

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Sumter County
Hon. George M. McFaddin, Circuit Court Judge
Appellate Case No. 2022-000849

RECEIVED

Aug 08 2022

S.C. SUPREME COURT

The State,

Respondent,

v.

Donald Ray Richburg,

Petitioner.

Opinion No. 2022-UP-118 (S.C. Ct. App. filed March 23, 2022)

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

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals properly affirmed the trial court's decision to admit the video of Petitioner's arrest because it demonstrated his flight and extreme actions to prevent being found and arrested. Further, the Court properly concluded the trial court did not err in its analysis regarding whether the probative value of the video was substantially outweighed by the danger of unfair prejudice.

II. The Court of Appeals properly found any issue related to the admission of the second statement pursuant to the rule of completeness found in Rule 106, SCRE, was not properly preserved for review on appeal. On the merits, the cross-examination was properly restricted because it sought to admit self-serving hearsay which was not properly admissible under Rule 106. (Petitioner's Questions 2 and 3).

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Sumter County Grand Jury for four counts of first-degree assault and battery and one count of discharging a firearm into a dwelling. On June 10–12, 2019, Petitioner proceeded to a jury trial before the Honorable George M. McFaddin. The jury found Petitioner guilty as charged, and the trial judge sentenced him to ten years' incarceration for each count with all sentences running concurrently.

Petitioner filed an appeal and, after briefing but without oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences. See State v. Richburg, Op. No. 2022-UP-118 (S.C. Ct. App. Filed March 23, 2022). Petitioner filed a Petition for Rehearing, and the State filed a Return. The Court of Appeals denied the Petition for Rehearing on May 19, 2022. Petitioner served and filed a Petition for Writ of Certiorari and this Return follows.

Factual Background

On June 17, 2018, Evelyn Brinson was asleep on the sofa in her living room. Around 4:00 a.m., she was startled awake by gunshots. As soon as she verified everyone in the home was alright, she called the police. Evelyn estimated she heard more than ten gunshots that night, recalling that bullets hit three motor vehicles, a boat, and several more entered the home. (R.p.52, line 20–R.p.62, line 15).

Jeremy "Ty" Brinson was also in the home that night. He was asleep when the gun fire woke him. After the firing stopped, Ty ran out of his room. He and his father exited the house and saw the taillights of a vehicle fleeing the scene. Ty thought he recognized the taillights, but he was sure he recognized the sound of the vehicle as the white truck belonging to Ron Smith. According to Ty, Ron's truck made a distinctive noise as a result of issues with his muffler. Ty

had heard this sound on several occasions in the past, including during a confrontation at a gas station approximately a day before the shooting. The men spoke, and Ty had hoped the issues between the men were resolved. However, the afternoon of the following day (hours before the shooting), Jeremy was driving and saw Smith and Petitioner following him in Smith's truck. (R.p.65, line 9–R.p.75, line 6).

Just before the shooting, Tabitha Browder, Ty's second cousin, met Petitioner. Browder quickly observed Smith had a firearm because he was showing it off to the people at the house. Petitioner appeared to be in a "fair mood," but Smith was upset about an ongoing feud with someone he refused to name. Still, Petitioner supported Smith and told him they were "boys" and he "[had] his back." The two men stayed at the home for some period of time and did not leave until shortly before the shooting occurred. (R.p.80, line 25–R.p.87, line 22).

Corporal Orlando McCray, an officer with the South Carolina Highway Patrol, pulled over Smith at 3:35 a.m. on June 17, 2018, approximately a half-hour before the shooting. Smith was observed weaving around the roadway. McCray and Trooper Brown who rode with McCray believed Smith could be driving under the influence. A warning ticket was issued to Smith. Corporal McCray observed the passenger in the vehicle while Trooper Brown interacted with Smith. (R.p.145-156). Corporal McCray later identified Petitioner as the passenger after picking him out of a photo lineup.

Smith later admitted getting pulled over by a State Trooper shortly before the shooting occurred, and Petitioner was the passenger in his car when that occurred. However, when the men approached the victims' residence, Petitioner moved over to the driver seat while Smith shot at the house. When Smith was asked to come in and speak with law enforcement about the shooting, he and Petitioner fled for "the lake." Smith also acknowledged that his truck, a white

Ford Ranger, had a distinct muffler sound that was louder than normal. (R.p.92-97; R.p.114-120).

