

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of General Sessions

Eugene C. Griffith, Circuit Court Judge

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Unpublished Opinion No. 2021-UP-275  
(S.C. Ct. App. filed July 14, 2021)

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THE STATE,

Respondent,

v.

MARION C. WILKES,

Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

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**Floyd & Spangler, Attorneys at Law**

Colin T.L. Spangler  
SC Bar No.: 103283  
1611 Augusta Road  
West Columbia, South Carolina 29169  
(803) 739-1824 t  
(803) 739-1888 f

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**S.C. SUPREME COURT**

**INDEX**

Certificate of Counsel ..... 2

Questions Presented ..... 2

Statement of the Case..... 3

Arguments ..... 4

1. The Court of Appeals correctly determined that the trial court erred in instructing the jury that malice may be inferred from the use of a deadly weapon but erroneously concluded the error was harmless.

2. The Court of Appeals erred in concluding Petitioner did not properly preserve the issue that the trial court erred in failing to view a portion of the film Where the Lilies Bloom (1974) before ruling on its admissibility.

3. The Court of Appeals erred in concluding the trial court’s decision to exclude Where the Lilies Bloom was the law of the case because the overall context of the State’s argument to the trial court was grounded on Rule 403, SCRE and the testimony reflected the alleged victim told Petitioner she wished to be buried in a manner consistent with the film and for her death to be concealed from the public.

Conclusion ..... 19

## **CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 22, 2021.

## **QUESTIONS PRESENTED**

1. Did the Court of Appeals correctly determined that the trial court erred in instructing the jury that malice may be inferred from the use of a deadly weapon but erroneously concluded the error was harmless?
2. Did the Court of Appeals err in concluding Petitioner did not properly preserve the issue that the trial court erred in failing to view a portion of the film Where the Lilies Bloom (1974) before ruling on its admissibility?
3. Did the Court of Appeals err in concluding the trial court's decision to exclude Where the Lilies Bloom was the law of the case because the overall context of the State's argument to the trial court was grounded on Rule 403, SCRE and the testimony reflected the alleged victim told Petitioner she wished to be buried in a manner consistent with the film and for her death to be concealed from the public?

## STATEMENT OF THE CASE

On November 3, 2014, grand jurors in Lexington County indicted Petitioner for one count of murder. (R. 235). The State, represented by Rhonda Patterson and Gill Bell, called the case to trial before the Honorable Eugene C. Griffith and a jury on February 26, 2018. (R. 1). Attorneys H. Wayne Floyd and Colin T.L. Spangler represented Appellant.<sup>1</sup> Trial of this case concluded on March 2, 2018, when jurors returned a guilty verdict on the sole charge of murder. (R. 233, ll. 13-19.) Judge Griffith sentenced Petitioner to forty-five (45) years imprisonment. (R. 234, ll. 6-7.) On August 16, 2018, Judge Griffith entered an Order denying Petitioner's Motion for a New Trial and for Reconsideration of his Sentence.

On August 23, 2018 Petitioner timely served his notice of appeal. Petitioner sought reversal of his murder conviction on the grounds that the trial court erred in charging the jury that malice may be inferred from the use of a deadly weapon. The parties completed briefing in June of 2019 and the Court of Appeals held oral argument in June of 2021. The Court of Appeals affirmed Petitioner's conviction on July 14, 2021, and Petitioner timely filed a petition for rehearing, which the Court of Appeals denied on December 22, 2021.

This petition for a writ of certiorari follows.

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<sup>1</sup> Sadly, Attorney Floyd passed away during the pendency of this Appeal. He will be remembered for his zealous advocacy and dedication to achieving justice for all.

## ARGUMENT

### I.

The Court of Appeals correctly determined that the trial court erred in instructing the jury that malice may be inferred from the use of a deadly weapon but erroneously concluded the error was harmless.

#### **Reason to grant certiorari**

The opinion issued by the Court of Appeals conflicts with this Court's jurisprudence on harmless error because misconstrues the evidence in the case to reach its conclusion that Petitioner's guilt is purportedly overwhelming.

