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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 Berkeley County
Honorable Maite Murphy, Circuit Court Judge

Court of Appeals Opinion No. 5908
Appellate Case No. 2019-000687

THE STATE,…….RESPONDENT,

v.

GABRIELLE OLIVA LASHANE DAVIS-KOCSIS,……...….PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina, 29211
(803) 734-6305

SCARLETT A. WILSON
Ninth Circuit Solicitor
300 California Avenue # B
Moncks Corner, South Carolina 29461

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES PRESENTED

1. Whether the Court of Appeals' opinion, which relied on *State v. Vazquez*, 364 S.C. 293, 613 S.E.2d 359 (2005) to affirm the Kocsis's sentences for kidnapping in spite of a sentence for murder, conflicts with S.C. Code § 16-3-910 and the Court's holding in *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984) and *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984), all of which prohibit a defendant from being sentenced for both murder and kidnapping.

2. Whether the Court of Appeals erred in affirming the trial court's admission into evidence of an unfairly prejudicial 911 call recording "for corroborative purposes and establishing the elements of the offense" when the record contains no support for this position and the trial court never listened to the recording before ruling.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether Petitioner's first issue has already been decided by this Court in *State v. Vazquez*, 613 S.E.2d 359 (2005) (as the Court of Appeals held) because it found S.C. Code §16-3-910 does not prevent a defendant from being convicted and sentenced for murdering one victim and separately kidnapping another.

2. Whether the Court of Appeals rightly affirmed the trial court's admission of a 911 call that rehabilitated the attacked credibility of the eyewitnesses and was relevant to prove criminal intent, corroborate the homeowner's identity, corroborate eyewitness's statements, and confirm their identification of Petitioner as a perpetrator. The call was material to the State in helping prove the elements of the crimes.

STATEMENT OF THE CASE

Petitioner was indicted for the murder of Mark Connor, burglary first degree, criminal conspiracy, and two counts of kidnapping by the August 2016 Berkeley County Grand Jury. (2016-GS-08-01951, -01953, 01955, -01957, -01959). She proceeded to trial by jury before the Honorable Maite Murphy from April 8-10, 2019, after which she was convicted as charged under the State's hand of one, hand of all theory. (R. p. 1, R. p. 71, R. pp. 525-526). The State[1] proved that Petitioner led others (armed and masked) to forcefully enter the home of Miss Rose in the middle of the night in order to exert payback on Mark Connor for stealing Petitioner's belongings. (R. pp. 71-72, R. pp. 83-85, R. pp. 91-119, R. pp. 143-145). The home was full of sleeping guests, including the two kidnapping victims Alexis Murray and Whitney Chance. (R. pp. 100-101, R. p. 158). Petitioner deployed pepper spray while two co-conspirators held Murray and Chance at gunpoint and a third executed Mark Connor in a bedroom while Petitioner looked on. (R. pp. 100-101, R. pp. 126-134, R. pp. 141-146, R. pp. 206-207, R. p. 237, R. p. 275).

Judge Murphy sentenced Petitioner to fifty years' imprisonment for murder and ordered her other sentences of fifty years for burglary, thirty years for each count of kidnapping, and five years for conspiracy to be run concurrent. (R. pp. 488-489). After Petitioner timely served her notice of appeal, the South Carolina Court of Appeals ordered briefing and held oral arguments. The court affirmed Petitioner's convictions and sentences in a published opinion on May 4, 2022. *State v. Davis-Kocsis*, 436 S.C. 468, 872 S.E.2d 415 (Ct. App. 2022). The court denied Petitioner's petition for rehearing a few weeks later, so Petitioner filed her petition for writ of certiorari with this Court. This return of Respondent follows.

[1] Ninth Circuit Assistant Solicitors Bart Stegall, Esq., and Jordan Smith, Esq. prosecuted the case; Petitioner was represented by Grant Smaldone, Esq., and Jason Luck, Esq. (R. p. 2).