On June 20, 2018, Investigator Randall Stewart of the Sumter County Sheriff's Office began investigating the drive-by shooting and discovered Petitioner had been with the primary suspect, Ronnie Smith, in the hours prior to the shooting. Stewart scheduled an interview with Petitioner to find out what potential information about the crime he might have. The following day, after issuing Petitioner Miranda warnings, Investigator Stewart questioned Petitioner about his recollection of that night. Petitioner admitted he had been with Smith earlier that night and even part of the day. Notably, Petitioner recalled sitting next to Smith in the latter's vehicle during the day when Smith had waved a gun at one of the victims of the drive-by and made threatening statements. Later, at a party, Smith began handling his firearm and began making statements that he was going to do something "reckless." After leaving the party, Petitioner told Smith he did not wish to go with him if he was going to do something stupid or reckless, so he went with his girlfriend Chelsea to Camden for the night and was not with Petitioner when the drive-by occurred. Petitioner put these claims into a written statement for police. After the interview, Investigator Stewart thanked Petitioner for his help and allowed him to leave the sheriff's office. (R.p.3, line 1–R.p.13, line 9; R.p.299).

However, as Investigator Stewart continued his investigation, he discovered Petitioner's statement was inconsistent with other evidence he was uncovering. After Smith was taken into custody, he told officers that Petitioner was, in fact, present during the drive-by shooting. As a result, Investigator Stewart obtained arrest warrants for Petitioner around August 15, 2018. Investigator Stewart attempted to contact Petitioner and notify him there were warrants for his arrest but was never able to obtain a response. The officer made contact with Petitioner's mother

and his probation officer. Investigator Stewart also contacted Petitioner's girlfriend, Courtney Huggins, and asked the local news to air a segment asking viewers for information regarding Petitioner. Still, Petitioner never contacted Investigator Stewart or turned himself in to authorities. (R.p.13, line 10–R.p.15, line 17).

Sergeant Ronald Dodson, Jr., a deputy with the Sumter County Sheriff's Office, is a liaison with the US Marshal's Task Force for locating U.S. Fugitives. On August 17, 2018, he was involved with the efforts to find Petitioner for his charged crimes. He received information that Petitioner was staying at the America's Inn in Sumter County and solicited the help of several officers before initiating the arrest. (R.p.158, line 18–R.p.162, line 11).

Sergeant Dodson and the rest of officers who arrested Petitioner wore body cameras that night. The body camera footage recorded by the officers—the Arrest Recording debated by the parties during the pretrial hearing—was presented in conjunction with his testimony.¹ Sergeant Dodson found Courtney Huggins, Petitioner's girlfriend, in a room at the hotel. Huggins, who was uncooperative, was told that if she did not cooperate she would be arrested and DSS would be called to take her child into custody. Sergeant Dodson confirmed it is standard practice for DSS to take custody of children when their parents are arrested. Meanwhile, officers noticed that ceiling tiles in the room were out of place and indicated they had been deliberately moved. Based on this information, officers realized Petitioner was hiding in the ceiling. Even after officers initially revealed to Petitioner they knew where he was hiding and that if he did not come out his child would be taken to DSS, he did not immediately come down from the ceiling. Petitioner eventually agreed to come down. He was taken into custody for his charged crimes,

¹ Trial counsel renewed his objection to the recording during the trial on the same grounds he objected to the Arrest Recording during the pretrial hearing. Following Sergeant Dodson's testimony, he also moved for a mistrial based on the recording's admission. (R.p.163, lines 4–13; R.p.168, line 5–R.p.169, line 17).

and Huggins was arrested for obstruction of justice. Although Huggins was ultimately charged for her actions, Sergeant Dodson allowed Huggins to call her mother and have her take custody of the child. (R.p.162, line 12–R.p.167, line 1; State’s Exhibit 7). Ultimately, the trial court admitted the video of Petitioner’s arrest into evidence over Petitioner’s objection.

Several months after he was taken into custody, Petitioner contacted Investigator Stewart to give a second statement. On November 27, 2018, Petitioner and his attorney, at the former’s request, met with Investigator Stewart and provided a second statement in which he admitted to being present at the shooting, but unaware of Smith’s intentions for the event until after the shooting began. (State’s Exhibit 6). The State did not seek to introduce this statement at trial but did introduce Petitioner’s first statement to Investigator Stewart. The trial court did not require the State to admit or discuss the second statement and did not allow Petitioner to cross-examine Stewart regarding the second statement. (R.219-222).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury’s verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

“A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in *exceptional circumstances*.” State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)) (emphasis added). This Court will “review a trial court’s decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give *great deference* to the trial court’s judgment.” Id. (emphasis added).