#### **Relevant facts**

Petitioner and Susan Wilkes (hereinafter "Decedent") married on December 6, 1979. (R. 132, ll. 23-25.) The couple remained married until Decedent's passing in early June 2014. (R. 133, ll. 6-7.) During the marriage Petitioner worked in retail grocery and Decedent worked office-jobs, including thirty-three (33) years at SCE&G. (R. 130, ll. 23-24, 143, ll. 14:-25, 144, ll. 1-2.) The couple bore no marital children, however, they adopted Decedent's grandson, Joseph Wilkes, when Joseph was an infant.<sup>1</sup> (R. 149, ll. 25, 150, ll. 1-25.) The family relocated from Winnsboro, South Carolina to 106 Linnet Drive, West Columbia in 1999, where they lived until Decedent's passing. (R. 149, ll. 14-19.)

At trial, Petitioner testified he and Decedent enjoyed a "quiet and peaceful" relationship (R. 133, ll. 9-10.) Outside of their respective careers, Petitioner and Decedent spent a great deal of time outdoors, hiking, exploring, and hunting. (R. 133, ll. 19-25, 134, 1-11, 143, ll. 1-6.) Decedent was of Native American heritage and along with Petitioner, often searched for artifacts left behind by tribe's native to South Carolina. (R. 135, ll. 11-16, 415, ll. 1-4.) Artifacts recovered by Decedent included several dozen arrowheads from

around South Carolina. (R. 135, ll. 11-15.) Additionally, Petitioner and Decedent traveled throughout the country during their marriage, where Decedent purchased additional artifacts and memorabilia relating to Native American culture. (R. 139, ll. 21-25.) Photographs of many of these items were entered at trial, with jurors being shown the actual arrowheads and other memorabilia during Petitioner's testimony. (R. 135-41.)

In March 2013 Decedent lost her job at SCE&G. (R. 144, ll. 3-8.) Petitioner testified that in months following Decedent's termination, she applied to numerous jobs but was unable to secure employment. (R. 144, ll. 9-19.) Petitioner testified Decedent's unemployment caused her to become depressed; this depression worsened when her unemployment benefit was stopped and their son's dream of entering the military was stifled by a freeze in recruitment. (R. 144, ll. 9-25.) Petitioner testified he believes he spoke with their family doctor, Dr. Karen Greenfield, about Decedent's depression and believed that Decedent was prescribed anti-depressants prior to her death. (R. 168, ll. 3-25, 169, ll. 1-2.)

On the date of her death, Decedent was at home with Petitioner. (R. 425, ll. 21-25, 426, ll. 1-7.) Petitioner testified Decedent fell at around 9 o'clock in the morning. (R. 425, ll. 1-10, 425, ll. 21-25, 426, ll. 1-7.) Later that same day, Petitioner testified Decedent was using a stepstool to reach into a cabinet in the home's kitchen. (R. 151, ll. 21-25, 152, ll. 1-7.) While reaching into the cabinet, she lost her balance and fell, striking her head on the seat of a kitchen chair. (R. 151, ll. 21-25, 152, ll. 1-7.) Petitioner testified he rushed to Decedent's aid and tried to stop the bleeding. (R. 152, ll. 8-14.) After controlling the bleeding, Petitioner went to move his vehicle so he could easily carry Decedent outside and drive her to Lexington Medical Center.<sup>3</sup> (R. 152, ll. 8-14.)

When Petitioner came back inside the home, he was shocked to find Decedent suffering from a stab wound to her chest. (R. 152, ll. 15-25, 153, ll. 1-3.) Petitioner testified he found

Decedent lying on the kitchen floor along with a kitchen paring knife lying beside her. (R. 152, ll. 15-25, 153, ll. 1-3.) This knife, Petitioner testified, was a "special" knife that Decedent kept in a certain cabinet to ensure other family members would not use it. (R. 152, ll. 23-25, 153, ll. 1-3.). Petitioner testified he held Decedent in his arms until she passed away. (R. 153, ll. 4-8.) In her final moments, Decedent told Petitioner to make sure their son attended college. (R. 153, ll. 4-8.)

Immediately after Decedent passed, Petitioner testified he moved her body into the garage and wrapped her body in a tarp and duct tape that she set aside prior to her death. (R. 154, ll. 17-25, 155, ll. 16-19.) The following morning, Petitioner informed Joseph Wilkes of Decedent's passing.

Q: Tell us what happened the next day.

A: I just left her there till the next morning. Joseph got u I told him exactly what she- said to tell him, that she had been "-- I guess the word would be euthanized because she had cancer, which that wasn't true. She said let him get over it and then later on, tell him what happened and tell him why I want to be buried up there.

Q: And so, did you tell Joseph the story that she told you?

A: Sir?

Q: Did you tell Joseph the story that she told you? A: Yes, I did.

(R. 156, ll. 5-16.)

Petitioner testified that same day, along with the help of Joseph Wilkes, he moved Decedent into the trunk of the family's Ford Taurus. (R. 157, 17-24.) Petitioner and Joseph Wilkes then drove to a location in Little Mountain, South Carolina. (R. 157, ll. 3-5.). Prior to her death, Decedent and Petitioner visited this location in hopes of one day purchasing it and subdividing the land. (R. 153, ll. 14-20, 154, ll. 10-16.) Petitioner testified during these visits Decedent marveled at the wonder of nature and told

Petitioner she wished to be buried in a specific spot underneath her favorite hickory tree. (R. 431, ll. 13-21.)

Petitioner testified he and Joseph Wilkes located the hickory tree previously selected by Decedent and dug a grave. (R. 157, ll. 22-25, 158, ll. 1-7.) They then placed Decedent's body in the grave along with a cinderblock to mark the spot, covering the body with soil from the property. (R. 157, 1-20.) Petitioner took care to place Decedent's body in the grave on her side, the same position she slept in. (R. 257, ll. 8-13.)

Petitioner testified at length regarding why he chose to bury Decedent in a remote area and conceal the death.

Q: And did she talk about whether she wanted to go through a funeral home and that type of thing?

A: Oh no, that was out. No. She wanted to be - she knew the Bible as much as I did. She wanted to be dust to dust. She wanted to go back to where she came from and she wanted to be where only God knew where she was. I heard that since probably Renee died. Probably around '97, '98, '99, somewhere in there. After that, she made that statement behind the funeral home up there at Winnsboro.

(R. 142, ll. 14-23.)

Petitioner testified that he and Decedent often watched a film titled Where the Lilies Bloom (1974) where the main character, a single father, informed his family he wished to be buried outside, in nature, with specific instructions to no tell anyone about his passing; when he passed, the family followed his instructions. (R. 146, ll. 8-25, 147, ll. 1-4.) Petitioner testified that after watching the film; Decedent relayed her desire to be buried like the character in the film. (R. 147, ll. 5-20.) After burying Decedent, Petitioner testified he and his son returned to their home in West Columbia, determined to follow Decedent's wish that her death be concealed. (R. 158, ll. 21-25, 159-60, ll. 1-4.) When

individuals became suspicious of Decedent's whereabouts, Petitioner reported to law enforcement she had gone missing along a walking route near their home. (R. 159, ll. 9-20.)

On June 15, 2014, Petitioner agreed to a voluntary interview with Investigator Bruce Wade of the West Columbia Police Department. (R. 332, ll. 1-5.) During this interview, Petitioner continued to conceal the story of Decedent's suicide, stating Decedent had gone for a walk and not returned. (R. 94, ll. 2-5.)

In the face of increasing suspicion, Petitioner agreed to another meeting with law enforcement at the South Carolina Law Enforcement Division Headquarters on June 16, 2014. (R. 95, ll. 19-24.) On June 18, 2014 law enforcement interviewed Petitioner's son; immediately following this interview, Decedent's body was recovered from the location in Little Mountain. (R. 99, ll. 5-25, (R. 100, ll. 1-25, 101, ll. 1-14.)

On June 18, 2014, after recovering Decedent's body, law enforcement again interviewed Petitioner. (R. 121, ll. 13-16.) Investigator Wade testified that during this interview Petitioner relayed that his wife, after falling and injuring her head, took a knife and committed suicide. (R. 120, ll. 7-20.) Investigator Wade also testified that Petitioner told him Decedent instructed Petitioner to conceal her suicide and desired a natural burial in Little Mountain. (R. 120, ll. 21-25, 121, ll. 1-12.)