STATEMENT OF FACTS

For purposes of this brief, Respondent relies on the relevant summary of facts of the crime, investigation, and trial as the South Carolina Court of Appeals set out in their direct appeal opinion:

> In 2016, a Berkeley County grand jury indicted Kocsis for the murder of Mark Connor (Victim), first-degree burglary involving Rosemary Hoffberg and her home, criminal conspiracy, and the kidnappings of Alexis Nicole Murray and Whitney Renee Chance.
>
> Pretrial, Kocsis moved to suppress State's Exhibit 1, which is a recording of a 911 call that consisted of Murray requesting emergency services to respond quickly, telling Victim not to die from his gunshot wound, describing that she and others had been pepper sprayed and Victim was shot, identifying Kocsis as a perpetrator, and stating they were asleep when Kocsis and the others came into the home.
>
> Chance can also be heard on the recording. Relying on Rule 403, SCRE, Kocsis argued the 911 call would "stir up the passions and prejudices of the jury via using emotion rather than facts." The State asserted all 911 calls are emotional, this call was not substantially prejudicial, and the 911 call provided a "real time" account immediately after the shooting. The trial court found State's Exhibit 1 admissible for "corroborative purposes and establishing the elements of the offense[s]" and stated "although [State's Exhibit 1] may be prejudicial, the probative value outweigh[ed] the prejudicial effects."
>
> In her opening statement, Kocsis asserted many of the witnesses, including herself, used methamphetamine, and she urged the jury to consider the credibility of the witnesses, their motives in testifying she was responsible for organizing how Victim was killed, and if she were "some drug leader."
>
> During the first witness's testimony, the trial court admitted State's Exhibit 1 over Kocsis's renewed Rule 403 objection. Thereafter, the State presented evidence that Kocsis was a drug dealer, Victim stole over a thousand dollars and a motorcycle from her, and Kocsis "put a hit on" Victim.
>
> On the day of Victim's death, Victim was staying at "Ms. Rose's" home, and there were several other people there, including Murray, Chance, Richard Curtis, Nick Varner, and Ms. Rose . . . .
>
> According to the State's witnesses, Kocsis, Matt Grainger, Grayson Griffin, and others broke into Ms. Rose's home in the early morning hours by breaking a window and kicking a door in while they were looking for Victim. These witnesses detailed Kocsis sprayed bear mace, or pepper spray, inside the home and indicated to

Grainger to shoot Victim. Thereafter, a gun went off, and Kocsis and the other intruders fled Ms. Rose's home.

According to Varner, he told Chance to call 911—although Murray was the one who actually called 911 on State's Exhibit 1. Varner testified he told Chance to tell law enforcement that they were at Ms. Rose's home and stated law enforcement would know the location. Deputy Kimberly Vandiver, of the Berkeley County Sherriff's Office, testified she was one of the first responders and she spoke with "[t]he owner of the residence."

Murray testified that during the break-in, she was in a bedroom and did not feel free to leave because one of the men Kocsis was with was pointing a gun at her face. Chance, who was in the living room, also testified she did not feel free to leave during the incident; Chance emphasized the mace caused her pain and she had difficulty breathing because of it.

Melissa Freeman, who was with the intruders, testified Kocsis "orchestrated" the incident, and Freeman believed Kocsis and the others were only going to scare Victim. Griffin testified he sold drugs to Kocsis and did not know that someone was going to be killed when they went to Ms. Rose's home. However, Curtis testified he overheard a phone call between Griffin and Kocsis in which Griffin told Kocsis that "they [could not] let stuff like this happen and [let] people get away with it."

During cross-examination of many of the State's witnesses, Kocsis questioned the witnesses about their credibility, focusing on their drug usage, criminal records, possible benefits from testifying, and their recollections of what occurred . . . .

Kocsis testified in her own defense and confirmed Victim took her money and motorcycle. According to Kocsis, the money that Victim stole actually belonged to Griffin because Griffin sold her drugs on credit. Kocsis asserted Griffin threatened that if she could not obtain the money from Victim, he "was going to take it out on [her]." Kocsis testified Griffin took out the hit on Victim, but Kocsis later acknowledged she shared information about the hit.

According to Kocsis, she received a text message that Victim was at Ms. Rose's home, and Griffin wanted her to tell him where the home was located. She stated Griffin gave her a pistol to give to Grainger, which she later gave to Grainger, and Griffin tried to give her a gun to use personally, but she declined to take it. Kocsis testified that upon arriving to Ms. Rose's home, Griffin told her that he planned to smash a window to cause everyone to run out.

