STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Oconee County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 2018-UP-014 (S.C. Ct. App. filed Jan. 10, 2018)
2015-GS-37-00399

THE STATE,

PETITIONER,

V.

GEROME C. SMITH,

RESPONDENT

APPELLATE CASE NO 2018-000434

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

SUSAN B. HACKETT
Appellate Defender

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR RESPONDENT

INDEX

PETITIONER'S QUESTION PRESENTED

The Court of Appeals erred in finding the trial judge did not commit harmless error in admitting the non-testifying criminal informant's written statement into evidence because: (1) the statement was cumulative to the other evidence of Respondent's guilt, including a video recording of the drug transaction; and (2) Respondent benefitted from the trial judge's error; relying on the same justification he used in admitting the written statement, the trial judge allowed Respondent to introduce into evidence an otherwise inadmissible phone call recording gin which Hunter denied purchasing crack cocaine from Respondent.

RESPONDENT'S COUNTER QUESTION PRESENTED

Did the Court of Appeals correctly conduct a harmless error analysis where the state conceded the trial judge's admission of a non-testifying criminal informant's written statement violated Respondent's right to cross-examination and confrontation pursuant to the Sixth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Brandon Hunter was on probation when he was arrested by police for multiple counts of drug offenses. App. 11, l. 21 – App. 12, l. 7; App. 43, ll. 2-6; App. 55, ll. 21-15; App. 56, l. 19 – App. 58, l. 23; App. 65, ll. 6-24; App. 151; App. 154-159. In an effort to work off his charges, Hunter agreed to be a confidential informant for the police on August 7, 2014. App. 43, ll. 2-5; App. 151-153. Additionally, the police paid Hunter for his services. App. 43, ll. 5-6; App. 46, ll. 8-10; App. 151-153.

On September 4, 2014, at 10:23 p.m., B.J. McClure and Jason Sutherland with the Seneca Police Department agreed to work with Hunter in hopes of arresting Respondent[1] regarding a drug buy that Hunter had previously arranged. App. 45, ll. 11-20; State's Exhibit #4.[2] At the time, Hunter was the prime suspect in a burglary despite his informant agreement requirement that he not violate any laws during his association with the police department. App. 151-153; State's Exhibit #4 at 13:23.[3] Sutherland placed a camera with night vision on Hunter's body along with a wireless transmitter. App. 44, ll. 16-18; App. 33, ll. 10-17. The devices recorded audio and video, but police could monitor only the audio in real time. App. 33, ll. 13-17; App. 33, ll. 16-18. McClure also gave Hunter $200 in documented funds to buy drugs. App. 44, ll. 19-20; State's Exhibit #4 at 1:25.

---

[1] During the video, the police indicated the target of the investigation was Jeffrey Chris Smith. State's Exhibit #4 at 1:20.

[2] Any prior conversations between Hunter and Respondent were not recorded and did not involve law enforcement.

[3] McClure claimed he was unaware the police suspected Hunter as the recent burglar of a home. App. 63-6-11. However, McClure heard Hunter tell Respondent that he was the prime suspect in the burglary of a home. App. 63, ll. 12-15. When Hunter returned from the alleged drug buy, McClure asked Hunter about the burglary. App. 63, ll. 15-18. McClure claimed that when he found out Hunter was involved in a burglary, he "fired him as a CI" and took him "to the Oconee law enforcement center and turned him over to be prosecuted for that." App. 59, l. 16 – App. 60, l. 1; App. 63, l. 18 – App. 64, l. 4; App. 65, ll. 10-18.

It was undisputed that Hunter owed money to Respondent. App. 44, l. 23 – App. 45, l. 1; App. 67, ll. 8-19; App. 75, ll. 1-8. It was also undisputed that on September 4, 2014, Hunter intended to pay Respondent the money he was due using Hunter's money, not the money provided by the police. App. 45, ll. 1-2; App. 67, ll. 15-16; App. 68, ll. 6-8. However, the police believed Hunter was going to purchase crack cocaine using the money supplied by the police. App. 45, ll. 3-6; App. 67, ll. 15-21; State's Exhibit #4 at 1:20. Thus, Hunter had "some cash" on him along with the police's "$200 in documented funds." App. 45, ll. 4-6; App. 67, ll. 8-21.