On June 19, 2014, Petitioner was again interviewed by Investigator Wade. (R. 103, ll. 3-5.) During this interview, Investigator Wade told Petitioner that Petitioner's son, Joseph Wilkes, was charged with murdering Decedent. (R. 435, ll. 5-13.) At this point Petitioner tried to shift the blame onto himself, stating he killed Decedent. (R. 106, ll. 9-16, 119, ll. 18-25, 120, ll. 1-4, 161, ll. 5-16.) At trial, Petitioner explained why he confessed to killing Decedent.

Q: Now, was there a point in time when you were speaking with Investigator Wade where he gave you some information that caused you to change the story?

A: Oh, yeah.

Q: What was that information that he told you?

A: That they were charging Joseph for something he didn't do.

Q: What were they charging Joseph with?

A: Charging him with murder.

Q: And once you heard him say they had charged Joseph with murder, what did you do at that point?

A: Well, I just said it was me.

Q: Now, when you told them it was you, were you being truthful? When you told him that you were the one that murdered her, were you being truthful?

A: No.

Q: So why did you tell them that lie?

A: Cover up for Susan and Joe.

Q: And --

A: I done lived my life. He needed to live a life.

Q: So when you told them that you murdered Susan, you were not being truthful?

A: That's correct.

(R. 161, ll. 5-25, 436, ll. 1-2.)

Petitioner further testified he did not kill Decedent.

Q: Marion, I want you to look at the jury. Marion Wilkes, did you murder Susan Wilkes?

A: No, I did not.

Q: Are you sure of that?

A: I'm very positive.

(R. 162, ll. 5-9.)

Petitioner was taken into custody following the June 18, 2018 interview; he remained in custody until trial of this matter.

The parties differed on many facts at trial, none more important than the cause of Decedent's injuries. The State called Dr. Janice Ross, a forensic pathologist who performed an autopsy on Decedent. Dr. Ross testified that during the autopsy she found blunt force injuries, including a skull fracture and lacerations to Decedent's head, and a single stab wound to

Decedent's chest. (R. 051, ll. 19-22, 053, ll. 1-4.) Dr. Ross testified on direct examination that she could not determine which injury occurred first. (R. 051, ll. 23-25.) On cross examination Dr. Ross admitted she determined Decedent's death to be caused by exsanguination due to an incised wound of the heart. (R. 60, ll. 21-25, 61, ll. 1-4.) Dr. Ross testified that the exact location of the wound revealed it may have been self-inflicted, as there is no bone to stop a knife from penetrating all the way to the heart. (R. 64, ll. 20-25, 65, ll. 1-13.) She also admitted it would not take a lot of pressure for a person to inflict the type of wound Decedent suffered. (R. 65, ll. 8-11.)

Further, Dr. Ross acknowledged that a cement block could have caused the skull fractures she found during her autopsy. (R. 63, ll. 6-9.) She admitted that law enforcement did not make her aware that a cement block was found in the grave. (R. 63, ll. 6-9.) Dr. Ross also acknowledged that a laceration to the head could be caused by someone falling and hitting their head on a table. (R. 64, ll. 9-12).

## **Argument**

While the Court correctly concluded the implied malice charge was error, it nevertheless concluded it was harmless. Petitioner respectfully submits the Court erred in failing to find that he suffered prejudice because of this erroneous charge. Other than the weapon, the record is scant of evidence of actual malice. No witness testified about observing a fight between Petitioner and Decedent on the date of her death. No witness testified about ill-will or hatred between the parties. The only evidence that could be deemed as reflecting malice came from Petitioner himself, when he told investigators about a confrontation that occurred immediately prior to her death. The story about the confrontation came during the interview where Petitioner confessed to killing Decedent following his son being charged with murder. Petitioner recanted this story at trial. (R. 161, ll. 5-25, 162, ll. 1-2.)