Kocsis stated Griffin broke a window and Grainger attempted to kick the door in. Kocsis explained the door started coming open, and Ms. "Rose Hoffberg" was "standing behind the door." . . . Kocsis stated she entered the home and looked for Victim, and upon seeing Victim in the backroom, she sprayed him with the mace. .

> . . Kocsis acknowledged the purpose of going to Ms. Rose's home was to obtain the stolen money. Kocsis denied the intention was to kill Victim and asserted the incident was not planned . . . . In her closing argument, Kocsis emphasized many of the State's witnesses were drug addicts, asserted they were liars, attacked their credibility, and contended their memories were faulty. Kocsis specifically went witness by witness in her closing argument and highlighted aspects about the individuals . . . .
>
> During its deliberations, the jury requested to listen to State's Exhibit 1 again, which the trial court permitted. The jury found Kocsis guilty as indicted, and the trial court sentenced Kocsis to an aggregate sentence of fifty years' imprisonment, including for the murder of Victim and the kidnappings of Murray and Chance.
>
> Thereafter, Kocsis moved for a new trial, asserting **(1)** "there was not [the] requisite evidence to prove any sort of legal possession necessary to prove a burglary charge"; **(2)** "there was [not] sufficient evidence to support a mens rea aspect of the kidnapping charge[s]"; **(3)** *State v. East* implied for a jury to "convict a defendant of kidnapping that is incident to another crime, ... there need[ed] to be a specific charge telling them that there must be requisite intent to commit two separate offenses"; and **(4)** she "would like ... like to reincorporate" her prior objection to the jury charge.
>
> The trial court denied her motion, finding there was sufficient evidence for the jury to return the verdicts it did, the jury was charged to consider each element of each offense separately, and it charged all of Kocsis's requested charges except for the burglary charge. This appeal followed.

State v. Davis-Kocsis, 436 S.C. 468, 872 S.E.2d 415, 418-420 (Ct. App. 2022) (emphasis added).

STANDARD OF REVIEW

Sentences for Kidnapping and Murder

A sentence will not be overturned absent an abuse of discretion, which is when a ruling is based on an error of law, or a factual conclusion is without evidentiary support. *State v. Fuller*, 425 S.C. 468, 480, 822 S.E.2d 910, 916 (Ct. App. 2019) (citations omitted).

911 Call Admissibility

The admission or exclusion of evidence is in the sound discretion of the trial court and its ruling will not be disturbed without a manifest abuse of discretion accompanied by probable prejudice. *State v. Collins*, 409 S.C. 524, 529-530, 763 S.E.2d 22, 25 (2014). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Bratschi*, 413 S.C. 97, 114, 775 S.E.2d 39, 48 (Ct. App. 2015) (cleaned up.) "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. McLeod*, 362 S.C. 73, 81-82, 606 S.E.2d 215, 220 (Ct. App. 2004). "If judicial self-restraint is ever desirable, it is when a Rule 403 [SCRE] analysis . . . is reviewed by an appellate tribunal." *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008).

ARGUMENT

I. Petitioner's first issue was decided by this Court in *State v. Vazquez*, 613 S.E.2d 359 (2005), when it held a defendant may be separately sentenced for murder and kidnapping when the respective victims are different. Therefore, the Court of Appeals rightly upheld the trial court's murder and kidnapping sentences here because the kidnapping victims were not murdered, and Petitioner was not charged with kidnapping the murder victim.

Petitioner argues that even though she was convicted of the murder of Mark Connor, the separate kidnapping of Alexis Murray, and the separate kidnapping of Whitney Chance, she should have still received the benefit of S.C. Code § 16-3-910's provision[2] that trial judges may not sentence a defendant for both the murder and the kidnapping of the same victim. (Petition at 1). This issue has already been decided by this Court in *State v. Vazquez*, 364 S.C. 293, 613 S.E.2d 359 (2005) (abrogated on other grounds by *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006)), and therefore this Court should deny the petition.