The police dropped off Hunter several blocks from where he had arranged to meet Respondent. App. 45, ll. 22 - App. 46, l. 1; State's Exhibit #4 at 3:45. Police did not follow Hunter or otherwise maintain visual contact with him. App. 44, ll. 16-18; App. 45, ll. 23-25; State's Exhibit #4. The police expected that Hunter would approach Respondent's car and remain at the window in order to effectuate the purchase. State's Exhibit #4 at 00:40. Shortly after Hunter got out of the car with police, the police drove away slowly and Hunter caught back up with the police. State's Exhibit #4 at 3:50. When Hunter arrived at the car in which the police were sitting, Hunter stopped. State's Exhibit # 4 at 4:08. Hunter placed a bag he was carrying down onto the ground. State's Exhibit #4 at 4:12. The contents of the bag were not revealed or discussed. Hunter then continued walking after being told by police, "Alright, you're good." State's Exhibit #4 at 4:34.

Hunter called an individual, presumably Respondent, asking for a ride. State's Exhibit #4 at 7:00. When the person did not arrive in the time in which Hunter thought was reasonable, Hunter called again, demanding his pickup. State's Exhibit #4 at 9:15; State's Exhibit #4 at 11:19. Upon learning he was walking in the opposite direction of his ride, Hunter turned around and stopped momentarily several times. State's Exhibit #4 at 10:00. Respondent arrived – Respondent was in the driver's seat, Andrew Cleveland was in the passenger seat, and Hunter got into the back seat

behind Cleveland. App. 70, ll. 12:15; State's Exhibit #4 at 12:02. McClure was aware of Cleveland's presence in the car and admitted it was possible that Hunter got the drugs from Cleveland, but McClure was unconvinced this was anything more than a mere possibility. App. 72, ll. 8-23.

Immediately upon getting into the car, Hunter and Respondent discussed Hunter's debt. State's Exhibit #4 at 12:11. As the group drove around, Hunter handed Respondent an indeterminate sum of money. State's Exhibit #4 at 13:34. On the camera, it appeared Hunter counted out approximately $120 – a sum substantially less than $200. State's Exhibit #4 at 13:30. The camera then showed Hunter holding a small plastic baggie with a powdery substance and shielding it from Respondent's view with his hand. State's Exhibit #4 at 13:39. Hunter asked for $10 back from Respondent and handed more money to Respondent. State's Exhibit #4 at 13:40. During Hunter's brief conversation with Respondent there was no mention of drugs, drug weights, or a specific amount of cash. App. 72, l. 24 – App. 73, l. 15; State's Exhibit #4. Hunter got out of the car and began walking. State's Exhibit #4 at 15:10.

While walking to meet back up with McClure and Sutherland, Hunter stopped to place something, presumably drugs and potentially cash, in his socks. App. 49, ll. 7-15; App. 74, ll. 3-14. State's Exhibit #4 at 17:15. Hunter also stopped and changed course during his walk back to police. State's Exhibit #4 at 15:32. The police picked up Hunter and drove him to "a confidential meeting location." App. 46, ll. 2-24; State's Exhibit #4 at 20:15. Hunter did not return any money to the police. App. 44, ll. 21-22; App. 68, ll. 5-6; State's Exhibit #4. Hunter gave one gram of crack to McClure. App. 46, l. 5; State's Exhibit #4 at 22:30. McClure admitted that when he watched the video, it appeared that Hunter counted out just over $100, nowhere close to $200, which Hunter gave to Respondent. App. 68, ll. 14-25. Although McClure would not admit that Hunter stole

money, he explained "that's the element that we're dealing with" when asked about Hunter's apparent malfeasance. App. 69, ll. 5-10; App. 75, ll. 3-4 ("It's possible that he kept some of our money, very possible."). McClure searched Hunter and found no drugs, but he was certain Hunter had some money on him. App. 68, ll. 9-11; App. 74, ll. 23-25 ("I didn't even count money"). McClure relied on Hunter's statement that Hunter used the $200 in documented funds to purchase drugs. App. 68, ll. 11-13; State's Exhibit #4 at 22:39; State's Exhibit #4 at 23:54. Hunter told police that he gave the money that he owed Respondent to Respondent. App. 75, ll. 9-11 State's Exhibit #4 at 22:55.