ARGUMENT

- I. **The Court of Appeals properly affirmed the trial court’s decision to admit the video of Petitioner’s arrest because it demonstrated his flight and extreme actions to prevent being found and arrested. Further, the Court properly concluded the trial court did not err in its analysis regarding whether the probative value of the video was substantially outweighed by the danger of unfair prejudice.**

The Court of Appeals correctly found the State’s video recording of Petitioner’s arrest was properly admitted into evidence over Petitioner’s objection pursuant to Rule 403, SCRE. The video had significant probative value as evidence of flight and the extreme length to which Petitioner went to avoid being captured—Petitioner climbed into the ceiling of a hotel room and refused to exit even when officers announced they knew his location and his child would be taken to DSS—and the probative value was not substantially outweighed by the danger of unfair prejudice.

Generally, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000); Rule 402, SCRE. Evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002); Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

“As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.” State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). This Court long ago recognized: “False and conflicting statements *and attempts to run away* have always been regarded as some evidence of guilty knowledge and intent.” Town of Hartsville v. Munger, 93 S.C. 527, 77 S.E. 219, 219 (1913) (emphasis added). Not many years later, this Court articulated: “The flight of one charged with crime has always been held to be some evidence tending to prove guilt. Solomon wrote as a proverb the ‘wicked flee when no man pursueth’; and Shakespeare made guilty² Hamlet to soliloquize that ‘conscience does make cowards of us all.’” State v. Freely, 105 S.C. 243, 89 S.E. 643, 645 (1916).

Petitioner has not argued the video is not relevant or that it does not have significant probative value demonstrating Petitioner’s consciousness of guilt. In reality, Petitioner in attempting to explain the prejudice of the video explained its significant probative value: “It showed that Petitioner was willing to allow his girlfriend to be arrested and have his child taken into DSS custody instead of surrendering to the police himself.” (Pet. Writ of Cert. p.7). Not only did Petitioner flee and hide in the ceiling of a hotel, but he was so consumed with avoiding arrest that he was willing to allow his girlfriend to be arrested and child taken to DSS. This extreme behavior is significant probative evidence of his consciousness of guilt.

Even relevant, evidence may still be excluded. Rule 403 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.” Rule 403, SCRE.

² Westlaw has the phrase as “bloody Hamlet;” however, a review of the South Carolina Reporter shows it is “guilty Hamlet.”

“Unfair prejudice means an undue tendency to suggest decision on an improper basis.” State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). “[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.” United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989). “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574, 587–88 (1997).

Petitioner cites to State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) to support his proposition that the officers’ statements regarding DSS and arresting Huggins were unfairly prejudicial. Corns, however, dealt with the issue of whether the threats made in that case were sufficient to overbear the defendant’s will and cause him to involuntarily give a statement to police he would not have otherwise given. In the present case, unlike Corns, the statements had little to no effect on Petitioner, which did not unfairly prejudice Petitioner, but instead, heightened the probative value of the video of his hiding in the ceiling of the hotel.

The video recording was submitted to establish Petitioner was aware law enforcement sought to arrest him and showed direct proof of the great lengths he would go to avoid capture. In fact, Huggins’ interaction with police in the recording was additional evidence Petitioner was aware law enforcement was after him: Investigator Stewart testified he contacted Huggins about Petitioner and told her he sought to arrest Petitioner. Still, Huggins is found at the same hotel

room in which Petitioner is ultimately discovered in the ceiling and denied knowledge of his location. Huggins' knowledge of the arrest warrant along with her efforts to help Petitioner remain hidden from police are strong evidence of his flight from law enforcement and his consciousness of guilt.

As discussed, the appellate courts review the trial court's determination under Rule 403 with great deference and only reverse under exceptional circumstances—not just when the appellate court may have weighed the evidence differently. Other courts also agree that care should be taken in reversing a trial court's decision regarding the balancing of probative value versus the possibility of unfair prejudice. See United States v. Green, 887 F.2d 25, 27 (1st Cir.1989) (“A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in ‘exceptional circumstances.’”); United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.”); see also, State v. Lyles, 379 S.C. 328, 338-339, 665 S.E.2d 201, 207 (Ct. App. 2008) (citing both Green and Long in discussing the great deference owed to the trial court on questions of probative versus prejudicial balancing).