The Court of Appeals made no error in their published 2022 opinion that affirmed the trial court's sentences. *State v. Davis-Kocsis*, 436 S.C. 468, 872 S.E.2d 415 (Ct. App. filed May 4, 2022). The court, first noting the issue was unpreserved, reached the merits in light of *State v. Vick* and discussed the cases Petitioner relies on including *Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009) (vacating the kidnapping sentence of a defendant sentenced for the murder and kidnapping of the same victim); *State v. East*, 353 S.C. 634, 638-639, 578 S.E.2d 748, 751 (Ct. App. 2003) (upholding the trial court's denial of a directed verdict on a kidnapping charge because the jury was properly instructed that they must find a separate intent to commit kidnapping in order to convict); *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984)

[2] **S.C. Code § 16-3-910 (1991):** "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20."

(upholding the four life sentences for four counts of murder but vacating the five life sentences given for five counts of kidnapping); and *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984) (vacating the life sentence for kidnapping when the judge also gave a life sentence for murder). It then logically explained why the cases Petitioner argues should have been applied to her did not.

It cited *State v. Vazquez*, 364 S.C. 293, 613 S.E.2d 359 (2005) and stated this Court held in it that section 16-3-910 did not apply to the separate kidnappings of Murray and Chance. *Davis-Kocsis*, 436 S.C. at 426; *Vazquez*, 364 S.C. at 302, 613 S.E.2d at 363. The "kidnapping sentences related to victims who were not murdered were proper." *Davis-Kocsis*, 436 S.C. at 426; *Vazquez*, 364 S.C. at 302, 613 S.E.2d at 363. The court then stated "[w]e acknowledge Kocsis cites two opinions from our Supreme Court from 1984 to support her position" (noting *Livingston* and *Stroman*) but then highlights that it relies on the most current and correct precedent in making its decision. *See State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the court of appeals to apply [the South Carolina Supreme Court's] precedent.")[3] The court is correct. It is incumbent that the Court of Appeals apply this Court's most recent precedent. S.C. Const. Art. V, § 9. To Respondent's knowledge, no other case has come out since *Vazquez* that impacts its ruling, and the Court of Appeals rightly considered all relevant and applicable lines of case law. This Court should deny the petition.

Petitioner was convicted of all three crimes at issue in this section under hand of one, hand of all. The record shows she "put a hit out" on Mark Connor for stealing cash and a motorcycle from her. It also shows she then organized a group to go and exact revenge in the

[3] Respondent notes for this Court that other cases that discuss § 16-3-910 were all decided before *Vazquez*: *e.g., Owens v. State*, 331 S.C. 582, 503 S.E.2d 462 (1998); *State v. McCall*, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991) (*overruled by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) on other grounds); *State v. Perry*, 278 S.C. 490, 299 S.E.2d 324 (1983); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); etc.

middle of the night, ensuring the group was armed and masked before forcibly breaking into Miss Rose's house where Mark Connor and many others slept. While inside, one co-conspirator held Alexis Murray at gunpoint, and Murray testified at trial that she did not feel free to leave. Another co-conspirator held Whitney Chance at gunpoint, who also testified she did not feel free to leave, especially when the pepper spray hurt her to the point of immobility. A third co-conspirator joined Petitioner in the bedroom where Connor and multiple others slept, and Petitioner yelled and encouraged that co-conspirator to "shoot him" right before he did, in fact, shoot Connor. The record shows that criminal intent existed for all three crimes, and that evidence existed to indict Petitioner for three distinct crimes as there were three separate victims.

It is true that "[o]ur courts have long held, where an appellant has been sentenced for a murder of a victim, this code section precludes a sentence for kidnapping *of that victim*, and any such sentence should be vacated." *Vick*, 384 S.C. at 201, 682 S.E.2d at 281. The reason for this is unknown, but circumstantial evidence shows that as a kidnapping conviction used to carry a mandatory minimum of life (S.C. Code § 16-3-910 (1976, *e.g.*)), and as murder used to also carry either a mandatory minimum of life (or death, of course) (S.C. Code § 16-3-20(A) (1978, *e.g.*)), the provision merely points out a redundancy.

