated that they escorted him to the bathroom and stayed outside the bathroom door while he was on his break. (App'x p. 256.) Collins said that the police officers yelled at him at times and promised to help him with the prosecutor at other times. (App'x pp. 258, 269.)

After examination of the witnesses, Collins's counsel argued that the statements were not voluntarily given because they were the product of coercion under the totality of the circumstances, including the officers' coaxing and disarming interrogation techniques and Collins's limited intelligence. (App'x pp. 278-290.) However, Judge Hyman rejected those arguments and ruled the statements were voluntarily given by Collins. (App'x pp. 291-293.)

IV. Trial.

At trial, the State's case against Collins was based almost entirely on his confession. There was no evidence that Collins helped Cohen obtain an insurance policy. (App'x p. 361.) There was no evidence that Collins aided Cohen in securing a storage unit. (App'x p. 367.) There was no evidence that Collins helped Cohen move

her furniture and appliances. (App'x pp. 387-388.) There was no evidence that Collins purchased kerosene. (App'x p. 379.) There was no evidence that Cohen told others that Collins was involved in her plan to burn the home and collect insurance proceeds. (App'x p. 388.) And other than his confession, there was no evidence that Collins was present when the fire began or participated in the burning of the home. (App'x p. 590.)

V. Testimony During Marissa Cohen's Trial.

While this appeal was pending, Collins testified during the trial of Marissa Cohen, which was held from January 6, 2020 to January 9, 2020 before the Georgetown County Court of General Sessions with the Honorable Kristi F. Curtis presiding. (App'x pp. 971-996.) Collins agreed to testify in exchange for the State's agreement to file a motion for a downward departure to his prison sentence. (App'x pp. 965, 974-76.)

Following Collins's testimony, the State moved to supplement the record in this appeal with Collins's testimony from Cohen's trial. (App'x 963-967.) Collins opposed the State's motion, arguing that subsequent testimony should not be permitted to be included in the record under Rule 210(c), SCACR, because it was not presented to the lower court in Collins's case. (App'x pp. 999-1005.) The Court of Appeals agreed with Collins, and the State's motion was denied. (App'x p. 1016.)

STANDARD OF REVIEW

Rule 242(b), SCACR, provides that a writ of certiorari "will be granted only where there are special and important reasons." In considering whether special and

important reasons exist, the Court should consider the following factors: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where Court of Appeals' decision conflicts with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision below conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR; *State v. Lyles*, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009).

ARGUMENT

I. The State has not presented "special and important reasons" to justify a writ of certiorari.

In seeking a writ of certiorari, the State does not address any of the factors enumerated in Rule 242(b), SCACR, or explain what "special and important reasons" justify the Supreme Court granting certiorari in this case. Instead, the State merely argues that the Court of Appeals erred in its decision below. While it is not surprising that the State disagrees with the Court of Appeals' decision, such disagreement alone is not sufficient to justify certiorari. To be sure, there are no "special and import reasons" warranting further appellate review because the Court of Appeals correctly ruled that Collins's confession was involuntary and overturned his conviction in accordance with well-established precedent from South Carolina courts and numerous other jurisdictions.

First, this case does not present novel questions of law. South Carolina courts have often been called on to address the voluntariness of a defendant's statement to law enforcement under the totality of the circumstances test, which originated nearly

50 years ago in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Here, the Court of Appeals faithfully applied the totality of circumstances standard, and there is no suggestion that this case is so novel or unique that some other standard should apply. Like every case, this case involves its own particular facts. But the presence of particularized facts does not render the questions of law presented novel. Put simply, the law regarding the voluntariness of confessions has been well-established for decades, and this case does not present novel questions of law.

Second, the Court of Appeals' decision does not conflict with a decision of either the South Carolina or the United States Supreme Courts. In fact, the well-reasoned opinion below was evidently based on thorough research of controlling precedent and contains no less than eighteen citations to decisions from those courts.

Third, all three appellate judges on the panel joined the Court of Appeals' decision without dissent.

Fourth, although the case does involve substantial issues regarding Collins's constitutional rights under the Fifth and Fourteenth Amendments, the Court of Appeals carefully considered those issues and ensured that Collins's rights were protected. Because these issues have been carefully examined and decided by the Court of Appeals, there are no "special and important" reasons to grant certiorari and conduct further appellate review. *Cf. S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236-37 (2020) (declining to grant petition for certiorari where Court of Appeals had conducted appropriate review).

II. The voluntariness of Collins's statements was raised and ruled upon by the lower court and, thus, preserved for appellate review.

Despite the trial court holding a *Jackson v. Denno* hearing for the sole purpose of determining the voluntariness of Collins's statements, the State argues that the issue of whether Collins's confession was voluntary is not preserved for appellate review. According to the State, the Court of Appeals' decision should be vacated because the issue of "whether Collins' confession was rendered voluntary by Agent Hardee's promise of confidentiality was not preserved for appeal because it was not raised to and ruled upon by the trial court during the *Jackson v. Denno* hearing." (State's Pet. Writ Cert. p. 8).