The jury in this case was not lured into declaring guilt on any ground other than the proof presented. The evidence Petitioner's girlfriend was threatened with arrest and his child was threatened to be removed to DSS custody demonstrates the desperateness of Petitioner's attempt to evade capture. The State submits the video was incredibly damaging evidence for Petitioner's case, but it was not unfair evidence or evidence which tends to suggest decision on an improper basis. Instead, it was evidence which directly pointed, correctly, to Petitioner's guilt.

II. The Court of Appeals properly found any issue related to the admission of the second statement pursuant to the rule of completeness found in Rule 106, SCRE, was not properly preserved for review on appeal. On the merits, the cross-examination was properly restricted because it sought to admit self-serving hearsay which was not properly admissible under Rule 106. (Petitioner's Questions 2 and 3).

The Court of Appeals correctly found the issue raised by Petitioner arguing the cross-examination of Investigator Stewart regarding Petitioner's second statement was allowed under Rule 106, SCRE, was not properly preserved for review on appeal because he made a different argument at trial from the one advanced on appeal. Additionally, even if preserved, the cross-examination sought the admission of blatant hearsay and was not properly admitted pursuant to Rule 106, SCRE.

Issue Preservation

Initially, the issue is not properly preserved for review on appeal. At trial, Petitioner never argued to the trial court that admission of the second statement or any part of the second contradictory statement was necessary to complete the first statement or the jury's understanding of the first statement. Instead, his argument was solely that he sought to clarify his defense for the jury and that the testimony would not be "self-serving" because it was placing him at the scene of the crime. On appeal, Petitioner maintains the cross-examination regarding the second contradictory statement should have been allowed pursuant to Rule 106, SCRE. This is a different argument than the one raised by trial counsel at trial.

Further, Petitioner clearly did not intend to utilize Rule 106 or argue pursuant to Rule 106 because he specifically disavowed the relief which he could have obtained under Rule 106. The Rule allows for the admission of the remainder of or a subsequent statement. It does not allow for the cross-examination of a witness related to inadmissible hearsay. In his discussion with the

trial court, Petitioner directly stated he did not seek to admit the second statement or any part of the statement. (R.220). This is the only relief allowed by Rule 106, and he specifically indicated it was not what he sought. As a result, it is clear from the Record, Petitioner never argued to the trial court that Rule 106 was the basis to allow him to address the subsequent statement.

As a result, the Court of Appeals properly found the issue was not preserved for review on appeal. See State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”); State v. Sheppard, 391 S.C. 415, 423, 706 S.E.2d 16, 20 (2011) (“Our law is clear than an issue may not be raised for the first time on appeal.”).

Additionally, Petitioner seems to argue because the State raised Rule 106 in its argument to prevent admission of the statement, this is sufficient to preserve the issue on his behalf. Significantly, even once the State raised Rule 106 and indicated it was not applicable, counsel for Petitioner never argued the State’s interpretation of the rule prohibiting the admission on that ground was incorrect, he instead argued that it should be allowed so he could tell the jury that he was not seeking to establish an alibi defense. He never asserted that Rule 106 allowed the admission. As a result, he cannot piggyback on the State’s discussion of the issue, especially when he failed to contest the State’s argument that Rule 106 did not apply. See, e.g., Brock v. Bd. of Adjustment & Appeals of City of Rock Hill, 308 S.C. 539, 543, 419 S.E.2d 773, 776 (1992) (finding an issue is not preserved when it is not raised by the appellant at trial); Tupper v. Dorchester Cty., 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) (finding appellant “cannot bootstrap an issue for appeal by way of a codefendant’s objection”); State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977) (finding issue not preserved because “appellant may not utilize the objection of another defendant to gain review”).

Petitioner maintains issue preservation should not be considered a “gotcha” against a defense attorney and that the Court should very broadly construe his argument in order to find the issue preserved. Issue preservation is a necessary requirement to prevent “gotcha” moments of the trial judge as well. “An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (italics in original). This Court further announced: “imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” Id. at 422, 526 S.E.2d at 724; see also, State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: “A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.”). The Court noted the purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant’s contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal. Id. Previously, this Court has explained:

The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him.

Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970). The trial court never had a meaningful opportunity to consider the arguments Petitioner has raised on appeal because

they were not made by trial counsel. As a result, this Court should find the issue not properly preserved for review on appeal and deny the Petition as to Questions 2 and 3.

Merits

On the merits, the trial court properly denied Petitioner's request to cross-examine Investigator Stewart about Petitioner's second self-serving and contradictory statement. It was blatant hearsay, admitted without an exception. It also did not qualify to be admitted pursuant to Rule 106, SCRE. As a result, the trial court properly prevented Petitioner from being able to force admission of his own self-serving statement which did not "in fairness" need to be considered in order to complete or provide necessary context to the first statement.