Before 1991, the provision in § 16-3-910 provided that "one shall suffer the punishment of life imprisonment for kidnapping unless sentenced for [life imprisonment for] murder, as provided in § 16-3-20." *See, e.g., State v. Copeland*, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982). Petitioner argues that if the Legislature meant the portion of the statute in question to apply only when the victim of the kidnapping is also the victim of the murder then it should and could have said so in it. Respondent asserts the opposite. One cannot conclude the Legislature

intended defendants to escape accountability for kidnapping a single or multiple other victims just because the Petitioner happened to also be convicted of a separate murder.

Petitioner conveniently avoids discussing *Vazquez* (decided in 2005), citing only *Stroman* (1984) and *Livingston* (1984) as the reasons why this Court should overturn the Court of Appeals. In *Vazquez*, like in *Stroman* and *Livingston*, there *were* multiple sentences for kidnapping and murder: four for kidnapping and two for murder. This Court, however, unlike in *Stroman* and *Livingston*, vacated *only two* of the four kidnapping sentences that overlapped with the two murder sentences: the petitioner had kidnapped and murdered two of the same people but had separately kidnapped two more. This Court notably upheld the other two sentences for kidnapping for the two victims that had *not* been murdered and held § 16-3-910's double-dip preclusion did not apply to them. This Court should find its most recent case on point applies here and deny the petition for a writ of certiorari.

II. The Court of Appeals properly upheld the trial court's admission of the 911 call because it rehabilitated the attacked credibility of the eyewitnesses, gave a real time account of what occurred post-shooting, was material to proving criminal intent and the elements of the crimes, and it corroborated the witnesses' statements of the identity of the shooter and the homeowner. Its probative value was not substantially outweighed by any prejudicial effect.

Petitioner argues the Court of Appeals erred in upholding the trial court's admission of the 911 tape as it was unfairly prejudicial for being "raw and emotional" and the record did not support admission for the stated purposes. (Petition at 10).[4] Respondent maintains this argument is without merit. The Court of Appeals rightly held that no manifest abuse of discretion of the trial court accompanied by probable prejudice occurred by the call's admission. *Davis-Kocsis*, 872 S.E.2d at 426. "If judicial self-restraint is ever desirable, it is when Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.*; *Lyles*, 379 S.C. at 339, 665 S.E.2d at 207. The court stated the 911 call was relevant under the spirit of Rules 401 and 402, SCRE, and its probative value was not substantially outweighed by the danger of undue prejudice under Rule 403, SCRE. *Davis-Kocsis*, 872 S.E.2d at 427. The Court of Appeals also rightly found the call was admissible to counteract the Petitioner's attempts to discredit the witnesses in her opening statement, cross-examination, and closing argument. This Court should deny the petition for writ of certiorari.

In its analysis of why the trial court was correct, the Court of Appeals compared Petitioner's case to *State v. Stephens*, 398 S.C. 314, 78 S.E.2d 68 (Ct. App. 2012). In *Stephens*, the Court of Appeals upheld the trial court's admission of a second photographic lineup under Rule 403 because the main defense strategy was to discredit a witness's identification of the defendant in the second lineup. 398 S.C. at 319-322, 728 S.E.2d at 71-73. The Court of Appeal here compared the facts of

[4] As to Petitioner's argument that the trial court erred by admitting the 911 call without listening to it first, this argument is not preserved for appellate review. Petitioner did not raise this issue to the Court of Appeals in its initial, final, or reply brief, at oral argument, or in its petition for rehearing. Therefore, Petitioner has waived this issue. This Court should deny the petition.

the cases and held the trial court in Petitioner's case did not abuse its discretion because Petitioner's main defense strategy at trial was to discredit the witnesses as unreliable drug addicts. *Davis-Kocsis*, 872 S.E.2d at 427. It found that the 911 call, admitted as State's Exhibit 1:

> [S]upported the State's version of events by providing an account of what happened in "real time," and the recording identified Kocsis as being part of the group that broke into Ms. Rose's home and killed Victim. Additionally, during cross-examination of many of the State's witnesses, Kocsis questioned the witnesses about their credibility, their drug usage, criminal records, possible benefits from testifying, and the quality of their recollections of what occurred.
>
> In her closing argument, Kocsis emphasized the State's witnesses were drug addicts, asserted they were liars, attacked their credibility, and contended their memories were faulty. Kocsis's case is similar to *Stephens* because in light of the whole trial, Kocsis attempted to discredit the State's witnesses like the defendant attempted to discredit the witness's identification in *Stephens*.