Petitioner concedes numerous versions of what occurred surrounding Decedent's death were presented at trial. Respondent relies on parts of each account to argue actual malice was present: the alleged affair, the finances, alcoholism, and gambling. While these factors may supply an alleged motive for the crime, they do not constitute malice under the law charged at trial. Further, in conducting a harmless error analysis, appellate courts "must be careful not to weigh the evidence. In assessing the State's harmless error argument, we recognize that what we refer to as plausible conflicting evidence may not be viewed as such by the jury." State v. Herndon, 430 S.C. 367, 373 n.6, 845 S.E.2d 499, 502 (2020) (finding the failure to give a Logan charge was not harmless because there was conflicting evidence of guilt). While Herndon involved the failure to give the defendant's requested charge on circumstantial evidence, the Court's analysis is equally applicable here because the inquiry is not what the verdict would have been if the correct charge had been given, but instead whether the erroneous charge contributed to the verdict. see State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578-79 (2019). When there is conflicting evidence, it logically follows that there is a greater likelihood that the improper charge contributed to the verdict and cannot be harmless.

Additionally, Petitioner explained his confession to the murder was his attempt to protect his son, who he learned was charged with murder. While the Court of Appeals relied on Wilkes's subsequently recanted confession as evidence of malice, Petitioner respectfully contends this is insufficient to demonstrate overwhelming evidence of malice and that the clearly erroneous jury charge did not contribute to the verdict. Further, the Court's recital of witness testimony for the proposition that Petitioner's demeanor *after* Victim's death was "calm and unemotional" in no way supports a finding of malice at the time the alleged crime was perpetrated, and thus is far short of overwhelming evidence of malice. By erroneously charging

the jury that it could infer malice by the use of a deadly weapon, the Court allowed the State to escape their burden of presenting evidence of actual malice.

## II.

The Court of Appeals erred in concluding Petitioner did not properly preserve the issue that the trial court erred in failing to view a portion of the film *Where the Lilies Bloom* (1974) before ruling on its admissibility.

### **Reason to grant certiorari**

The Court of Appeals employed a hyper-technical approach to issue preservation rules that is contrary to this Court's jurisprudence.

### **Relevant facts**

At trial, the admissibility of *Where the Lilies Bloom* was argued on three separate occasions: immediately prior to Petitioner taking the stand; during Petitioner's testimony on direct examination; and at the beginning of Petitioner's testimony on re-direct examination.<sup>2</sup> Each of these arguments followed an objection by the State to the admissibility of the film.

After the State raised its objection to the film under Rule 403—citing specifically unfair prejudice based on waste of time and that it was cumulative—the trial court was tasked with determining both the probative value of the film and the danger of unfair prejudice it presented. Instead of screening the film to reach a conclusion on these issues, the court ruled the film was inadmissible. The question in this case is this: Could the court meaningfully evaluate the film's probative value and weigh it against the State's argument that it constituted unfair prejudice

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<sup>2</sup> Although argument on the film's admissibility was heard three (3) separate times, the film was only offered by Petitioner twice: during his direct examination and at the conclusion of his cross examination. The other argument occurred when the State objected to the film prior to Petitioner's testimony, before the film was offered by Petitioner.

without first discerning the film's contents, either by screening the film in whole or in part? Respectfully, Petitioner asserts the answer to this question is no.

### **Argument**

Petitioner submits the Court of Appeals erred in applying a hyper technical application of our preservation rules, thereby preventing it from reaching the merits. It is clear that an issue must be both presented to and ruled upon by the trial court in order to preserve an issue on appeal. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting the “long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments”). However, in employing this fundamental rule, the court is tasked not with examining whether a party used the exact language of a rule or case but instead must review the record to determine whether the trial court understood the basis of the objection. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (noting that the precise legal doctrine need not be named when “it is clear from the argument presented in the record that the motion was made on this ground”). Specifically, issue preservation rules are not a game of “gotcha,” see Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); instead, they are intended “to prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” I'On, 338 S.C. at 406, 526 S.E.2d at 724.

Because the Court of Appeals invoked too narrow an application of issue preservation rules, it did not address the merits. Concerning the merits, the trial court did not, nor could it have, properly analyzed the admissibility of the film without first screening it. Without actually looking at the piece of evidence, a court is in no position to determine its probative value or assess the danger of unfair prejudice it presents. While there is no bright-line rule in this state as to how much

analysis a trial court must undertake before ruling on an objection brought under Rule 403, it is clear the court must, at the very least, undertake *some* analysis of the contested evidence before excluding it at trial. See generally State v. King, 424 S.C. 188, 199-200, 818 S.E.2d 204, 210 (2018) (finding an issue preserved where the argument was not that the trial court failed to employ a proper Rule 403 or 404(b) analysis, but instead that “the trial court erred by not conducting any analysis *at all* before deciding to admit evidence of the unrelated murder charge and the [other] charges”) (emphasis in original).

