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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In the Supreme Court

*On Petition for Writ of Certiorari to the Court of Appeals*  
APPEAL FROM RICHLAND COUNTY  
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5851(S.C. Ct. App. filed August 18, 2021)

THE STATE,.....PETITIONER-RESPONDENT

v.

ROBERT XAVIER GETER,.....RESPONDENT-PETITIONER

**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
Appellate Case No. 2021-001408

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 14244

TOMMY EVANS, JR.  
Assistant Attorney General  
S.C. Bar No. 65282  
P.O. Box 11549  
Columbia, South Carolina 29211-1529\  
Telephone: (803) 734-6305

BYRON GIPSON  
Solicitor Fifth Judicial Circuit  
(803) 576-1800

ATTORNEYS FOR PETITIONER-RESPONDENT

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## **PETITIONER'S QUESTIONS PRESENTED**

Whether the Court of Appeals erred by not finding the error in both instances of Richland County Sheriff's investigator Joseph Clarke vouching for the prosecution's case preserved for appellate review, and not harmless error, where Clarke testified defense counsel's opening statement to the jury was the first time he heard of the self-defense case and where he also testified that victim Stone's testimony conversely was absolutely consistent since this inadmissible vouching testimony was very prejudicial?

## **RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED**

Did Geter fail to preserve the argument against Investigator Clarke's statement regarding trial counsel's opening argument being the first time he heard of self-defense? And did the Court of Appeals err in deciding there was an error made by the Circuit Court in allowing Investigator Clarke's testimony, due to the fact there was sufficient evidence presented to the jury proving Petitioner's guilt beyond a reasonable doubt without the testimony of Investigator Clarke, should this error be considered harmless?

## STATEMENT OF THE CASE

On June 17, 2015, the Richland County Grand Jury returned a true bill indictment for Respondent/Petitioner (Geter) for the offenses of murder and attempted murder. On May 15, 2017, Geter's case was called for trial before the Honorable Alexander S. Macaulay, Circuit Court Judge. Present representing the State of South Carolina were Assistant Solicitors Richard Cathcart and Jeremiah Shellenburg, and representing Geter was attorney Aimee Zmroczek. During trial the trial court denied Geter's motion for immunity under the Protection of Persons and Property Act.<sup>1</sup> During trial two jurors informed the trial Court that they had prior knowledge of this case due to the fact they knew one of the victim's mother. At that time the trial court decided to declare this case a mistrial.

The case was again called for trial on April 9, 2018, this time before the Honorable DeAndrea G. Benjamin. Again representing the State of South Carolina were Assistant Solicitor's Richard C.R. Cathcart and Jeremiah J. Shellenberg of the Fifth Circuit Solicitor's Office. This time representing Geter was Assistant Public Defenders Aimee J. Zmroczek and Ryan Schwartz of the Fifth Circuit Public Defender's Office.

After four days of testimony Geter was found guilty by a jury of his peers for the offenses of murder and attempted murder. Geter then appeared before the trial court and received a sentence of forty years incarceration for the offense of murder; and twenty years for attempted murder. The trial court ordered these sentences to be served concurrently. Geter filed a timely notice of appeal before the South Carolina Court of Appeals.

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<sup>1</sup> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force. S.C. Code Ann. §16-11-450 (2018).

Within his notice of appeal Geter argued the trial court erred in instructing the jury on transferred intent because that was an inapplicable jury charge for attempted murder. Geter also raised the issue of Richland County Sheriff's investigator Joseph Clarke who testified that he heard about self-defense for the first time during trial counsel's opening arguments; and, Mr. Stone's testimony was absolutely consistent with what he told him during the course of his investigation. Geter argued that Investigator Clark drew legal conclusions about evidence, and he improperly vouched for the testimony of Mr. Stone.

On June 7, 2021, the parties involved appeared before Judges Konduros, McDonald and Geathers of the South Carolina Court of Appeals for a hearing. On August 18, 2021, the Court of Appeals issued an opinion, in a two to one decision they decided to affirm in part and reverse in part.<sup>2</sup>

Both sides decided to request a rehearing each on a separate issue decided by the Court of Appeals. On November 5, 2021, the Court of Appeals issued their decision regarding both requests for rehearing. Two of the presiding judges denied a rehearing on both issues. Judge Geathers voted to grant a rehearing on the issue of transferred intent being applied to attempted murder.

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<sup>2</sup> Judge John D. Geathers issued a dissenting opinion regarding the issue of whether transferred intent can be applied to attempted murder.

## WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). Pursuant to rule 242 of the South Carolina Appellate Court Rules, “a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.”