To be preserved for appellate review, an issue must have been raised to and ruled upon by the trial judge and cannot be raised on the first time on appeal. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). For an issue at trial to be preserved for appellate review, it must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.*

Issue preservation rules should be applied "with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644(2011). Any doubts as to whether an appellant has preserved an argument should be resolved in favor of finding the argument preserved. *See State v. Jenkins*, 408 S.C. 560, 568 n.7, 759 S.E.2d 759, 763 n.7 (Ct. App. 2014) (resolving doubt about issue preservation in favor of appellant) (citing *Atl. Coast Builders &*

Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012)) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful").

Under this standard, there can be no doubt that the issue of the voluntariness of Collins's statements was raised and ruled upon by the trial judge. Collins's trial counsel argued repeatedly during the *Jackson v. Denno* hearing that Collins's statements to law enforcement were the product of coercion and manipulation and were not voluntary under the totality of the circumstances. (App'x pp. 278-90.) In response, the trial judge directly addressed these arguments based on the totality of circumstances and found that the statements were voluntary and that there was no evidence of coercion. (App'x pp. 291-93.) Thus, the voluntariness of Collins's statements under the totality of the circumstances was preserved for appeal.

Because the State cannot credibly contend that the overall issue of voluntariness was not preserved, it attempts to isolate only one of the circumstances that rendered the confession involuntary as being unpreserved –law enforcement's promise to Collins that his statements would be confidential. Yet, to make this argument, the State is forced to mischaracterize the record, which actually proves that Collins's trial counsel raised the promise of confidentiality as being part of the totality of circumstances that rendered the statements involuntary.

During the *Jackson v. Denno* hearing, Collins's trial counsel cross-examined the law enforcement officers on their interrogation techniques, including their attempts to "disarm" Collins and make him feel comfortable. (App'x pp. 200-01.)

Collins's counsel then specifically questioned the law enforcement officers on their promise that they would keep his statements confidential. (App'x pp. 204-05, 245-46.) In response to this question, one of the officers referred to this promise as a possible "disarming technique." (App'x p. 205.) Following cross-examination, Collins's trial counsel, over several interruptions from the trial judge, attempted to argue that the law enforcement officers' interrogation had been coercive under the totality of the circumstances, including their coaxing and disarming interrogation tactics and Collins's low intelligence:

> Mr. Wilson, Jr: Well, let me finish putting it on the record, Judge. When you look at *State versus Evans*, Your Honor, *State versus Evans* talks about the totality of the circumstances, the coercive activity that is going on. In this particular case you had police officers, again, offering information, statements to him which –
>
> The Court: I did not hear it that way.
>
> Mr. Wilson, Jr.: I understand that, Your Honor. I understand, Judge, but I'm just saying this for my argument. They were offering him statements on the actual video telling him certain things that he then picked up on and then began to regurgitate. This is the first issue. *The second issue is is that what else I find to be coercive about this, if I may say this, be so bold to say it, that the police actually during this time, you know, they were coaxing him and trying to get him to go ahead and disarm him, and if it'd been somebody –*
>
> The Court: Isn't that what they're supposed to do?
>
> Mr. Wilson, Jr.: Judge, let me finish. Let me finish, Judge. If it had been someone who honestly had a GED or even had a high school education, he does not have that, and that's one of the factors that the court in *Evans* said that the court has to consider when they talk about whether or not someone is susceptible. . . .

(App'x pp. 281-82) (emphasis added). In sum, Collins's trial counsel elicited testimony that the law enforcement officers attempted to disarm Collins by, among other things, promising him confidentiality and then argued that such technique was coercive and rendered his statements involuntary.

Although there may have been more emphasis placed on the promise of confidentiality on appeal than at the trial level, that does not mean the issue was not raised and ruled upon. Put simply, both appellate and trial counsel for Collins argued that his statements were not voluntary based on the totality of the circumstances surrounding law enforcement's coercive interrogation techniques and Collins's susceptibility to being coerced because of his intellectual deficiencies. The trial court rejected those arguments, making them ripe for appeal. Therefore, the issue has been preserved for appeal and was not waived.

III. The Court of Appeals correctly applied the abuse of discretion standard and determined that the trial court clearly erred in ruling that Collins's statements were voluntary.

The State also bases its petition for certiorari on the assertion that the Court of Appeals conducted a *de novo* review of the voluntariness of Collins's statements rather than under an abuse of discretion standard. However, a close examination of the Court of Appeals' decision reveals that it fully understood the standard to apply and found the trial court's ruling "clearly erroneous," thus warranting reversal even under this deferential standard.

In the decision, the Court of Appeals repeatedly referenced the abuse of discretion standard and stated that it was "not insensitive to the deferential standard

of review we apply to the trial court's determination of the voluntariness of a statement." (App'x p. 949.) Despite the abuse of discretion standard being deferential, it does not serve as an impenetrable shield from critical appellate review as cases from the Supreme Court confirm. *See State v. Osborne*, 301 S.C. 363, 367, 392 S.E.2d 178, 180 (1990) (reversing trial court's determination that confession was voluntary because of evidence showing that it was induced by threats of prosecution); *State v. Peake*, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (reversing trial court's ruling that statement was voluntary under totality of circumstances because is was the product of officer's product of leniency). Also, the Court of Appeals relied on cases from several other jurisdictions that were decided under the abuse of discretion standard in which appellate courts reversed the trial courts' determinations of voluntariness based on assurances of the statements' confidentiality.

Significantly, in reaching its decision, the Court of Appeals did not disturb the factual findings of the trial judge. As the Court of Appeals highlighted, there "is no dispute as to what occurred and what was said during the interview at hand, as we have the video of it before us." (App'x p. 947.) Moreover, as the Court of Appeals also noted, the State conceded in oral argument that, if *Miranda* warnings were required here, the assurances of confidentiality negated the warning and rendered Collins's statements inadmissible as a matter of law. (App'x p. 947, fn.9.) Instead of challenging the trial court's factual findings, the Court of Appeals ruled that the trial judge's legal conclusions as to the voluntariness of the statements were in clear error based on the undisputed facts. Ultimately, the Court of Appeals' decision shows that

this case involved extreme circumstances of police coercion that rendered the trial court's ruling clearly erroneous under the abuse of discretion standard, and there is no "special and important reason" to grant certiorari to review the decision further.

IV. The Court of Appeals did not err in denying the State's motion to supplement the record on appeal because the matter in question was not presented to the lower court in Collins's case.

Finally, the State argues that certiorari should be granted because the Court of Appeals erred in rejecting its attempt to supplement the record with Collins's testimony from Cohen's trial given during the pendency of this appeal. Yet, not only does the State fail to convincingly explain how the Court of Appeals erred, it also does not explain how this purported error presents a "special and important" reason that warrants the granting of certiorari under Rule 242(b), SCACR.

As a threshold matter, the Court of Appeals correctly denied the State's motion to supplement the appellate record with materials from a subsequent and separate trial of another person. Rule 210(c), SCACR, expressly provides that the "Record shall not, however, include matter which was not presented to the lower court or tribunal." Here, it is undisputed that the material sought to be supplemented was never presented to the lower court during Collins's trial. In fact, it would have been impossible to do so because the testimony in question was not provided until after Collins appealed his conviction in exchange for the State agreeing to move for a downward departure of his prison sentence. Therefore, denial of the motion to supplement the record was correct under the applicable rules.

To avoid Rule 210(c)'s clear prohibition on including matter that was not presented to the lower court in the record, the State relies on two cases, *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981), and *State v. Sroka*, 267 S.C. 664, 230 S.E.2d 816 (1976). However, neither of those cases supports the proposition that a record on appeal can be supplemented with materials from a separate case. Both *Whetsell* and *Sroka* involved inculpatory statements made by defendants during the post-conviction phases of their respective trials. They did not involve attempts to supplement the record on appeal with testimony from separate trials. Therefore, *Whetsell* and *Sroka* do not support supplementation of the record with materials that are expressly excluded from the record under Rule 210(c).

Most significantly, the State's arguments regarding the Court of Appeals' purported error in denying the motion to supplement the record ultimately undermine its entire petition for certiorari. According to the State, in light of Collins's testimony in Cohen's trial,

> Collins is effectively worse off than he was prior to his trial because the State can now use his subsequent confession against him in a future trial. Collins will be hard pressed to argue against the admission of a confession given under oath while represented by counsel. Collins will also struggle to explain his subsequent confession to a future jury if the Court of Appeal's reversal of his conviction stands.

(State Pet. Writ Cert. pp. 14-15.) In other words, the State intends to use Collins's testimony from Cohen's trial against him in a future trial, and it is extremely confident that such testimony will be admitted into evidence and secure his conviction. If the State's position is correct, then it has not been prejudiced by the Court of Appeals' decision as it can still obtain the conviction of Collins that it seeks

to affirm in this Court. Therefore, the State implicitly admits that there is no "special and important" reason for further appellate review under Rule 242(b).

CONCLUSION

For the foregoing reasons, Collins respectfully requests that the Court deny the State's Petition for Writ of Certiorari.

Respectfully submitted,

s/E. Brandon Gaskins
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Court Appointed Lead Counsel for Respondent Randy Collins

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211
Telephone: (803) 734-1330
Facsimile: (803) 734-1345
rdudek@sccid.sc.gov

Co-counsel for Respondent Randy Collins

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