At the conclusion of the alleged transaction, Sutherland typed a statement for Hunter to sign. App. 30, ll. 11-16; App. 166. Sutherland obtained Hunter's signature on the statement. App. 30, ll. 20-24; App. 166. The statement was dated September 2, 2014; Sutherland claimed this was a typographical error during the trial. App. 31, ll. 2-23; App. 166. During this discussion, the police asked Hunter if Respondent's name was "Jeff" and Hunter responded that he believed Respondent's name was "Gerome." State's Exhibit #4 at 23:08. While speaking to police, the mysterious item Hunter was carrying with him all night reappeared, but no discussion or clarification of the item was provided. State's Exhibit #4 at 23:18.

Sutherland removed the devices from Hunter's body. App. 33, ll. 20-23. McClure downloaded the video to his computer when the men returned to their offices. App. 33, l. 23 – App. 34, l. 1; App. 46, l. 18 – App. 47, l. 3.

On September 8, 2014, four days after the alleged drug buy, McClure packaged the drugs he received from Hunter and placed them in an evidence locker. App. 53, ll. 3-17. McClure explained the delay was because he "probably" arrived at his office "11:30, midnight." App. 53, ll. 3-9. Instead of packaging the drugs and placing them into the evidence at that late hour or anytime over

the next several days, McClure placed the drugs in a "safe" in his office. App. 53, ll. 3-9. McClure did not reveal who had access to the safe or how he kept items within the safe separate and identifiable. McClure did not place the drugs into a "Best pack" – presumably one that would show evidence of tampering – until September 8, 2014. App. 53, ll. 3-17.

On April 13, 2015, the Oconee County grand jury indicted Respondent for distribution of crack cocaine second offense. App. 160-161. Two weeks prior to trial, Hunter called Respondent and confessed to having fabricated Respondent's alleged crack cocaine sale to him. App. 108, l. 24 – App. 112, l. 10; Defense Exhibit #4. On July 13, 15, 2015, Respondent proceeded to trial before the Honorable R. Scott Sprouse and a jury. Gregory L. Cole, Jr., represented Respondent, and Lindsey Satterfield Simons represented the state.

Respondent testified in his defense. He explained that Hunter owed him money from a card game. App. 101, l. 19 – App. 102, l. 4. Respondent wanted his money back and arranged to meet Hunter so that Hunter could pay off his debt. App. 102, ll. 2-5. Respondent acknowledged picking up Hunter, driving around for approximately five minutes, and getting money from Hunter. App. 102, ll. 12-13. When Hunter asked to be dropped off, Responding obliged. App. 102, l. 15. When defense counsel played the video of the purported drug sale and Respondent narrated, "I see Mr. Hunter giving me some money that he owed me. Then I see his hand go beside his leg. Then I see him come back with a baggie cuffed . . . between his forehand and his thumb. . . ." App. 105, ll. 12-23.

Ultimately, the jury found Respondent guilty as charged. App. 147, ll. 10-23. The trial court sentenced Respondent to eighteen years imprisonment, suspended upon the service of eight years in prison and five years on probation. App. 148, ll. 3-22.

On July 22, 2015, Respondent served his notice of appeal. John Strom perfected the notice by filing a brief raising four legal errors. App. 169-199.[4] Petitioner responded, conceding error regarding two of the issues presented. App. 200-224. However, Petitioner contended the errors were harmless. App. 200-224. On December 6, 2017, the Court of Appeals heard argument on the case. App. 225-228. Ultimately, the Court held the trial judge erred and the error was not harmless beyond a reasonable doubt. App. 225-228. Petitioner filed a petition for rehearing on January 17, 2018. App. 229-235. The Court of Appeals denied the petition on February 8, 2018. App. 236. Thereafter, Petitioner filed a petition for writ of certiorari asking this Court to exercise its discretion to review the harmless error analysis conducted by the Court of Appeals. This return follows.

[4] The remaining issues on appeal concerned the erroneous admission of Hunter's statement to police pursuant to the Rules of Evidence, the erroneous admission of the drugs based on an insufficient chain of custody, and the erroneous admission of the video evidence based on an insufficient chain of custody. App. 168-199.