Davis-Kocsis, 872 S.E.2d at 427.

This ruling is correct. A trial judge has considerable latitude in its decision to admit or exclude evidence. *State v. Bratschi*, 413 S.C. 97, 113, 775 S.E.2d 39, 47-48 (Ct. App. 2015). The trial court did a 403 analysis on the record after Petitioner moved to exclude State's Exhibit 1 in a pre-trial motion. R. 12-14. The Petitioner argued the 911 call was more prejudicial than probative as it would "stir up the passions and prejudices of the jury via using emotions rather than facts" because the witnesses were with their friend who had just been shot and were relatively emotional.[5] The State responded by pointing out that all 911 calls are emotional; their admissibility is based on whether they were relevant and then on whether their danger of unfair prejudice substantially outweighs their probative value instead.[6] The court then concluded the call's probative value was

[5] This Court upheld the admission of a 911 call into evidence (even though caller was audibly distressed) as the caller described the crime scene immediately after her and her family were shot, and it was relevant to establishing the circumstances of physical torture in the death penalty trial.) *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003).

[6] **Rule 403, SCRE:** Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. "Although relevant, evidence may be excluded if its probative value is

not substantially outweighed by the danger of undue prejudice and admitted it, as it corroborated witness statements and would help the State to establish the elements of the crimes.

Alexis Murray (one of the kidnapping victims) can be heard on the call stating, "we just got pepper sprayed and my friend got shot." She requested EMS respond quickly, told the victim not to die from his wound, described how her and her friends were pepper sprayed, how the victim was shot, identified Petitioner as a perpetrator, and stated everyone in the house was asleep when Petitioner and her co-conspirators forcibly broke down the door. She also confirms that Miss Rose's house was at 512 McCrystal (important to the elements of "without consent" and "dwelling" of Petitioner's burglary first degree indictment), and describes the two vehicles the perpetrators arrived in. Whitney Chance, the other kidnapping victim, can be also be heard on the call. By admitting it, the trial judge ensured the jury was provided with a real-time account of the events that occurred after the shooting and helped them assess the credibility of the witnesses.

It is jury's job to assess the credibility of the witnesses. Under Rule 607, SCRE, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Character evidence, specific instances of conduct, and evidence of bias, prejudice, or any motive to misrepresent may also be used to impeach a witness in order to help the jury make their credibility assessments, subject to the parameters in Rule 608, SCRE. However, while solicitors (or any attorney for that matter) cannot improperly vouch for the credibility of a witness via personal assurances, they are squarely permitted to rehabilitate a witness whose credibility has been attacked. *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2002). The solicitor asserted just this in his argument in favor of admissibility pre-trial. He reminded the court that

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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."

under Rule 801(d)(1)(B), SCRE, a prior consistent statement of a witness is admissible (subject of course to Rules 401 to 403), to "rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

The court properly admitted the call after the Petitioner attacked the credibility of the witnesses in her opening statement. R. 14, R. 31-36.

> [Y]ou will hear from a lot of witnesses in this case, and the one thing that ties almost all of them together is drugs. It's not just marijuana or pills or anything like that. It's meth, ice. It's a terrible drug. And you will hear about people staying up for days, weeks at a time Call them tweakers. People that just live a sad life . . . .
>
> You might hear some people that [Petitioner] set it up. Ask yourself, who is saying that? What is their motive to say that? The truth will come out . . . .

R. 32, R. 35.

The record thus supports the trial court's ruling that the tape was admissible to rehabilitate the witnesses' credibility the Petitioner attacked. The trial court properly analyzed Rules 401 to 403 and 801 in making its determination that the danger of undue prejudice did not substantially outweigh the probative value of the 911 call – State's Exhibit 1 – and rightly admitted it. The Court of Appeals then rightly upheld the trial court's ruling. This Court should do the same and deny the petition for writ of certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT A. WILSON
Ninth Circuit Solicitor
300 California Avenue # B
Moncks Corner, South Carolina 29461

ATTORNEYS FOR RESPONDENT

By: s/Julianna E. Battenfield

July 20, 2022