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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Paul M. Burch, Circuit Court Judge

Opinion No. 5974 (S.C. Ct. App. Filed April 5, 2023)

THE STATE,

RESPONDENT,

V.

CALVIN D. FORD,

PETITIONER

APPELLATE CASE NO. 2019-001912

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 18, 2023.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in remanding Petitioner's case back to the circuit court to make specific findings of fact that support its determination of whether Petitioner is entitled to immunity under the Protection of Persons and Property Act without first resolving the inconsistent evidentiary issues that arose during the immunity hearing regarding (1) whether the circuit court improperly allowed Aliga Campbell's attorney to invoke Campbell's Fifth Amendment privilege without Campbell being present and without determining whether the testimony Petitioner sought to elicit from Campbell was self-incriminating, and (2) where the circuit court subsequently excluded Campbell's written statement, which summarized the testimony Petitioner sought to elicit from Campbell, by finding that it was not a statement against penal interest under Rule 804(b)(3), SCRE, and thus not incriminating?

II.

Whether the Court of Appeals erred in affirming the trial court's admission of a prior consistent statement of the State's star witness where there was no express or implied charge of recent fabrication or improper influence or motive because defense counsel simply impeached her with other prior inconsistent statements?

STATEMENT OF THE CASE

On June 22, 2017, a Horry County grand jury indicted Petitioner for the murder of Jamal Burgess, the murder of Dameion Alston, possession of a weapon during the commission of a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime. R. 907-908; R. 910-911; R. 913-914. Petitioner's counsel, Jonny McCoy, filed a motion to dismiss pursuant to the Protection of Persons and Property Act.¹ R. 879. On March 5, 2019, the Honorable Benjamin Culbertson presided over a hearing on the motion. R. 1. Counsel McCoy represented Petitioner. Mary Ellen Walter and Joshua Holford represented the State. R. 1. At the conclusion of the hearing, Judge Culbertson denied Petitioner's request for immunity. R. 195, ll. 7-20; R. 902.

On November 4-8, 2019, the State called Petitioner and Aliga Campbell² to trial before the Honorable Paul M. Burch and a jury. R. 196. Holford and Walter continued to represent the State, Counsel McCoy continued to represent Petitioner, and Counsel Fox represented Campbell. R. 196. The jury acquitted Campbell of all charges. R. 876, ll. 2-8. The jury acquitted Petitioner of the murder of Alston. R. 876, ll. 9-11. However, the jury convicted Petitioner of the murder of Burgess and the two weapons charges. R. 876, ll. 12-24. Judge Burch sentenced Petitioner to life imprisonment without the possibility of parole for murder and to five years imprisonment for each of the weapons convictions. R. 878, ll. 17-23; R. 909; R. 912; R. 915.

On November 13, 2019, Petitioner served his notice of appeal. Final briefing by the parties was completed in June 2021. Oral argument was held before the Court of Appeals on

¹ See S.C. Code Ann. §§ 16-11-410 to -450 (2015)

² Campbell was tried under the theory of accomplice liability.

December 7, 2022. On April 5, 2023,³ the Court of Appeals remanded Petitioner's case to the trial court to make specific findings of fact that support its determination of whether Petitioner is entitled to immunity under the Protection of Persons and Property Act. State v. Ford, Op. No. 5974 (S.C. Ct. App. filed April 5, 2023). App. 1-9. The Court of Appeals also affirmed the trial court's admission of a prior consistent statement of Sherika Gore and vacated Petitioner's sentence for possession of a weapon during the commission of a violent crime. Id. However, the Court of Appeals declined to address the other issues that arose during the immunity hearing relying on Futch v. McCallister Towing of Georgetown, Inc. 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting appellate courts need not address remaining issues when disposition of an issue is dispositive). Id. Petitioner filed a petition for rehearing on April 21, 2023, requesting the Court of Appeals re-issue its opinion and address Issues I and II of the Final Brief of Appellant, as well as reverse its holding on the admission of the prior consistent statement of Gore. App. 10-17. The Court of Appeals denied the petition for rehearing on May 18, 2023. App. 18. This petition for writ of certiorari to the Court of Appeals follows.