ARGUMENT

The Court of Appeals correctly conducted a harmless error analysis where the state conceded the trial judge's admission of a non-testifying criminal informant's written statement violated Respondent's right to cross-examination and confrontation pursuant to the Sixth Amendment to the United States Constitution.

Reasons to deny certiorari

This Court should deny certiorari to review the unpublished *per curiam* opinion by the Court of Appeals in this matter. The issue presented is not a novel question of law as it is a straightforward application of harmless error analysis. There has been no indication that the case law cited by the Court of Appeals, which governed its analysis, was incorrect. The only complaint is with *how* the Court of Appeals analyzed the impact of the admission of the non-testifying confidential informant's statement to law enforcement on the jury trial. See Rule 242(b)(1), SCACR.

All three judges on the Court of Appeals' panel who considered the matter joined in the same unpublished *per curiam* opinion; thus, there was no dissent. See Rule 242(b)(2), SCACR.

The state has not, and cannot, point to a single prior decision of this Court with which the decision of the Court of Appeals conflicts. See Rule 242(b)(3), SCACR. In fact, the Court of Appeals' opinion applies this Court's directives regarding how to conduct a harmless error analysis.

While there are substantial constitutional issues directly involved – a violation of the Confrontation Clause – the violation was conceded by the state. Thus, the only matter of contention is what impact the constitutional violation had on the case. This case simply does not present the type of substantial constitutional issues over which this Court will exercise its sound judicial discretion to grant certiorari. See Rule 242(b)(4), SCACR.

Finally, the decision of the Court of Appeals correctly answers the federal question at issue. There is simply no conflict between the Court of Appeals' resolution of the issue presented and any decision of the United States Supreme Court. See Rule 242(b)(5), SCACR.

This Court should deny a writ of certiorari to review the Court of Appeals' unpublished *per curiam* opinion where the state conceded a constitutional violation of Respondent's rights under the Confrontation Clause and only quibbles over whether the substantial violation was harmless beyond a reasonable doubt.

Relevant facts

Brandon Hunter was supposed to be the state's star witness. After answering introductory questions, the solicitor asked Hunter if he had ever worked as a confidential informant for the Seneca Police Department. App. 11, l. 16 – App. 12, l. 10. In response, Hunter asserted his Fifth Amendment right against self-incrimination. App. 12, l. 11.

Outside the presence of the jury, Hunter informed the court that, while he did not know of any charges pending against him, he was asserting his Fifth Amendment right not to incriminate himself. App. 12, l. 24 – App. 13, l. 10. The solicitor reported that her office had no pending charges against him. App. 13, ll. 2-5. Defense counsel explained that Hunter appeared to be anticipating that answering questions would expose him to criminal liability. App. 13, ll. 18-22. Without further inquiry, the court rejected Hunter's Fifth Amendment assertion and directed him to answer the state's questions. App. 14, ll. 3-4.

When the jury returned, Hunter continued to assert his Fifth Amendment right not to incriminate himself. App. 14, l 11 – App. 15, l. 5. Upon losing its star witness and the only real evidence in the case, the solicitor announced her intent to admit Hunter's written statement pursuant to Rule 613, SCRE. App. 15, ll. 21-23. In that short, typed one paragraph statement, Hunter

summarily claimed "I met with Jerome Smith and purchased Crack with the documented funds." App. 166. The solicitor argued that under Rule 613, SCRE, "generally when a witness has responded with anything less than an unequivocal admission, the trial court has wide latitude to allow extrinsic evidence of the statement." App. 17, ll. 6-17. According to the solicitor, asserting the Fifth Amendment right against self-incrimination was a "less than an unequivocal admission." App. 17, ll. 15-17.

Defense counsel objected to the admission of Hunter's written statement arguing that asserting the Fifth Amendment is "wholly different" than denying having made an inconsistent statement. App. 17, l. 20 – App. 18, l. 14. According to defense counsel, invoking the protections of the Fifth Amendment were not the equivalent of a admitting or denying the contents of a statement and the analysis was inapplicable. App. 18, l. 23 – App. 19, l. 12. The court rejected the defense's argument and ruled that the written statement was admissible under Rule 613(b), SCRE. App. 9, ll. 9 – 18. Thereafter, the state read the entirety of the statement to the jury and asked Hunter if he admitted or denied the statement. App. 21, l. 6 – App. 22, l. 3. Hunter responded that he wished to invoke his protections and immunities under the Fifth Amendment. App. 22, l. 4.