Moreover, this Court’s holding in Goss v. State is instructive. 425 S.C. 101, 820 S.E.2d 373 (2018). In Goss, a judge ruling on a PCR application chose not to hear testimony from alibi witnesses; rather the judge, along with consent of both parties, took judicial notice of the witness's testimony. Goss at 106, 375. The judge went on to rule these witnesses were not credible despite never actually hearing their testimony or performing any type of analysis into their credibility. Id. The Goss court found this analysis to be erroneous, noting: "When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder choose to hear firsthand." Goss at 108, 376.

In this case, the trial court's decision to rule on the probative value of the film without even making a cursory attempt to evaluate its contents is error. Petitioner contends that in light of Goss, when a court rules on the admissibility of evidence, the court must make decisions based on *all* the evidence and cannot fail to examine the piece of evidence or its contents prior to ruling. Accordingly, it was error for the Court of Appeals to determine Petitioner did not preserve this issue on appeal, and thus, it should have reached the merits.

### III.

The Court of Appeals erred in concluding the trial court's decision to exclude Where the Lilies Bloom was the law of the case because the overall context of the State's argument to the trial court was grounded on Rule 403, SCRE and the testimony reflected the alleged victim told Petitioner she wished to be buried in a manner consistent with the film and for her death to be concealed from the public.

#### **Reasons for granting certiorari**

The Court of Appeals decision acts as a windfall for the State since it characterizes the trial court's ruling as based on Rule 402 rather than Rule 403, which was the Rule the State repeatedly advanced in arguing the film should be excluded.

#### **Relevant facts**

In anticipation of Petitioner offering the film, the State objected to the film's entry prior to Petitioner taking the stand. (R. 126, ll. 7-25, 127-29, ll. 1-15.) The crux of the State's argument was that the film should be excluded under South Carolina Rule of Evidence 403. (R. 126, ll. 21-22.)<sup>3</sup> After hearing only from the State, the trial court took the matter under advisement. (R. 129, ll. 16-17.)

Petitioner took the stand and testified about the plot of the film and its characters. (R. 146, ll. 8-25, 421, ll. 1-4.) Petitioner then identified and offered a DVD copy of the film, informing the court he wished to enter the DVD and publish the first thirty-five (35) minutes of the film to the jury.<sup>6</sup> (R. 147, ll. 21-25, 148, ll. 1-3.) At this point the State renewed its objection under Rule 403, arguing "Your Honor, we stand on the same objection. We think this is *cumulative*. We think it's a

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<sup>3</sup> Indeed, the State asserted because videos are treated as photographs, "they are to use the same 403 analysis." (R. 126, ll. 20.)

*waste of time*. We think it's *prejudicial*, Your Honor. He has summarized what the movie is about. I think that is sufficient for the jury's benefit." (R. 148, ll. 4-8.) (emphasis added).

## **Argument**

The Court of Appeals determined Petitioner misconstrued the trial court's ruling as one under Rule 403 rather than Rule 402, and thus, the failure to address Rule 402 until on reply rendered the issue unpreserved. However, this conclusion ignores the fact that it was the State who objected and sought to exclude the film under Rule 403.

Significantly, Rule 403 is entitled, "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time." The text of the rule provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is immediately apparent that the State's objection was based on Rule 403 because it used the same grounds as set forth in both the title of the rule and its contents—that the film was "cumulative," "a waste of time," and "prejudicial." (R. 148, ll. 4-8.). While it is perplexing how the introduction of the film could be highly prejudicial to the State if it apparently was not even relevant, it is patently evident the State—the party that raised the objection—sought to exclude the video under Rule 403. Accordingly, the trial court's ruling should be viewed in light of the parties' arguments, rather than under Rule 402. While the question on appeal ultimately stems from the trial court's decision to exclude the film, characterizing the ruling as one under Rule 402 effectively transforms the State's basis for the objection.