### Rule 242(b) SCACR

There have been numerous decisions made by this Court and the United States Supreme Court as it pertains to whether something is preserved for appeal, or to be considered harmless error. These are not novel questions of law. The Court of Appeals was correct in deciding unanimously that Geter failed to preserve the issue of Investigator Clarke’s statements regarding their opening statements; and, on how Investigator Clarke’s statements did not affect the outcome of this case. There was plenty of evidence provided by the State proving that Geter committed this crime beyond a reasonable doubt. So Investigator Clarke’s statements were harmless. This is not a Constitutional question, nor has the Court of Appeals made a decision against a prior decision of

the United States Supreme Court. The State is of the opinion that the issue of Investigator Clarke's testimony was properly decided by the Court of Appeals, so this court should deny certiorari on these two issues.

## STATEMENT OF FACTS

On March 7, 2015, Geter and victim Mr. James Lewis got into an altercation at Cullers Bar in Richland County, South Carolina. During this altercation Mr. Lewis beat Geter about his face causing swelling and a cut above one eye. A second victim, Mr. Clarence Stone who at times was a person who attempted to keep peace, broke up this fight. Mr. Stone pulled Mr. Lewis out of the establishment to a deck out back. (R. p. 138 lines 10-11) Once the fight ended the owner Ms. Deborah Culler instructed Geter to leave. (R. p. 31 lines 18-19) Instead of going out of the front door Geter decided to go out of the back where the deck was located. While leaving the establishment a witness by the name of Michael Harkness overheard Appellant stating "I'm gonna kill somebody tonight." (R. p. 75 lines 12-13)

While both victims were outside on the deck Mr. Stone attempted to calm down Mr. Lewis. As Geter walked out he offered his hand to make both men think he was offering peace. (R. p. 139 lines 7-21) Once he approached, Geter pulled out a knife and attacked both men. Mr. Stone in an attempt to stop the altercation was stabbed in the eye. (R. p. 141 lines 4-6) Bloodied and in pain, Mr. Stone went back into the establishment for assistance. Geter and Mr. Lewis continued fighting, Geter stabbed Mr. Lewis twice, including the fatal stab wound to the chest puncturing his heart. While Mr. Lewis lay bleeding Geter pulled the knife out of his chest and left the establishment. (R. p. 100 lines 7-12) Mr. Lewis was assisted back into the bar, and laid in the front doorway waiting on emergency medical services. Mr. Lewis was rushed to the hospital where he later died due to excessive bleeding. Mr. Stone lost vision in the eye Geter stabbed. (R. p. 141 lines 23-24) Deputies with the Richland County Sheriff's Department later responded to the incident location. Lead investigator Joseph Clarke received statements from witnesses who informed him that "Boo" committed this murder. (R. p. 212 lines 18-21) "Boo" was the nickname Geter went by. At the

completion of this investigation warrants were issued for Geter for the offenses of murder and attempted murder.

Geter was later informed by law enforcement that Mr. Lewis died due to his stab wounds and was instructed to turn himself in. Geter turned himself in the next day and was arrested for one count of murder and one count of attempted murder. At the time of his arrest Appellant maintained to the authorities that he was “jumped” by five individuals and he stabbed Mr. Lewis in self-defense. (R. p. 219 lines 19-21)

### ARGUMENT

**Court of Appeals did not err in deciding that Geter failed to preserve the issue of Investigator Clarke’s mentioning that opening arguments was the first time he heard of Geter’s self-defense argument. The Court of Appeals also did not err in finding that Investigator Clarke’s testimony was harmless. Sufficient evidence exists proving Geter guilty beyond a reasonable doubt. Clarke’s testimony did not affect the trial’s outcome.**

During trial Richland County Sheriff’s Department Investigator Joseph Clarke testified as to what he found and observed during his investigation. As part of his redirect examination, Investigator Clarke was asked about the scenario of facts Geter’s counsel relayed to the jury during opening arguments. He was asked, if that was the first time he ever heard of self-defense? He answered, “Yes.” (R. p. 248 lines 23-25). At that time Geter’s counsel objected due to opening arguments not being evidence. The objection was overruled by the trial court. Investigator Clarke was then asked if the statement given to him by victim Stone was the same given during Mr. Stone’s testimony? Investigator Clarke responded, “seems absolutely consistent, correct.” (R. p. 248 line 25). Geter’s counsel again objected on the ground of improper bolstering.

During his appeal Geter argued that both statements were improper. Geter further argued that Investigator Clarke making a statement about trial counsel’s opening argument was improper

because Investigator Clarke was making a legal conclusion about the evidence; and that Investigator Clarke improperly bolstered the testimony of one side over the other.

The Court of Appeals unanimously decided that the first statement made by Investigator Clarke regarding Geter's counsel opening statements were not preserved due to an improper objection, and even though they thought Investigator Clarke's statement concerning the testimony of Mr. Stone was improper bolstering, this error was harmless. The Court of Appeals decided that numerous eyewitnesses testified as to Geter's actions, and forensic evidence corroborated their testimony. Investigator Clarke's statements did not affect the outcome of this case, so if allowing this testimony was done in error, that error was definitely harmless.