Prior to the statement being entered into evidence, defense counsel renewed his objection and further argued that admitting the statement violated Respondent's right to confront adverse witnesses. App. 31, ll. 12-23. Counsel argued the defense had "not had the opportunity to confront this other witness because he's pled the Fifth on everything." App. 31, ll. 19-22. Permitting the jury to hear the statement was in violation of the Sixth Amendment because Respondent had "no ability to cross-examine because he's not answering any questions." App. 31, ll. 22-24; App. 32, ll. 6-8. The court again overruled Respondent's objections and admitted Hunter's statement into evidence. App. 31, l. 25 – App. 32, l. 5; App. 32, ll. 9-10.

Discussion

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" Crawford v. Washington, 541 U.S. 36, 42 (2004) (quoting U.S. Const. amend. VI). The Confrontation Clause is applicable to the states under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). The South Carolina Constitution provides the same protection to criminal defendants. S.C. Const. art. I, § 14; see State v. Green, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977).

The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. California v. Green, 399 U.S. 149 (1970); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). The cross-examination of adverse witnesses has been described as the "greatest legal engine ever invented for the discovery of truth." Green, 399 U.S. at 158 (internal quotations omitted).

In Crawford, 541 U.S. at 50-51, the Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Crawford rule applies to all "testimonial" evidence. Id. Statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006) (explaining the Confrontation Clause of the Sixth Amendment, as interpreted in Crawford, does not apply to "non-testimonial" statements not intended to be preserved as evidence at trial).

As the Court of Appeals held and the state conceded, the trial court violated Respondent's right to confront and cross-examine witnesses by allowing the state to enter into evidence Hunter's

written statement as a substitute for his testimony. Respondent had no opportunity to cross-examine him. State v. Sierra, 337 S.C. 368, 372-373, 523 S.E.2d 187, 189 (Ct. App. 1999) (holding defendant's confrontation rights were violated when prosecutor impeached defense witness during cross-examination with prior inconsistent statement that witness allegedly made to prosecutor, permitting prosecutor to confront witness with that statement implicated prosecutor as witness without affording defendant opportunity to cross-examine).

Beyond question, Hunter's statement was testimonial evidence. Crawford, 541 U.S. at 51-52 (testimonial statements include statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available of use at a later trial and statements taken by police officers in the course of interrogations). Hunter had entered into an informant agreement with law enforcement. He signed the statement immediately after he allegedly purchased crack cocaine for the purposes of producing evidence against Respondent. Davis, 547 U.S. at 821 (a statement during police questioning is testimonial when the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

Upon embarking upon its harmless error analysis, the Court of Appeals explained that in order to make the determination, a "'reviewing court must review the entire record to determine what effect the error had on the verdict.'" App. 226 (quoting State v. Douglas, 369 S.C. 424, 432, 632 S.E.2d 845, 849 (2006)). Further, the Court explained that an "'[e]rror is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.'" App. 226 (quoting Douglas, 369 S.C. at 432, 632 S.E.2d at 849). The Court of Appeals noted "'[t]he key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" App. 226 (quoting State v.

Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012)). Finally, the Court explained that it must consider "whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." App. 226 (quoting Tapp, 398 S.C. at 389-390, 728 S.E.2d at 475).

With this undisputedly correct framework in mind, the Court of Appeals explained that the only individuals present during the undercover operation were Hunter, Respondent, and a passenger. App. 226. "The passenger did not testify, [Hunter] refused to testify concerning the events, and [Respondent] testified the transaction involved only a repayment of money [Respondent] loaned [Hunter], and not the delivery of drugs." App. 226. As the Court of Appeals observed, "no testimony was presented from any of the individuals present during the event in question to show [Respondent] sold or delivered any drugs" to Hunter. App. 226-227.

Next, the Court of Appeals examined the video evidence. The Court assumed the video recording was properly admitted for the purposes of the analysis. App. 227. According to the Court, the video was "not conclusive as to whether a drug deal occurred between [Respondent] and [Hunter]." App. 227. After recounting the testimony from Sutherland, McClure, and Respondent regarding what the video showed, the Court of Appeals explained that it had reviewed the video and was "not convince[d]" "the admission of [Hunter]'s written statement was harmless." App. 227.

> While there is evidence from which a jury could believe [Respondent] is handing drugs to [Hunter] during the exchange of money, the video is not perfectly clear that this is what, in fact, occurred. Rather, a jury could determine, from the video and other evidence presented, that [Hunter] did not obtain the drugs from [Respondent] that night but, instead, set it up to appear that way.

App. 227. Thus, the Court of Appeals concluded the admission of Hunter's written statement was not harmless beyond a reasonable doubt. App. 227.

Petitioner asserted "the Court of Appeals failed to consider that recorded exchange in the context of the remainder of the video and the testimonies of Officers Sutherland and McClure,

which demonstrated there was no reasonable possibility that [Hunter] obtained the drugs from anyone but Respondent." Pet. at 9. The opinion reveals the Court of Appeals considered the testimony of Sutherland, McClure, Respondent, and the video evidence. There was no indication the Court failed to consider the entire video or the testimony of the witnesses. In fact, McClure admitted that Hunter may have obtained the drugs from the passenger. Although McClure downplayed this scenario as unlikely, he admitted it was a possibility. Despite the testimony about searching Hunter, there was still evidence that Hunter may have had the drugs in his possession all along. Contrary to the testimony, the video showed Hunter stop and reverse course prior to meeting with Respondent. The video also showed Hunter carrying an item, which was never discussed or the contents revealed.

Next, Petitioner accused the Court of mischaracterizing the video. Pet. at 11 n.6. According to Petitioner, "the Court of Appeals claimed the video showed Hunter's hand '[went] beside his leg and [came] back up with a baggie cuffed in his hand as if [Hunter] was trying to hide or plant something.'" Pet. at 11 n.6. To the contrary, the Court of Appeals clearly stated that Respondent "described [Hunter] giving him money that was owed to him by [Hunter], and then [Hunter]'s hand going beside his leg and coming back up with a baggie cuffed in his hand as if [Hunter] was trying to hide or plant something." App. 227. The Court accurately recounted Respondent's testimony regarding what the video showed. The Court's characterization of the video was that it was "not perfectly clear." App. 227.

The admission of Hunter's statement could not have been harmless error as it was the cornerstone of the state's case. In effect, Hunter's statement became the key witness for the prosecution because he was the only person who witnessed the purported sale. As the video footage

was inconclusive as to whether a transaction occurred, the state was reliant on Hunter's statement to support its theory of the case.

Moreover, the state improperly weaponized Hunter's assertion of a constitutional right by repeatedly attributing Hunter's invocation of his Fifth Amendment to completely unsubstantiated allegations of witness intimidation by Respondent. App. 43, ll. 18-25; App. 119, ll. 3-25; App. 141, ll. 3-24. Apparently not satisfied with having trampled on Respondent's Sixth Amendment right to confront adverse witnesses while misappropriating the rules of evidence in her quest for a conviction, the solicitor could not resist "gilding the lily" in closing arguments:

> You can tell [Hunter's] scared. Agent McClure told you it's not uncommon for informants to recant. **It's not uncommon for them to become uncooperative due to pressure that's put on them by -- either on them or pressure on their family, or it's not uncommon for them to fold when they they see mass showings against them.** He told you all of that. ...
>
> We don't know why [Respondent] got Brandon Hunter to say that. That is important, that we don't know why. **I submit to you there was some sort of threats or intimidation made to get Brandon Hunter to make that statement**.

App. 141, l. 16 – App. 142, l. 17 (emphasis added).[5] See State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985)(stating that references to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats); State v. Rogers, 96 S.C. 350, 352, 80 S.E. 620, 621 (1914)(explaining that it would be "a prostitution of justice" to permit evidence that someone attempted to influence a witness by fear without any evidence that connects the defendant with the improper influence).

---

[5] The solicitor's closing argument that Hunter was threatened or intimidated to "plead the Fifth" and to state in an audio recording that Respondent did not sell him drugs, but that Hunter had "set up" Respondent guts Petitioner's outrageous argument that Respondent "benefitted" from the judge's admission of Hunter's statement into evidence. Any benefit from the introduction of the recording of Hunter confessing that he had set up Respondent was destroyed by the solicitor's improper use of Hunter's confession to personally "submit" to the jury that Respondent had threatened or intimidated Hunter.