³ A letter from the Court of Appeals dated April 7, 2023, was sent to the parties which stated that due to a clerical error, the opinion had not been sent out on April 5, 2023. Therefore, the deadline for the remittitur would be calculated as of April 7, 2023, the date the opinion was officially sent out to the parties.

ARGUMENT

I.

The Court of Appeals erred in remanding Petitioner's case back to the circuit court to make specific findings of fact that support its determination of whether Petitioner is entitled to immunity under the Protection of Persons and Property Act without first resolving the inconsistent evidentiary issues that arose during the immunity hearing regarding (1) whether the circuit court improperly allowed Aliga Campbell's attorney to invoke Campbell's Fifth Amendment privilege without Campbell being present and without determining whether the testimony Petitioner sought to elicit from Campbell was self-incriminating, and (2) where the circuit court subsequently excluded Campbell's written statement, which summarized the testimony Petitioner sought to elicit from Campbell, by finding that it was not a statement against penal interest under Rule 804(b)(3), SCRE, and thus not incriminating.

Relevant Facts

During the hearing on Petitioner's request for immunity pursuant to the Protection of Persons and Property Act, Counsel McCoy called Aliga Campbell as a witness. R. 108, ll. 24-25. Attached to Petitioner's motion for immunity was a sworn statement by Campbell. R. 879. On August 10, 2016, Campbell described how he and Jamal Burgess, the deceased, had a heated discussion prior to Petitioner's arrival at the party where the fatal shooting later occurred. R. 879. Burgess admitted to Campbell that he knocked out Petitioner's teeth on a prior occasion. R. 879. Pursuant to Burgess's request, Campbell called Petitioner about his arrival at the party, but Petitioner did not answer. R. 879. Minutes later, Petitioner arrived, and Campbell told Petitioner that Burgess wanted to talk to him. R. 879. When Petitioner did not walk to Burgess, Burgess approached him. R. 879.

Campbell described Burgess as “whipping out his gun” “the whole time.” R. 879. According to Campbell, when Burgess pushed Dameion Alston to the side, Alston’s gun fell to the ground. R. 879. Burgess then “whipped out his gun, turned and fired.” R. 879. Petitioner picked up Alston’s gun and “fired back at Burgess in self-defense.” R. 879. Campbell was clear, “Burgess fired first. It was self-defense.” R. 879. Campbell believed Burgess was going to kill Petitioner. R. 879. “Burgess was waving the gun all around and shooting at everyone.” R. 879. Lastly, Campbell explained that the day before the shooting Burgess rode by his house where he and Petitioner were outside. R. 879. Burgess saw the two men and pulled up his shirt to show them his gun in his waistband. R. 879. Campbell “took this as a threat and a warning against [Petitioner] and anyone with [Petitioner].” R. 879.

While the parties were waiting for Campbell to arrive in the courtroom from lock-up, Counsel Fox advised the presiding judge that although Campbell was not a defendant for purposes of the hearing on Petitioner’s immunity request, Campbell was a co-defendant in the case. R. 109, ll. 7-8. Counsel Fox “advised and would advise Mr. Campbell again to invoke his rights under the Fifth Amendment not to give any testimony at all.” R. 109, ll. 10-13. According to Counsel Fox, Campbell was “still indicted in a double homicide that [was] still pending.” R. 109, ll. 13-14.

When the judge indicated that he was not going to “compel [Campbell] to testify” over the objection of his counsel, Counsel McCoy argued he did not think Counsel Fox objected to Campbell being called and that it was a “procedural matter.” R. 109, ll. 19-20. Counsel Fox then informed the presiding judge that he objected to Campbell testifying in any way. R. 109, ll. 21-24. Defense counsel explained that Campbell provided “a sworn statement and a written affidavit,” two weeks after the shooting and over a year prior to his arrest. R. 110, ll. 1-13.