Moreover, even if the trial court ruled solely under Rule 402, which Petitioner rejects, the State opened the door to the film's admissibility by vigorously questioning Petitioner about the film during its cross-examination. There, the State repeatedly questioned Petitioner about specific

scenes, characters, and statements made in the film. (R. 190, ll. 7-23.) Following cross-examination, Petitioner re-offered the film, arguing that because the State went into specific statements made in the film, the film should be admitted in order to give jurors the opportunity to evaluate the film as a whole. (R. 191, ll. 5-8.) The trial court again excluded the film, noting “I don't think that movie needs to come in, so I'm sticking -- I'm not going to allow the movie.” However, the Court of Appeals disregarded the fact that there would have been little need for the State to extensively question Petitioner about the film if it felt the film was not relevant. This is not what the State did, however, and therefore is another instance demonstrating the issue in the parties’ eyes turned on Rule 403 rather than Rule 402.

Thus, the Court of Appeals erred in concluding Petitioner did not preserve the issue when it tailored its argument based on the ground the State advanced at trial. To hold otherwise would enable the State to reap the benefits of a ruling based on nothing the State presented to the court. Here, the State never raised Rule 402, and therefore, to the extent it is unclear as to the precise basis of the trial court’s ruling, any confusion should be decided in favor of Petitioner. See Atl. Coast Builders, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, J., concurring) (noting preservation rules are not a game of “gotcha” and that “where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation”); State v. Williams, 417 S.C. 209, 229, 789 S.E.2d 582, 593 (Ct. App. 2016) (“Our supreme court has observed ‘it may be good practice for us to reach the merits of an issue when error preservation is doubtful.’”) (quoting Atl. Coast Builders, 398 S.C. at 330, 730 S.E.2d at 285)).

Regarding the merits, the State spent significant time and effort at trial detailing the manner and method of Decedent’s burial. These efforts began with the State’s opening statement, wherein the Solicitor painted a vivid picture of a body decomposing in a shallow grave, telling jurors they would hear about “a burial as malicious as the killing that put her (Decedent) there,” and that

Decedent was buried beside a family pet, with the pet's grave covered in mementos and ceremonial items that were absent from Decedent's. (R. 2, ll. 2-22.)

The State continued with testimony about the gravesite, including photographs of Decedent in the grave. State Ex. 108, 109, 110, 112 (R. 191, ll. 5-8, p. 046, ll. 12-25.) The State's focus on the burial concluded in the Solicitor's closing argument, wherein she told jurors Decedent was "stuffed in a cold, shallow grave." (R. 194, ll. 1-2.) In each of these examples the manner of burial was argued as being probative of Petitioner's guilt. Admitting the film, in whole or in part, would have permitted jurors to decide whether the burial was truly "malicious," or if it was Petitioner's attempt to follow Decedent's instructions, that she be buried in the manner shown in the film.

Assuming arguendo the trial court did not err in excluding the film when offered during Petitioner's direct examination, the State opened the door to its admissibility when the State questioned Petitioner about specific scenes and characters on cross examination. When the State delved into specific portions and passages, the film's probative value certainly rose above the low-threshold for admissibility under Rules 401 and 402. Further, once the State opened the door to admitting the film, it seems disingenuous to allow the State to successfully argue the film's probative value was significantly outweighed by the danger of unfair prejudice, as required to warrant exclusion under Rule 403.

Petitioner concedes that an issue such as this, a film being probative of a manner of burial in a murder prosecution, has not been clearly addressed by this Court. However, in this case, the film was directly probative of the manner and method of Decedent's burial and should have been considered by jurors while deliberating.

Respondent's own brief before the Court of Appeals supports Petitioner's argument that the jury should have been permitted to view the film: Respondent goes into painstaking detail of each factual difference in the death of Decedent and the death of the film's main character. This analysis

is then used as an attempt to draw out dissimilarities and argue against the film's admissibility. *This analysis, however, was only made possible through viewing the film and its contents.* This analysis is one that jurors should have been permitted to conduct, unfortunately, the trial court foreclosed on that opportunity when it excluded the film.

### **CONCLUSION**

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

**Floyd & Spangler, Attorneys at Law**

s/ Colin T.L. Spangler  
Colin T.L. Spangler  
SC Bar No.: 103283  
1611 Augusta Road  
West Columbia, South Carolina 29169  
(803) 739-1824 t  
(803) 739-1888 f