#### **Standard of Review**

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494 (2013). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. *State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012). In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such relief beyond a reasonable doubt. *State v. Kromah*, 401 S.C. at 361, 737 S.E.2d at 501.

### Analysis

The Court of Appeals found that the initial objection regarding Investigator Clarke's statement on trial counsel's opening argument being the first time hearing about self-defense was not preserved for appeal. During this questioning trial counsel objected due to opening arguments not being evidence. Trial counsel never stated these statements were improper bolstering or making a legal conclusion without evidence. The Court of Appeals ruled that this was not a proper objection so this matter was not preserved. The State agrees. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694. The objection by trial counsel had to do with opening arguments not being evidence not for bolstering or an improper legal conclusion which was argued on appeal. This is totally separate reasoning that is being introduced during appeal. Geter should not be allowed to argue that the trial court erred in allowing the evidence in the record when the objection being raised during appeal was never raised before the trial court. They are accusing the trial court of making an error when the court never had an opportunity to address this argument. This is not fair to the trial court, and was rightfully not considered by the Court of Appeals. In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). This decision was proper and followed South Carolina law so it should not be subject to review by this Honorable Court.

The Court of Appeals also ruled that although the statements made by Investigator Clarke regarding the testimony of Mr. Stone was improper bolstering these statements did not affect the outcome of the trial, so they are considered harmless. They made this decision due to the fact there

was sufficient evidence presented by the State revealing that Geter committed murder and attempted murder beyond a reasonable doubt. Investigator Clarke's testimony did not affect the outcome of this trial. Error is harmless only when it could not reasonably have affected result of trial. *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993).

According to all eyewitness testimony the fight between Geter and Mr. Lewis was started by Geter. Although Mr. Lewis got the better of him, Geter refused to stop coming after Mr. Lewis. (R. p. 92 lines 19-22). Mr. Stone finally broke up the fight and took Mr. Lewis out of the club through the back door onto a deck. At that time the owner told Geter he had to leave. Instead of leaving out of the front door he went out of the back door and attacked both men with a knife, killing one and seriously injuring another.

Geter raised the defense of self-defense. This has not been corroborated by any eyewitness testimony or forensic evidence. All of the physical evidence corroborated the testimony made by eyewitnesses, that Geter was the aggressor and stabbed both victims without provocation. He stated he stabbed Mr. Lewis on the dance floor, however, all of the blood evidence was found on the deck where all of the witnesses testified is where lethal attack occurred. Crime Scene Investigator Yvonne Woods testified that she did a walk-through of the premises and placed markers everywhere blood was found. She found blood stains on the back deck. Dr. Gary Amick an expert on DNA analysis testified that all of the blood swabs submitted by Investigator Woods matched the DNA of Mr. Lewis.

The statements of Investigator Clarke were not essential for the State to get a conviction. The State did not even mention these statements in their closing arguments. However, testimony of the eyewitnesses were mentioned throughout the States closing arguments. The testimony of Deborah Culler telling Geter that he must leave. (R. p. 536 line 11). Testimony of Reeshema Culler

of what she observed on the deck when Geter stabbed Mr. Lewis to death. (R. p. 542 lines 10-21). Testimony of Michael Harkness when he testified that Geter stated “I’m gonna kill someone tonight.” (R. p. 544 lines 8 – p. 545 line 7). The testimony of Clarence Stone when he spoke about the initial fight and what occurred on the deck prior to him being stabbed in the eye by Geter. (R. p. 545 line 8 – p. 546 line 4). Testimony of Crime Scene Investigator Yvonne Woods concerning the blood evidence found at the crime scene. (R. p. 546 line 5 – p. 547 line 3). And the State in closing mentioned the testimony of Geter and how many contradicting stories he told with no evidence to corroborate his testimony. (R. p. 549 line 20 – p. 553 line 15). Nothing mentioned by the State in their closing argument were about statements made by Investigator Clarke. This is due to the fact these statements were not a factor in the conviction of Geter. Without that statement there still would be overwhelming evidence of Geter’s guilt. Therefore, if there was any error made by the trial court allowing these statements into evidence that error was definitely harmless. The decision of the Court of Appeals was correct and should not be subject to review.

## CONCLUSION

Based on the forgoing reasons, The State submits Geter has failed to show that the question presented warrants certiorari review. This Court should deny this petition for writ of certiorari is it relates to this issue.

Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 14244

TOMMY EVANS, JR.  
Assistant Attorney General  
S.C. Bar No. 65282

BYRON GIPSON  
Solicitor, Fifth Judicial Circuit

By: s/ Tommy Evans, Jr.  
TOMMY EVANS, JR.  
S.C. Bar No. 65282

Office of the Attorney General  
P.O. Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-6305

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