Further, defense counsel indicated that he wanted to call Campbell as a witness “for record sake” even if he wished “to plead the Fifth Amendment.” R. 110, ll. 14-15. The judge framed the question as whether defense counsel could call Campbell “as a witness over his attorney’s objection.” R. 111, ll. 1-3. Defense counsel explained that it was necessary for Campbell to be called to the stand and assert his privilege if that is what he chose to do. R. 111, ll. 4-10. The judge questioned whether he would permit “Campbell [to] take the stand to assert his Fifth Amendment right when his attorney says, no I’m invoking it now, he doesn’t take the stand.” R. 111, ll. 15-17. The judge noted defense counsel sought to call Campbell as a witness during “a motion hearing,” not “a criminal trial.” R. 111, ll. 17-18. The solicitor opined, “I actually don’t think it’s proper to call someone just to invoke their Fifth Amendment.” R. 111, ll. 20-21. In light of Counsel Fox’s invocation of the privilege for Campbell, the judge would not permit defense counsel to call Campbell as a witness. R. 110, ll. 17-21; R. 112, ll. 4-6; R. 116, ll. 11-20.

When the presiding judge indicated he would permit Campbell’s lawyer to invoke the Fifth Amendment privilege against self-incrimination for Campbell, defense counsel expressed his desire to call his private investigator to testify to the contents of Campbell’s statement. R. 110, ll. 4-16; R. 110, ll. 22-25; R. 112, l. 23-R. 113, l. 1. Specifically, counsel argued that his investigator should be permitted to testify to Campbell’s prior statement as a statement against penal interest pursuant to Rule 804(b)(3), SCACR. R. 113, ll. 8-13; R. 114, ll. 1-6. The judge agreed that Campbell was not available because of the assertion of his privilege against self-incrimination; however, the judge determined the statement was not against Campbell’s interest and therefore could not be admitted pursuant to Rule 804(b)(3), SCRE. R. 113, ll. 14-21; R. 113, ll. 24-25; R. 114, ll. 8-9. The State objected to the admission of the statement through defense counsel’s investigator and the judge sustained the objection. R. 115, l. 22-R. 116, l. 7.

Discussion

The Court of Appeals properly concluded that it was necessary to remand Petitioner's case back to the circuit court to make specific findings of fact that support its determination of whether Petitioner is entitled to immunity under the Protection of Persons and Property Act. However, the Court erred in failing to rule on the evidentiary issues surrounding the testimony of Campbell that arose during the hearing where the circuit court made contradictory rulings excluding Campbell's testimony as both self-incriminating and not against his penal interest.

The Court of Appeals correctly held that the order of the circuit court denying immunity to Petitioner was inadequate for appellate review because it did not contain specific findings of fact that supported its decision as required by State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564, (2019) and State v. McCarty, 473 S.C. 355, 878 S.E.2d 902 (2022). Critical to the decision of immunity, and to the findings of fact that the circuit court will need to make upon remand of this case, is the improperly excluded testimony of Campbell. While a remand is proper in this matter, it does not dispose of the issues regarding the circuit courts exclusion of Campbell's testimony and the impropriety of allowing Campbell's attorney to invoke Campbell's Fifth Amendment privilege. Were the circuit court to grant Petitioner immunity, these issues would be rendered immaterial. However, if the circuit court upholds its initial decision denying immunity, Petitioner would again raise these issues on appeal for the appellate court's consideration. If the appellate court were to decide, as Petitioner has argued in the final brief, petition for rehearing, and *infra*, that the circuit court's rulings are contradictory and cannot stand, another remand would then be required. Thus, it is not in the interest of judicial economy to remand this matter without first deciding these evidentiary issues.

Turning to the merits of the issue, the circuit court improperly allowed Counsel Fox to invoke Campbell's Fifth Amendment privilege against self-incrimination which barred defense counsel from calling Campbell to testify to the statement he had given. "[T]he privilege against self-incrimination is **personal and may not be invoked by, or on behalf of, a third person.**" State v. Hughes, 328 S.C. 146, 150, 493 S.E.2d 821, 822 (1997) (emphasis added). This Court has explained that "[a] judge may not invoke a witness's Fifth Amendment privilege; and, in any case, 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." State v. McGuire, 272 S.C. 547, 550-551, 253 S.E.2d 103, 104-105 (1979). Recently, this Court reiterated that "a witness himself must assert the privilege" against self-incrimination. Further, this Court wrote that a circuit court should not allow a blanket invocation of the Fifth Amendment unless the witness is the defendant in the case on trial. State v. Lawrence, Op. No. 28156 (S.C. Sup. Ct. filed June 7, 2023). The record is clear that circuit court allowed Counsel Fox to invoke Campbell's Fifth Amendment privilege. This was an error that was further compounded when the circuit court allowed Counsel Fox to make a blanket invocation and did not take any action to determine whether the testimony defense counsel sought to elicit was self-incriminating of Campbell.

After the circuit court allowed Counsel Fox to invoke Campbell's Fifth Amendment privilege, defense counsel logically sought to admit Campbell's statement as a statement against penal interest under Rule 804(b)(3), SCRE. However, the circuit court ruled Campbell's statement could not be admitted through defense counsel's investigator because it was not a statement against his penal interest. The rulings by the circuit court allowing Counsel Fox to invoke Campbell's Fifth Amendment privilege against self-incrimination and finding that

Campbell's statement was not against his penal interest were in direct conflict with each other and both simply cannot be correct.

If the statement was incriminating then Campbell himself, and not his counsel, could have invoked his Fifth Amendment privilege against self-incrimination, making himself unavailable and making the statement admissible under Rule 804(b)(3), SCRE, as a statement against his penal interest. If the statement is not incriminating, then neither Campbell, nor his counsel, could invoke his Fifth Amendment privilege and defense counsel should have been able to call Campbell to testify about his statement during the immunity hearing.

A fair reading of Campbell's sworn statement reveals that it is in no way incriminating of Campbell. Accordingly, neither he nor his counsel should have been able to invoke his Fifth Amendment privilege against self-incrimination. Petitioner respectfully requests that this Court find it was error to allow counsel for Campbell to invoke Campbell's Fifth Amendment privilege because the privilege is personal and can only be invoked by the person it protects. Further, Petitioner respectfully requests this Court hold that the contents of the statement were not incriminating, were not protected by the Fifth Amendment, and defense counsel should have been able to call Campbell as a witness during the immunity hearing. In the alternative, were this Court to find the statement was somehow incriminating of Campbell, Petitioner requests this Court hold the circuit court erred in finding the statement was not against Campbell's penal interests and it should have been admissible through defense counsel's private investigator pursuant to Rule 804(b)(3), SCRE.

II.

The Court of Appeals erred in affirming the trial court's admission of a prior consistent statement of the State's star witness where there was no express or implied charge of recent fabrication or improper influence or motive because defense counsel merely impeached the witness with her other prior inconsistent statements.

Relevant Facts

During the trial, the State called Sherika Gore to the stand. Gore purported to be an eyewitness to the fatal incident and was a key witness for the State. During his cross-examination of Gore, defense counsel questioned whether she saw Felicia Williams at the party. R. 604, l. 25 – R. 605, l. 2. Gore insisted Williams was at the party before and after the shooting. R. 605, ll. 3-14. When Gore talked to the police, she never mentioned Williams. R. 606, ll. 2-7. She explained she “was never asked that.” R. 606, l. 7. Gore admitted she and Williams were friends. R. 606, l. 13 – R. 608, l. 12. Additionally, Gore told the police that Petitioner arrived in a white two-door car, but at the time of trial, she claimed Petitioner walked to the area. R. 619, l. 15 – R. 620, l. 14. Gore did not really care about any inconsistencies in her statements as she claimed that what she was saying was “the truth.” R. 620, l. 18 – R. 621, l. 6. For Gore, the only truth that mattered was that Petitioner shot Burgess, and it was irrelevant whether she gave inconsistent statements on how Petitioner arrived to the area: “He was there, if he walked, road [sic] a bike, drove a bus.” R. 621, ll. 1-6.

Defense counsel also questioned Gore about her testimony during the hearing on Petitioner's request for immunity. R. 610, ll. 2-22. During the hearing, Gore indicated that when

she saw Petitioner with a gun, she ran, which was different from her testimony during the trial that she actually saw Petitioner shoot the gun. R. 610, l. 11 – R. 612, l. 18. Eventually, Gore seemed to admit that her testimony during direct examination was not accurate because she did not see Petitioner fire the gun. According to Gore, “Well, does it matter? I seen him with a gun.” R. 612, ll. 1-18; R. 613, ll. 8-9.

Additionally, defense counsel used Gore’s testimony during the immunity hearing to impeach her with an inconsistent statement on whether she saw where Petitioner allegedly retrieved a gun. R. 617, l. 4 – R. 618, l. 18. Gore claimed that she did not remember at the time of the hearing, but she remembered at the time of the trial. R. 618, ll. 17-18.

Further, defense counsel questioned Gore’s ability to give accurate testimony about her observations of the conflict between Burgess and Petitioner. R. 613, ll. 17-24; R. 614, ll. 7-9. When Gore indicated she did not remember making certain statements to police, defense counsel used portions of her recorded statement to refresh her recollection. R. 615, l. 6 – R. 616, l. 21.

Defense counsel asked if Gore and Williams “ever discussed [her] version of events [and if they had] told each other what [they] thought happened.” R. 618, l. 25 – R. 619, l. 2. Gore denied any such conversations. R. 619, ll. 3-12. Gore claimed she never went over her testimony with Williams. R. 619, ll. 8-12. However, she admitted that she and “[e]verybody” had discussed the shooting. R. 619, ll. 13-14.

On re-direct examination, the solicitor moved to introduce Gore’s interview with police as an exhibit. R. 626, ll. 17-20. When defense counsel objected, the State claimed “there ha[d] been an allegation of recent fabrication by the Defense.” R. 626, l. 21 – R. 627, l. 2. The State provided no specifics to support this claim. Boldly, the State claimed that because defense counsel “used portions of the interview to cross-examine the witness ... the State [was] permitted

by the rules of evidence to play the prior consistent statement.” R. 627, ll. 2-5. Despite defense counsel’s continued objection, the judge allowed the State to introduce the recording of Gore’s interview with police “considering all the testimony that’s been given up to this point.” R. 627, ll. 8-9.

Thereafter, the jurors heard Gore’s prior consistent statement to police in which she accused Petitioner of killing Burgess. State’s Exhibit #61. Importantly, she told the police she saw “fire from the barrel,” which was consistent with her trial testimony, and inconsistent with her testimony at the pre-trial hearing. State’s Exhibit #61.

Discussion

The Court of Appeals held that the trial court did not abuse its discretion in allowing the State to play the prior consistent statement of witness Sherika Gore during re-direct examination. In support of its holding, the Court wrote that defense counsel’s questioning of Sherika Gore “implied that Gore either collaborated with Williams to fabricate her version of events or Williams improperly influenced Gore’s testimony.” The Court further wrote that “Ford’s implication of recent fabrication or improper influence is compounded by his persistence in repeating the questions until Gore admitted that she had discussed the incident with others.” State v. Ford, Op. No. 5974, pg. 6 (S.C. Ct. App. filed April 5, 2023). Respectfully, there was not an implied or express charge of recent fabrication that supported the playing of the statement pursuant to Rule 801(d)(1)(B), SCRE.