Additionally, the solicitor diluted the state's burden of proof when she defined reasonable doubt and what the jury had to determine. According to the solicitor, "[r]easonable doubt is not beyond all doubt, it's beyond a reasonable doubt." App. 133, ll. 1-2. To apply this standard, the solicitor told the jurors to "go into that jury room," and ask, "Do I reasonably believe that a drug deal took place?" App. 133, ll. 2-5. The evidence, the case, the burden of proof was "just as simple as that." App. 133, l. 5.

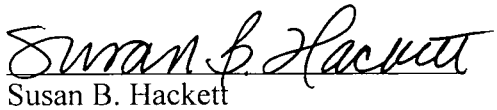
Furthermore, and deeply disturbing, the state used Respondent's prior criminal record to convince the jury that he was guilty of the crime for which he was charged. Recalling McClure's testimony that the police were using Hunter, a street level drug dealer, in order to "catch that bigger fish," the solicitor reminded the jurors that Respondent had a prior conviction for "trafficking, which is a significant weight of drugs, trafficking shows you he's that bigger fish they were trying to get." App. 141, l. 24 – App. 142, l. 5. In other words, the solicitor did not use Respondent's prior record for the purpose for which the rules allow its admission – attacking credibility – the solicitor used the prior criminal convictions to suggest to the jury that Respondent was guilty of trafficking drugs previously and was guilty of distributing the drugs for which he was on trial.

Respondent respectfully requests this Court deny the petition for writ of certiorari as no special and important reasons have been provided or exist to invoke this court's discretionary review. The unpublished *per curiam* opinion issued by the Court of Appeals correctly determined the admitted violation of Respondent's right to confrontation pursuant to the Sixth Amendment was not harmless beyond a reasonable doubt. The Court of Appeals was not addressing a novel question of law, but was merely applying long-standing legal principles of harmless error analysis. The opinion was unanimous and did not conflict with any decisions of this Court or with the United States Supreme Court. Finally, Petitioner conceded the trial judge violated Respondent's right

pursuant to the Confrontation Clause, which was the substantial constitutional issue involved in the case. The only complaint was how the Court of Appeals viewed the evidence in conducting its harmless error analysis. Thus, the substantial constitutional issue involved is more attenuated upon further inspection. Therefore, this Court should deny the petition for writ of certiorari.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari because no special or important reason exists for this Court to exercise its discretionary review. In the event this Court grants the petition, Respondent respectfully requests the opportunity to brief fully the issue presented. Additionally, should this Court reverse the Court of Appeals, Respondent respectfully requests this Court remand the case to the Court of Appeals for consideration of Respondent's remaining three issues on appeal. See Conits v. Conits, 422 S.C. 74, 78, 810 S.E.2d 253, 254 (2018) (remanding to the Court of Appeals to rule on the merits of the issue that was previously found unpreserved by the Court of Appeals); Centennial Casualty Co., Inc. v. Western Surety Company, 412 S.C. 331, 335, 772 S.E.2d 274, 276 (2015) (remanding to the Court of Appeals for consideration of the respondent's remaining challenges to the trial court's order); State v. Pinckney, 339 S.C. 346, 350, 529 S.E.2d 526, 528 (2000) (remanding to the Court of Appeals for consideration of the defendant's "remaining issue whether the trial court erred in denying respondent's directed verdict motion on the ground of not guilty by reason of insanity"); State v. Grovenstein, 335 S.C. 347, 353 n.6, 517 S.E.2d 216, 219 n.6 (1999) (explaining that when there are remaining issues on appeal not addressed by the Court of Appeals, the proper remedy is to remand for consideration of those other issues).



Susan B. Hackett
Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR RESPONDENT

This 26th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Oconee County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 2018-UP-014 (S.C. Ct. App. Filed Jan. 10, 2018)

2015-GS-37-00399

THE STATE,

PETITIONER,

V.

GEROME C. SMITH,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari to the Court of Appeals in the above referenced case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gerome C. Smith, #326839, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 26th day of April, 2018.

Susan B. Hackett
Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.