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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS LATRELL LAWRENCE,

PETITIONER.

Opinion No. 5863 (S.C. Ct. App. filed Oct. 6, 2021)

APPELLATE CASE NO. 2021-001492

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

The Court of Appeals erred in holding the hazards of self-incrimination were openly apparent for a witness whose proposed testimony was that he and Petitioner went to a home to purchase marijuana, but never completed the purchase, and that he and Petitioner exercised self-defense when the homeowner attacked Petitioner.

Most telling in Respondent's brief is the assertion that "Bennett faced a real risk of self-incrimination if compelled to provide any substantive testimony or answers about the incident which led to Lawrence's charges because Bennett, too, was being prosecuted for and awaiting his own trial on pending criminal charges related to the same incident." BOP at 15. This earlier statement was repeated during Respondent's crescendo and forms the essential argument presented by Respondent: "Importantly though, Bennett's status at the time of Lawrence's trial of being under pending indictment and awaiting his own trial in connection to the incident established all that was necessary to demonstrate he faced a genuine risk of self-incrimination by offering any substantial testimony about the events that led to his own pending criminal charges." BOP at 23. Respondent's statements echoes the Court of Appeals' opinion that "[t]he hazard of incrimination was openly apparent. Bennett was not facing just a risk of prosecution; he was already being prosecuted as Lawrence's indicted co-defendant. Almost anything Bennett could utter about the incident would likely be used against him at his upcoming trial." App. 6.

Respondent's position, and the published opinion issued by the Court of Appeals, incentivizes prosecutors to charge individuals with crimes in hopes of chilling the individuals' desire to testify truthfully when that truth does not align with the state's theory of the case. This Court must disabuse prosecutors from this nefarious practice.

Petitioner's fear of the Court of Appeals' opinion being used in this way, which is reinforced by Respondent's brief, is not the product of hyperbole. The disparate treatment of the witnesses is all that need to be viewed. Here, the trial judge took exceptional care to ensure Bennett was fully informed of his right against self-incrimination and erroneously allowed him to invoke his privilege. However, no one – the trial judge nor the prosecutor – made any effort to dissuade Baxter from testifying regarding his violations of the law. Repeatedly, Baxter admitted to violating the laws of South Carolina. The prosecutor asked Baxter, "Did you have any marijuana in the house," and Baxter answered affirmatively. R. 16, ll. 5-6. On cross-examination, Baxter confirmed that the police found marijuana in glass Mason jars in his home. R. 50, ll. 19-20. He also admitted to possessing a digital scale, which he claimed to use when he purchased marijuana because he did not "want nobody playing" him. R. 51, ll. 6-8. Spontaneously, Baxter declared, "It was no secret I smoked marijuana. I smoke marijuana all day every day. I self-medicated." R. 51, ll. 11-12. He later told the jurors that he "smoke[s] heavily," and he knew that it was wrong. R. 53, ll. 23-25.

Baxter's heavy consumption of marijuana was confirmed by the testimony of law enforcement. Justin Jenkins smelled marijuana at Baxter's home as soon as he arrived. R. 66, ll. 17-20. Brandon Byrd confirmed the police found less than an ounce of marijuana in Baxter's home. R. 89, ll. 6-19. Dwayne Peters also confirmed the seizure of marijuana from Baxter's home, and he further confirmed the presence of a scale. R. 164, ll. 12-16; R. 179, ll. 15-24. Thus, not only did Baxter confess to violating the laws of this state, but there was substantial corroborating evidence of his guilt. See S.C. Code Ann. § 44-53-370(d)(4).

Importantly, Baxter admitted to the completion of a crime whereas Bennett only admitted to *thinking* about committing a crime. Nonetheless, great care was afforded Bennett to address

the smallest fraction of a chance that he may incriminate himself. Yet, no one even hesitated to allow Baxter to confess to criminal activity. Perhaps, the significant difference between Baxter and Bennett, which discouraged the state and the judge from exercising any caution with Baxter, was that the state had not filed charges for simple possession of marijuana related to the drugs found in Baxter's home. R. 166, ll. 21-23. Accordingly, per the reasoning of the Court of Appeals and Respondent, and the implicit reasoning of the trial judge and prosecutor, invoking of the Fifth Amendment applies only to individuals charged with offenses and the prosecutors would be incentivized to charge individuals who would otherwise provide favorable testimony for a defendant.

Respondent reads Grunewald v. United States, 353 U.S. 391 (1957) too broadly. According to Respondent, Grunewald stands for the proposition that "the privilege prevents the compelled disclosure of a claim of innocence since such a claim could potentially be incriminating in 'ambiguous circumstances.'" BOR at 18. Max Halperin was charged along with Henry Grunewald, with tax fraud. Grunewald v. United States, 353 U.S. 391, 393 (1957). Halperin asserted his Fifth Amendment privilege before a grand jury investigating the matter when he had been called as a witness. Id. at 415. When he testified at his trial, the Government cross-examined him with that assertion. Id. More specifically, the Government asked him the very questions that had been put to him before the grand jury. Id. at 416. At trial, he answered each question in a way consistent with innocence. Id. at 416-417. The Government then asked Grunewald whether he asserted his privilege before the grand jury when asked the same questions. Id. at 417.

The Court was not answering whether Halperin had invoked his privilege properly; rather, the Court was tasked with answering whether the impeachment with the prior invocation

was proper. The precise question presented was whether the trial court erred in holding that Halperin's plea of the Fifth Amendment privilege before the grand jury involved such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes. Id. at 419. After noting that the Fifth Amendment privilege protects the innocent, the Court held that Halperin's trial testimony was "wholly consistent" with his innocence, which he had claimed during the grand jury proceeding, and therefore, was not a prior inconsistent statement and not proper for impeachment. Id. at 422.

Here, the trial judge conducted the in camera hearing regarding Bennett's invocation in an ex parte setting where she excluded the prosecutor and Petitioner's counsel. Not only did Petitioner's counsel not get to ask the questions that should have been the subject of the inquiry. See State v. McGuire, 272 S.C. 547, 550-551, 253 S.E.2d 103, 103 (1979) (explaining "it is well settled that a witness who is not also a defendant can invoke that privilege only after the incriminating question has been put"). Counsel was not even permitted to know what Bennett told the trial judge. R. 153, ll. 23-24; R. 155, ll. 11-13. Furthermore, the state chose not to memorialize Bennett's conversations with the governmental actors in any way, preventing Petitioner from presenting Bennett's testimony in the event Bennett asserted his privilege not to testify. In fact, Petitioner's counsel learned of Bennett's exculpatory statements to the prosecution from Bennett's lawyer. R. 154, ll. 14-16. When Petitioner's counsel inquired of the prosecutor regarding a conversation with Bennett, the prosecutor responded simply, "I didn't write anything down." R. 154, ll. 18-21.

Petitioner respectfully requests this Court reverse the Court of Appeals where there was no authentic danger of incrimination.

CONCLUSION

Petitioner respectfully requests this Court reverse the Court of Appeals and hold the trial judge erred by allowing Bennett to assert his Fifth Amendment privilege where the proposed testimony was not incriminating.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of December, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above-referenced case has been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mfarthing@scag.gov, this 13th day of December, 2022

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER