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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 HORRY COUNTY
The 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

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2019-000971

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

TOMMY EVANS, JR.
Assistant Attorney General
S.C. Bar No. 65282

P.O. Box 11549
Columbia, South Carolina 29211-1529
(803) 734-6305

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

TABLE OF CONTENTS

PETITIONER’S QUESTIONS PRESENTED.....1

RESPONDENT’S COUNTER STATEMENT OF QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

WHY CERTIORARI SHOULD BE DENIED.....5

STATEMENT OF FACTS.....7

ARGUMENTS

1. Court of Appeals did not err in not addressing within their opinion the issue of the circuit court not allowing co-defendant Aliga Campbell to take the stand to assert his Fifth Amendment right when it has already been asserted by Mr. Campbell’s trial counsel. Court of Appeals also did not err in deciding that the circuit court did not err in not allowing Petitioner’s private investigator to testify since the statement of Mr. Campbell is not against his penal interest, therefore, not an exception to hearsay.....11

2. The Court of Appeals did not err in affirming the trial court's admission of the prior consistent statement of Ms. Sherika Gore when defense counsel implied that there was a recent fabrication of improper influence or motive when he inquired concerning her speaking to the solicitor or law enforcement and any conversation between her and another witness Felicia Williams.....17

CONCLUSION.....21

PETITIONER'S QUESTIONS PRESENTED

1. 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?
2. 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?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in not deciding whether the trial court erred in limiting the Petitioner in not allowing him to call his co-defendant Aliga Campbell to testify after Mr. Campbell's counsel stated on Mr. Campbell's behalf that he was going to invoke his Fifth Amendment rights? Did the Court of Appeals also err in deciding that the trial court did not err in not allowing Petitioner's private investigator to testify as to the statement of Mr. Campbell since it was not a statement against interest, therefore, not considered a hearsay exception?
2. Did the Court of Appeals err in affirming the trial court's admission of a prior consistent statement of Ms. Sherika Gore when defense counsel implied that there was a recent fabrication or improper influence or motive when he inquired in Ms. Gore into any conversation Ms. Gore may have had with another witness Felicia Williams concerning these events?

STATEMENT OF THE CASE

On June 22, 2017, the Horry County Grand Jury indicted Petitioner Calvin D. Ford for the offenses of murder (2cts), possession of a weapon during the commission of a violent crime, and unlawful possession of a firearm by a person convicted of a violent crime. Representing the State of South Carolina were Assistant Solicitors Mary Ellen Walter, and Joshua Holford of the Fifteenth Circuit Solicitor's Office, representing the Petitioner was attorney Jonny McCoy.

Prior to trial Petitioner filed a motion for Immunity from Prosecution pursuant to S.C. Code Ann. §16-11-450 (R. p. 879 -901). The Honorable Benjamin Culbertson presided over the immunity hearing which was held on March 5, 2019. (R. p. 1-195). At the conclusion of this hearing Judge Culbertson denied the Petitioner's motion in a Form 4 Order filed the following day. (R. p. 902-903).

The Petitioner's case was eventually called for trial on November 4, 2019, before the Honorable Paul M. Burch. Petitioner and co-defendant Aliga Campbell trials were held simultaneously. After five days of testimony a jury of his peers unanimously found the Petitioner guilty of the murder of Jamal Burgess and guilty as well for both weapons offenses. (R. p. 876 l. 9-11). Petitioner was found not guilty of the second murder indictment. (R. p. 876 l. 9-11).¹ After the reading of the verdict Petitioner appeared before the trial judge. Petitioner received a sentence of a period of incarceration for the remainder of his natural life for murder, and five years concurrent for both weapon offenses. While serving his sentence Petitioner filed a timely notice of appeal.

Within his appeal Petitioner argued that the trial court erred in denying immunity without making specific findings; allowing co-defendant's counsel to invoke his Fifth Amendment

¹ Aliga Campbell was found not guilty on all counts. (R. p. 876 l. 1-8).

privilege without him testifying and invoking it himself; determining that the co-defendant's statement was not self-incriminating, thereby, not allowing the Petitioner's investigator to testify as to the co-defendant's statement. The trial court also erred in allowing the state to introduce a prior consistent statement where there was no express or implied charge of a recent fabrication or improper influence or motive; and trial court erred when he determined that the Protection of Persons and Property Act does not provide immunity for crimes of possession of a firearm by a felon, and possession of a weapon during the commission of a violent crime.

All interested parties appeared before the Court of Appeals for arguments on December 7, 2022. The Court of Appeals filed their opinion on April 5, 2023. Within this opinion Judges Aphrodite Kondurous, Blake A. Hewitt, and Jerry D. Vinson, Jr. unanimously decided that the trial court erred in not making a specific findings of fact on the elements of self-defense during the immunity hearing, in violation of this Court's decision in *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022). The Court of Appeals also found: that the prior statement of the witness was offered to rebut defendant's contention that the witness's testimony was recently fabricated; and that the trial court failed to apply the Act to the defendant's weapons offenses in determining that the defendant was not entitled to immunity for the use of deadly force. *State v. Ford*, 439 S.C. 261, 886 S.E.2d 710 (Ct. App. 2023). Petitioner filed a petition for rehearing on April 21, 2023, the Court of Appeals denied this petition on May 18, 2023.

Petitioner now requests a writ of certiorari seeking review from this Court. Respondent will argue that the decision of the lower court does not fall within any of the parameters found in South Carolina Appellate Rule 242, this petition should be subject to dismissal. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews the Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). Pursuant to rule 242 of the South Carolina Rules of the Appellant Court, “a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.”

Rule 242 SCACR.

In reviewing each of these criteria the present case does not apply. The Court of Appeals unanimously remanded the case back to the trial court to make specific findings of fact that support whether Petitioner is or not entitled immunity. There are numerous United States and South Carolina Supreme Court decisions relating to the Fifth Amendment, and a prior consistent statement of the State’s witness, so there exists no novel question of law. This decision was unanimous, not in conflict with a prior decision made by this court; there exists no substantial constitutional issues, and there was no federal question that the Court of Appeals decision

conflicted with a decision made by the United States Supreme Court. The decision of the Court of Appeals should not be subject to review, this petition should be denied.

STATEMENT OF FACTS

On July 23, 2016, a birthday party was held in a residential area adjacent to Mr. Joe White Avenue in Myrtle Beach, South Carolina. (R. p. 236 l. 19-21; p. 239 l. 11 – p. 240 l. 24; p. 691 l. 19-24). Around 9:00 pm there was a call to law enforcement regarding a shooting that had just occurred. (R. p. 244 l. 1 – p. 245 l. 3). Once they arrived they found a large crowd and two gunshot victims, Jamal Burgess, and Damian Alston. (R. p. 241 l. 2 – p. 242 l. 17). Officers were unable to locate a weapon (R. p. 264 l. 4 – p. 265 l. 10; p. 282 l. 13-25), however, they were able to locate five .380 cartridge casings, a single .9-millimeter cartridge casing, and one bloodied projectile. (R. p. 309 l. 4-9). The .9-millimeter casing lay separate from the .380 casings. (R. p. 309 l. 4-9). The .380 casings appeared “in close quarters to each other, almost in a line. It appeared either someone was either walking towards or retreating back from that scene while they were being fired.” (R. p. 310 l. 25 – p. 311 l. 3). Agent James Green of the South Carolina Law Enforcement Division testified as an expert in firearms identification. (R. p. 368 l. 5-6) Agent Green testified that Four of the five .380 casings were determined to have been fired by the same firearm; the fifth contained “some markings” that made the firearms analyst, “think it could have been fired by the same firearm” as well, but the results were technically inconclusive. (R. p. 373, l. 12-18). Agent Green also testified that the fired projectile was “most consistent with a .380 auto caliber bullet.” (R. p. 374 l. 15-25). Agent Green determined that there were at least two guns involved in the shooting, “but there could have been four.” (R. p. 374 l. 15-25).

Law enforcement was able to locate some of the eyewitnesses. Darlene Young, who was at the party testified she hugged the two victims when she arrived and did not feel a gun on either one of them. (R. p. 333 l. 9 – p. 334 l. 6). Ms. Young testified that she did not see Petitioner nor his co-defendant when they arrived; however, she did notice the Petitioner walk up and stand with

other partygoers. (R. p. 336 l. 1-25). Young also saw Burgess put his arm around the Petitioner's neck and she watched them walk from the porch together, talking. Young thought that they were solving an issue between them. (R. p. 337 l. 1-20). They walked out to the street and once they got there she heard the Petitioner say to Burgess "If I want something done to you I could have been had it done to you." (R. p. 337 l. 23-25). At that time the other victim Alston "was trying to eliminate the problem" between Petitioner and Burgess, who "were having words." (R. p. 338 l. 2-11). She then saw Burgess "moving his hands" as he spoke to the Petitioner. (R. p. 340 l. 14-19). Young testified she saw "fire coming out of a gun and hit," Burgess. (R. p. 340 l. 23-24). She also testified that Petitioner pulled a gun "out of one of his pockets" and she saw fire from the gunshot. (R. p. 341 l. 2-5). While all this was happening Burgess's hands were in the air. (R. p. 341 l. 23-25). Young testified that she did not see either victim with a gun. (R. p. 341 l. 19-22). After she saw Burgess get hit with that bullet she ran. (R. p. 342 l. 12-24). Young testified that she heard more gunshots as she ran away. (R. p. 343 l. 10-18).

Another eyewitness Sherika Gore testified that she was talking to people when she noticed Petitioner walk up from across the street and approach Burgess. (R. p. 593 l. 10-13; p. 595 l. 16-20). Petitioner and Burgess "kind of walked off and they started talking." (R. p. 595 l. 19-20). Gore testified that she could not hear what they were talking about. (R. p. 596 l. 22-25). She stated that, "from the outside looking in it seemed like whatever issue that they had, they were trying to resolve them." (R. p. 600 l. 25 – p. 601 l. 1). Then their voices raised, when she looked at them next, she saw Petitioner take a gun out and fire it. (R. p. 598 l. 3-4). Gore testified that it looked like Petitioner pulled out his gun from his waist; and she never saw him bend down to the ground. (R. p. 598 l. 6-10). She then heard multiple shots as she attempted to find her children. (R. p. 599 l. 6-9). Gore testified that after the shooting she did not see a gun, nor did she hear anyone talk about

a gun. (R. p. 602 l. 21 – p. 603 l. 25). Gore also testified that she did not see a gun on Burgess that day. (R. p. 594 l. 1-2; p. 621 l. 7-24).

A third eyewitness, Felicia Williams, testified that she was at the party and saw the Petitioner and the two victims standing in the street talking. (R. p. 639 l. 2-19). Williams heard a bottle break and then looked over to see Burgess move Alston out of the way, she then saw Petitioner, “take a gun up off his side and pull it out and shoot.” (R. p. 640 l. 1 – p. 641 l. 3). Williams testified that she saw no one else with a gun, and she never saw the Petitioner bend down to retrieve a gun. (R. p. 641 l. 4-12). She stated that she saw Petitioner shoot at Burgess then she took off running. (R. p. 641 l. 13-17).

During the immunity hearing Petitioner testified. He stated that when he was before both victims, Alston dropped his gun, he picked it back up and fired it at Burgess. Petitioner testified that he then dropped the gun in a pond as he fled the scene. (R. p. 544 l. 12 – p. 546 l. 12). Petitioner also testified that he saw Burgess with a gun, and Burgess fired at him then he fired back. (R. p. 546 l. 13 – 20).

Several persons testified on the Petitioner’s behalf during the immunity hearing and trial. Patrick “PJ” Brave testified that he heard that Burgess came to the party with a gun. (R. p. 684 l. 6-14). Also testifying for Petitioner his first cousin Everett Ford. Ford testified that when he saw Burgess at the party, he appeared “aggressive,” that “something was wrong with him.” (R. p. 695 l. 1-17). Ford testified that Burgess grabbed Petitioner aggressively placing his arm around him and then they had words. (R. p. 696 l. 10-25; p. 698 l. 7-15). Ford also said that as Alston tried to break them up, Burgess pulled out his gun and fired at Petitioner. (R. p. 699 l. 1-14). Ford stated that at first he thought Burgess shot Petitioner because he “went down a little bit.” (R. p. 700 l. 16-14). Ford also stated that he started to run as he heard gunshots from multiple guns. (R. p. 701 l. 15-

23). Ford believed Petitioner retrieved a gun “off the ground or something” when Alston was trying “to diffuse the situation,” because he did not see Petitioner with a gun after hearing the initial shot. (R. p. 702 l. 1-17). Ford also testified that four years prior to the incident, Burgess hit the Petitioner in the face with a gun knocking his teeth out. (R. p. 688 l. 8-19; p. 707 l. 10). Ford stated that after that Petitioner stayed away from Burgess, who was “known to have a gun.” (R. p. 689 l. 6-15).

Another witness, Mr. Maurice Vereen testified on the Petitioner’s behalf. Vereen testified that he was at the party prior to the shooting, but cannot recall being there during the shooting. He also stated that he can’t say that he saw Burgess with a gun that day. (R. p. 728 l. 2-6). However, he informed Petitioner’s private investigator that he saw Burgess “ appear to pull at his waistband where his handgun was located, and then shots were fired.” (R. p. 727 l. 2-25).

Finally, Petitioner called Mr. Walter Stanley to testify. Stanley testified that he saw Petitioner and Burgess in a headlock, Petitioner broke away, and that is when Burgess pulled the handgun and fired at Petitioner. (R. p. 738 l. 2-23). Stanley stated that the Petitioner ducked then came up with his own gun firing striking Burgess. (R. p. 738 l. 23-25).

ARGUMENTS

- 1. Court of Appeals did not err in not addressing within their opinion the issue of the circuit court not allowing co-defendant Aliga Campbell to take the stand to assert his Fifth Amendment right when it has already been asserted by Mr. Campbell's trial counsel. Court of Appeals also did not err in deciding that the circuit court did not err in not allowing Petitioner's private investigator to testify since the statement of Mr. Campbell is not against his penal interest, therefore, not an exception to hearsay.**

Fifth Amendment

Petitioner argues that the Court of Appeals should have addressed the fact counsel for co-defendant, Aliga Campbell, should not have been allowed to assert fifth amendment protections for Mr. Campbell. It is the opinion of the Petitioner that the trial court should have allowed the defense to call Mr. Campbell to the stand to assert his Fifth Amendment rights.

During the pre-trial immunity hearing Petitioner made an attempt to call his co-defendant Aliga Campbell to the stand. At that time Campbell's counsel informed the court that he has advised him, "to invoke his right under the Fifth Amendment not to give any testimony at all." (R. p. 109 l. 7-13). Petitioner's trial counsel then stated that it would be, "fine for record sake" if Campbell took the stand to solely invoke the Fifth Amendment. (R. p. 110 l. 13-15; p. 111 l. 4-10). The circuit court ruled that he could not force Mr. Campbell to take the stand. The court decided that it could not compel Mr. Campbell to take the stand during the immunity hearing because he had, "Campbell's rights to protect as well." (R. p. 109 l. 16-24; R. p. 112 l. 4-9).

The Fifth Amendment of the United States Constitution specifically states, "No person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; S.C. Const. Art. I § 12. The circuit court adequately recognized Mr. Campbell's rights in this instance by not compelling him to testify, even just to take the stand and invoke his Fifth Amendment rights.

During an immunity hearing the court sits as a factfinder and is not permitted to draw any negative inference from Campbell's invocation of the privilege against self-incrimination.² "It is desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation." *State v. Hughes*, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997).

Hughes modified the prior holding in *State v. Perry*, 279 S.C. 539, 309 S.E.2d 9 (1983), to the extent that *Perry* "may be read to **require** the calling of a witness **solely** for the sake of invoking his or her Fifth Amendment privilege." *Id.*, 328 S.C. at 154, 493 S.E.2d at 825 (emphasis modified from original) In *Hughes* this court reasoned:

Many courts have found no abuse of discretion in a trial court's refusal to permit defense counsel to call a defendant to the stand solely to require them to assert the privilege in the presence of the jury. Finally, **it has been recognized that when a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand.**

Hughes, 328 S.C. at 152, 493 S.E.2d at 824 (emphasis added).

The circuit court did not abuse discretion in not compelling the co-defendant to testify only to assert his Fifth Amendment right to avoid self-incrimination. Mr. Campbell faced a joint trial with the Petitioner. This was not just some eyewitness, but the co-defendant that was also facing a life sentence without the possibility of parole. Mr. Campbell is also a defendant in this case and cannot be forced to take the stand and testify. He has the right to invoke his Fifth Amendment privileges regarding any possible questions that may be asked in the case in which he is being accused. The settled law provides that the privilege extends not only to answers that would themselves support a criminal conviction, but also to answers furnishing a link in the chain of

² The circuit court must weigh the evidence and make its own credibility and factual findings before reaching a decision as to immunity under the Protection of Persons and Property Act. *State v. McCarty*, 437 S.C. 355, 372, 878 S.E.2d 902, 911 (2022).

evidence needed to prosecute an individual. *Grosshuesch v. Cramer*, 377 S.C. 12, 22, 659 S.E.2d 112, 117 (2008), quoting, *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). While on the stand Mr. Campbell would be subject to questions not only pertaining to his statement but anything pertaining to the self-defense claim raised by the Petitioner, all of which could be used against him during trial. That is why this court has decided numerous times that a defendant has blanket invocation of his Fifth Amendment rights. *State v. McGuire*, 272 S.C. 547, 550-551, 253 S.E.2d 103, 105 (1979)(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. Lawrence*, 2023 WL 3857478 (2023)(unless the witness is the defendant in the case on trial, the court should not allow a “blanket” invocation of the Fifth Amendment). This court would agree that since Campbell was also a defendant in this case; therefore, subject to a punishment of imprisonment for the remainder of his natural life, he is afforded certain protections the average witness does not have. One of those protections is not being forced to take the stand in order to invoke his Fifth Amendment right which was already expressed to the court. So, the circuit court did not err in not compelling Mr. Campbell to take the stand in order to invoke his Fifth Amendment rights.

The decision of the Court of Appeals is dispositive

The Petitioner seeks this Court’s opinion on this issue because it was not addressed by the Court of Appeals within their opinion. This court decided in *Futch v. McAllister Towing* that an appellate court need not address a remaining issue when disposition of prior issue is dispositive. *Futch v. McAllister Towing of Georgetown, Inc.* 335 S.C. 598, 518 S.E.2d 591 (1999). Once the Court of Appeals determined that this case should be remanded for the circuit court to make specific findings supporting its determination as decided by this Court in *McCarty*, the case was

remanded so the circuit court can either conduct a new immunity hearing before issuing a ruling, or issue a new order based on the record of the hearing it has already conducted. In any case the court not allowing Mr. Campbell to take the stand to invoke his Fifth Amendment rights is harmless due to this decision by the Court of Appeals.

As a result of this remand either two things will happen, there will be a new immunity hearing where both sides are allowed to present evidence again allowing the circuit court to make a determination regarding immunity, or the circuit court will look at the previous record and create a new order with specific findings supporting their determination. *See, McCarty*, 437 S.C. at 375-76, 878 S.E.2d at 913.

Mr. Campbell was found not guilty at the conclusion of his trial; therefore, he is no longer a defendant in this case. Since Mr. Campbell was exonerated he no longer faces any criminal liability; therefore, he is not allowed any Fifth Amendment protection as it pertains to this case. So, if called, he could testify or at least take the stand to invoke his Fifth Amendment rights pertaining to a different case. However, since he is no longer a defendant the court can then compel him to take the stand where he would be obligated to testify regarding the events that happened that evening. His Fifth Amendment right to self-incrimination will no longer be an issue.

If the circuit court instead decided to create an order from the record, the testimony of Mr. Campbell would be cumulative to other testimony already made before the court; therefore, any denial for Mr. Campbell not to take the stand to exercise his Fifth Amendment rights may be deemed harmless where the testimony would have been cumulative to other testimony admitted. *Hughes*, 328 S.C. at 153, 493 S.E.2d at 824, *citing, State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368 (1985), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

The crux of Mr. Campbell's statement was that the victim, Burgess, began talking to Petitioner as soon as Petitioner arrived at the party. At some point, their discussion escalated, and the second victim Alston tried to intervene. Mr. Campbell stated Burgess shot first and Petitioner shot back in self-defense, only after picking up Alston's gun that fell on the ground. (R. pp. 900-901, Motion for Immunity, Ex. 4). Assuming *arguendo* that Campbell's testimony would have aligned with the statement he provided, this testimony would have been cumulative to that delivered by both the Petitioner and his cousin Everett Ford. Mr. Campbell's testimony would have continued to contradict that of the State's witnesses who did not see a gun on Burgess. Thus, Campbell's testimony could not have affected the outcome of the immunity hearing. Either he would have invoked the Fifth Amendment, or his proposed testimony would continue to facilitate the jury question. So, the decision made by the Court of Appeals is dispositive, there was no error in them not addressing this issue in their final opinion.

Campbell's statement was not against interest therefore not a hearsay exception

Petitioner argues that the court erred in not allowing his private investigator to testify in order to get into the record the statement given by Campbell. Although Campbell could be considered an unavailable witness due to his invoking his Fifth Amendment rights, the circuit court correctly determined that this statement was not a statement against interest therefore it was not within one of the hearsay exceptions listed in the South Carolina rules of evidence.

The circuit court correctly denied the Petitioner to allow his private investigator to testify for the purpose of bringing in a sworn statement made by Campbell. Since Campbell was declared unavailable his statement would have to be, "at the time of its making so far contrary to [his] pecuniary or proprietary interest, or so far tended to be subject to declarant to civil or criminal

liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3)SCRE.

Campbell's statement was not adverse to his own interests. (R. pp. 900-901 Motion for Immunity Ex. 4). The statement made by Campbell describes that Burgess told Campbell to call Petitioner and "tell him to come to the party." (R. p. 900, Motion for Immunity Ex. 4 pg. 1). Campbell tried to call Petitioner; however, he did not answer, but Petitioner walked up to the party a few minutes later. (R. p 900, Motion for Immunity, Ex. 4 pg. 1). Then Campbell told Petitioner that Burgess wanted to talk to him. (R. p. 900, Motion for Immunity Ex. 4 pg. 1). Campbell then described what he witnessed between Petitioner, Burgess and the second victim Alston. (R. p. 901, Motion for Immunity, pg. 2). The statement given by Campbell can be construed as including incriminating information about Burgess as he describes him as being one of the shooters and shooting at Petitioner first, and be incriminating information about the Petitioner as being the "other shooter."

Because Campbell's statement was not sufficiently adverse to his penal interest, the statement was not admissible via the hearsay exception for statements against interest made by an unavailable witness. Further, because the statement did not "tend to expose the declarant to criminal liability," the circuit court did not need to consider whether "corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3).

Within his petition for writ of certiorari the Petitioner argues that if the statement is incriminating then Campbell himself and not his counsel should have invoked his Fifth Amendment privilege thereby making himself unavailable and then making his statement admissible under Rule 804(b)(3). Petitioner further argues that if the statement was not against his interest, Campbell nor his counsel should have been allowed to invoke his Fifth Amendment

privilege. Petitioner's counsel should have been allowed to call Campbell to testify. Petitioner reasoning regarding this matter is flawed. Campbell was not just another witness he was the co-defendant, therefore he had more of an interest not to testify. The statement was not the only thing he could have been asked about while on the stand and not the only thing from which he should receive Fifth Amendment protection. The Fifth Amendment protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *Kastiger v. U.S.*, 406 U.S. 441, 445, 92 S.Ct. 1653, 1656 (1972). Since Campbell was a co-defendant he certainly had a right to invoke his Fifth Amendment right against self-incrimination. As stated earlier, the defendant has a right to have blanket protection under the Fifth Amendment.

The statement he gave was not a statement against interest, so that statement was not allowed into evidence since it was not an exception to the hearsay rule. The circuit court made the proper decision in not compelling Campbell to take the stand and not allowing that statement into evidence. This case should not be subject to review by this Court.

1. The Court of Appeals did not err in affirming the trial court's admission of the prior consistent statement of Ms. Sherika Gore when defense counsel implied that there was a recent fabrication of improper influence or motive when he inquired concerning Gore's conversation with another witness Felicia Williams.

Petitioner argues that the trial court erred in allowing the state to admit hearsay testimony during the redirect examination of witness Ms. Sherika Gore. The State was allowed to play over the Petitioner's objection, the entirety of the seven minute and twenty-six second statement Gore made the day after the shooting. (R. p. 626 l. 2 – p. 627 l. 22; State ex. 61).

Pursuant to rule 801(d)(1)(A-B) of the South Carolina rules of Evidence, a statement is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

- A. inconsistent with the declarant's testimony, or;
- B. consistent with declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arouse.

Rule 801 (d)(1)(A-B) SCRE.

When a party offers a prior consistent statement, the following elements must be satisfied before the prior consistent statement can be admitted into evidence:

(1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive; (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001).

In this petition the Petitioner included a part of the record from the testimony of Gore. These were questions Petitioner's trial counsel posed to Gore concerning any conversation she had with another witness Felicia Williams. First, trial counsel questioned Gore about whether she informed the State that she was friends with Williams. (R. p. 606 l. 5-10). Gore consistently answered that the State never asked her about Felicia. (R. p. 606 l. 7, 11). Petitioner's counsel then questioned Gore on the collateral matter of whether she considered Williams her "best friend" or a "dear friend" and whether she had posted that to her on Facebook. (R. p. 606 l. 12 – p. 608 l. 12). Gore then answered to the effect that Williams is a "friend" (R. p. 526 l. 1-13). Later Petitioner's counsel questioned whether Gore and "Felicia Williams ever discussed [their] version of events." (R. p. 618 l. 25 – p. 619 l. 2) Gore testified that "we've never gone over what we – what our testimonies if that's what you're getting at." (R. p. 619 l. 11-12). The Petitioner argues that this is ordinary cross-examination, however, this is completely and totally accusations that Gore and

Williams got together to get their stories straight. It is even obvious to Gore when she tells him we never gone over our testimonies “if that’s what your getting at.” After this Petitioner’s counsel persisted asking whether she had “ever talked about what you saw that night?” (R. p. 619 l. 13). Gore answered, “We have Everybody has” (R. p. 619 l. 14). It is obvious that Petitioner’s counsel was making accusations that Gore and Williams, who were friends at the time of the incident, got together and came up with a story to tell against the Petitioner. If this was not the case why mention Williams at all during Gore’s cross-examination. Although Williams was also present at the scene, she and Gore did not arrive at the party together nor were they in the same vicinity when the shooting occurred. According to Gore’s testimony the only contact they had at that party was after the shooting happened when Gore asked Williams to get her kids out of the area.

In the opinion the Court of Appeals compared this case with their decision of *State v. Jeffcoat*, 350 S.C. 392, 565 S.E.2d 321 (2002). In *Jeffcoat* defense counsel implied that the victim “practiced” before testifying thereby he implied that the victim was coached. The Petitioner argues that this case is different than *Jeffcoat* because there was no allegation that Gore was ever coached. Rule 801(d)(1)(A-B) does not only inquire about any “coaching” of witness, but it also includes any expressed or implied charges against the declarant of a recent fabrication or improper influence or motive. Rule 801 (d)(1)(B). It was obvious that Petitioner’s counsel was implying there was some improper influence from Gore and Williams getting together to compare their testimonies. This accusation falls under Rule 801 therefore it was proper for the circuit court judge to allow the playing of Gore’s statement that she made to law enforcement on the day of the shooting.

The circuit court made the right decision in allowing this testimony because it fell under Rule 801(d)(1)(A-B) which made this testimony a hearsay exception. The Court of Appeals made

the proper decision in affirming this ruling by the circuit court. This should not be subject to review by this Honorable Court.

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. This Court should deny this petition and let stand the decision of the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

TOMMY EVANS, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

By: s/ Tommy Evans, Jr.
TOMMY EVANS, JR.
S.C. Bar No. 65282
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

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ATTORNEYS FOR RESPONDENT