Rule 106 states:

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106, SCRE. This Court has noted the text of Rule 106 is substantially similar to the Federal Rule, Rule 106 Fed.R.Evid, and looked to the Federal Rule for assistance in interpreting and applying Rule 106. Initially, this Court noted: "Rule 106, Fed.R.Evid., is based on the " 'rule of completeness' and seeks to avoid the unfairness inherent in 'the misleading impression created by taking matters out of context'." State v. Taylor, 333 S.C. 159, 170, 508 S.E.2d 870, 875 (1998) (quoting Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529 (11th Cir.1986)). Its purpose is "to permit the contemporaneous introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading." United States v. Jamar, 561 F.2d 1103, 1108 (4th Cir.1977).

This Court has also looked to the advisory committee's notes regarding the Federal Rule and noted: "The [corresponding federal] rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial." State v. Tennant, 394 S.C. 5, 15, 714 S.E.2d 297, 302 (2011) (quoting Fed.R.Evid. 106 advisory committee's note (1972 proposed rules). This Court explicated: "The standard here is "fairness." Id.

As the Fifth Circuit Court of Appeals noted: "Although different circuits have elaborated Rule 106's 'fairness' standard in different ways, . . . , common to all is the requirement that the omitted portion be relevant and 'necessary to qualify, explain, or place into context the portion already introduced.'" United States v. Branch, 91 F.3d 699, 728 (5th Cir. 1996). The Seventh Circuit Court of Appeals has explained a two-part test to the admission of evidence under the Federal Rule 106: 1) the evidence must be relevant to the issues in the case and 2) the evidence must qualify or explain the evidence offered by the opponent. See United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992). The Court went on to explain:

The test is conjunctive. Once relevance has been established, the trial court then must address the second half of the test, and should do so by asking (1) does it explain the admitted evidence, (2) does it place the admitted evidence in context, (3) will admitting it avoid misleading the trier of fact, and (4) will admitting it insure a fair and impartial understanding of all of the evidence.

Id.

In the instant case, the second statement was not necessary to explain or place the first statement into context. It was not used to qualify what Petitioner said in the first statement. Instead, the second statement served no purpose other than to create a new, contradictory, version of events to establish Petitioner's defense to the crime. He did not seek to admit any portion of the statement, or even cross-examine Investigator Stewart about the second statement,

as a means of clarifying the first statement or allowing the jury to see the full picture regarding when the first statement was made to Investigator Stewart. Instead, the purpose of the second statement—given five months after the first statement, after Petitioner was arrested and obtained counsel, and three months after his request for discovery—was to contradict the prior statement and set forth a new defense. As a result, any reference to it or cross-examination by Petitioner related to his statement was inadmissible hearsay and not admissible pursuant to Rule 106, SCRE. See, e.g., United States v. Faruki, 803 F.3d 847, 857 (7th Cir. 2015) (“Faruki was not entitled to introduce his own hearsay statements through Baraker to “impeach” earlier statements Faruki had made that were already in evidence. The district court properly found that the *appropriate vehicle for the introduction of such evidence* would have been for *Faruki himself to have taken the stand.*”). His cross-examination was not to provide context about the first statement or clarify what was said. It was to change his defense in front of the jury by contradicting his prior statement. This is not a reason to employ Rule 106, SCRE.

Most significantly, fairness does not require the admission of the second statement or Petitioner’s right to cross-examine the investigator related to the statement. As this Court noted, the rule: “seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context.” Taylor, 333 S.C. at 170, 508 S.E.2d at 875 (internal quotation and citation omitted). If the State can be forced to admit the statement, or Petitioner is allowed to bring forth the basic contents of the statement through cross-examination, then a defendant could always draft a written statement of his full defense and what would ultimately be his testimony at trial, give it to an officer before trial, and have it admitted without having to take the stand and testify subject to cross-examination if the State ever used a prior statement. Petitioner sought to have his version of events put before the jury without having to testify and subject himself to

cross-examination. Certainly, fairness cannot dictate such a result. As discussed in Faruki, Petitioner had a means of getting this information to the jury. He chose not to avail himself of it. Accordingly, this Court should deny the Petition for Writ of Certiorari as to Questions 2 and 3.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

ERNEST A. FINNEY, III,
Solicitor, Third Judicial Circuit

BY:



William M. Blich, Jr

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 8, 2022