During cross-examination, defense counsel pointed out numerous inconsistencies between Gore’s statement to police, her testimony during the immunity hearing, and her trial testimony. Near the end of a lengthy cross-examination the following exchanged occurred,

Q: Have you and Felicia Williams ever discussed your version of events? Have you told each other what you thought happened?

A: No.

Q: So your dear friend, you guys have never talked about that night?

A: Exactly. I said she was my friend, not a best friend. It's nothing for us to discuss.

Q: So you've never said, the young woman who you told to get your children, you've never gone over, "That's crazy," or anything like that?

A: I've never – we've never gone over what we – what our testimonies if that's what you're getting at.

Q: Have you ever talked about what you saw that night?

A: We have. Everybody has.

R. 618, l. 25-R. 619, l. 14.

The Court of Appeals likened this brief line of questioning to the questioning that occurred in State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 324 (Ct. App. 2002). However, the questioning in Jeffcoat is readily distinguishable from the questions defense counsel asked of Gore. In Jeffcoat, 350 S.C. at 397, 565 S.E.2d at 324, the Court of Appeals found the questioning by defense counsel implicitly raised the issue of improper influence or "coaching." The questions by defense counsel were pointed and specifically asked whether the victim had been told by her mother or the solicitor **what to say while in the courtroom**. Id. (emphasis added). It was proper for the trial court to allow the prior consistent disclosures of the victim in Jeffcoat because defense counsel in that case had clearly implied that her courtroom testimony had been coached or influenced by others.

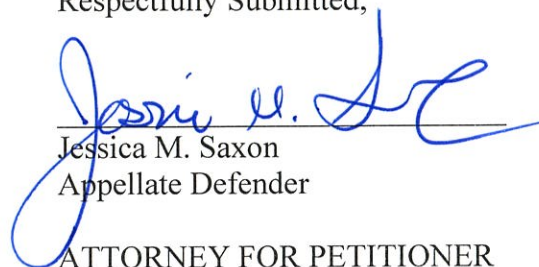
Unlike the questions in Jeffcoat, the questions defense counsel posited to Gore were not about whether her **courtroom** testimony had been coached but merely if she had discussed the events of the incident with Felicia Williams or anyone else. This was standard cross-

examination and impeachment of a witness. This Court has made clear “[t]he plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence.” State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001). “Although questioning a witness about a prior inconsistent statement does call the witness’s credibility into question, that is not the same as charging the witness with ‘recent fabrication’ or ‘improper influence or motive.’” Id. The brief exchange at the end of a lengthy cross-examination did not imply recent fabrication or improper motive, it simply confirmed that Gore, like most witnesses, had spoken about the incident after it occurred with others who were present during the shooting. Thus, it was not proper to allow the State to play the entirety of Gore’s prior statement to police.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to the Court of Appeals to allow full briefing of these issues.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of June, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Paul M. Burch, Circuit Court Judge
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SC Court of Appeals

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Opinion No. 5974 (S.C. Ct. App. Filed April 5, 2023)
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THE STATE,

RESPONDENT,

V.

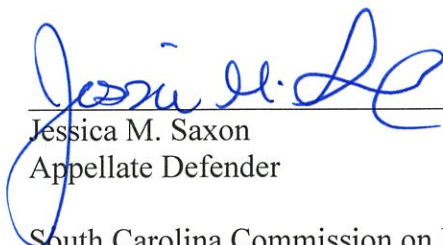
CALVIN D. FORD,

PETITIONER

APPELLATE CASE NO. 2019-001912
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CERTIFICATE OF SERVICE
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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for writ of certiorari to the Court of Appeals and appendix in the above-referenced case has been served upon Tommy Evans, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Calvin D. Ford, #342303, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of June, 2023.


—————
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[2019-001912 The State v. Calvin D. Ford COA Cert Appendix.pdf](#)

Good Morning,

Please find attached for service in the above-referenced case the Petition for Writ of Certiorari to the Court of Appeals and the Appendix, which will be filed today, June 19, 2023, with the Court of Appeals via email filing.

Thank you,
Shelby

Shelby Pollard

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