STATE OF SOUTH CAROLINA **COUNTY OF COLLETON**	)	**COURT OF GENERAL SESSIONS** **FOURTEENTH JUDICIAL CIRCUIT**
State of South Carolina, v. Richard Alexander Murdaugh, Defendant.	)	Indictment Nos. 2022-GS-15-00592, 593, 594, and -595 **MOTION IN LIMINE TO ALLOW THE STATE'S USE OF DEFENDANT'S PRIOR TESTIMONY IN RETRIAL**

The State seeks a preliminary ruling that Defendant's sworn testimony from the first trial is admissible in the retrial. "Nothing, it seems, is as effective in helping to ascertain the truth in the courtroom." Nadine Farid, *Oath and Affirmation in the Court: Thoughts on the Power of A Sworn Promise*, 40 New Eng. L. Rev. 555, 557 (2006).

Defendant Richard Alexander Murdaugh, a former lawyer, waived his Fifth Amendment right against self-incrimination after the trial judge's explanation and caution, specifically advising the trial judge that he understood, had no questions about his right, and had decided, "I am going to testify. I want to testify." (Attachment 1, Tr. pp. 4661-4664). Defendant then voluntarily took the stand and gave testimony under oath, including *on direct examination* and cross about why he lied repeatedly to law enforcement, his family, his friends, and his law enforcement when he claimed he was not at the murder scene for hours prior to when he called 911. The State submits that there is no statute, law, rule or other reason that prohibits the State from using that sworn testimony during retrial either for substantive evidence or impeachment based merely on its origin from the prior trial. Therefore, the State seeks a preliminary ruling that the mere

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fact the testimony was offered during the first trial presents no bar to its subsequent use in the retrial.[1] In support of its position, the State would show the following:

1. The Supreme Court of the United States has recognized "the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceeding." *Harrison v. United States*, 392 U.S. 219, 222 (1968). The limitation to this well-established rule applies when the prosecution has relied on "wrongfully obtained" statements that "impelled" the testimony, thus making it "fruit of the poisonous tree" and inadmissible. *Id.* In essence, if a defendant testified "in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id.*, at 223. There has been no suggestion of that circumstance here; specifically, there is no ruling of any error that "impelled" the testimony. While a defendant may claim that the prosecution's case prompted the decision to testify, merely making that decision considering "the strength of the lawful evidence adduced against him" poses no bar to the testimony's subsequent use. *Id.*, at 222.

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[1] Defendant, on the other hand, is barred from using the testimony to shape his defense as it is, for him, hearsay without an applicable exception. *See State v. Terry*, 339 S.C. 352, 356, 529 S.E.2d 274, 277 (2000) (finding a defendant may not "procure[] his own unavailability by invoking his protection against self-incrimination"). This motion does not seek a preliminary ruling on whether any particular statement or admission would be relevant for a specific point, or a preliminary ruling on the scope of impeachment. Rather, the State seeks a narrow ruling only that the prior testimony is not *per se* inadmissible. *See, e.g., United States v. Arthur*, 602 F.2d 660, 663 (4th Cir. 1979) (acknowledging the wise decision to "concede[] that 'it may be permissible . . . to allow the prosecution to introduce in its case the recorded testimony of an accused from an earlier trial proceeding …'"). The State respectfully submits that specific objections, such as those questioning relevance or scope, should be reserved for the trial. Additionally, a pre-trial ruling on this matter would provide notice to the defendant that sworn testimony may be used and may anticipate same in preparing for retrial.

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Notably, even where prior testimony is considered to have been induced by unconstitutional error, our Supreme Court has found that the sworn testimony is still admissible for impeachment purposes because, as our Court has bluntly stated, it "will not condone perjury." *State v. Brown*, 296 S.C. 191, 194, 371 S.E.2d 523, 525 (1988). *See also id.,* at 193-194, 371 S.E.2d at 524 ("Under both federal and state law, unconstitutionally seized evidence is admissible for impeachment" observing the Supreme Court's acknowledgement that "'when defendants testify, they must testify truthfully or suffer the consequences. This is true even though a defendant is compelled to testify against his will.'") (quoting *United States v. Havens*, 446 U.S. 620, 626 (1980)). However, as shown, there is no finding of unconstitutional error which would have induced the testimony at issue. *Harrison* controls and there is no bar to its use in the State's case.

2. Moreover, our Rules of Evidence support that prior sworn testimony may be deemed admissible. Rule 804(b)(1), SCRE provides, if the declarant is unavailable, the following exception to the general hearsay prohibition:

> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Here, there could be very little doubt that the testimony shows direct, cross-examination and redirect, such that the testimony was fairly developed with an eye toward attempting to address the State's case. Yet even more dispositive to the prior testimony here is that at issue is *the defendant's own testimony* and that is not hearsay when offered

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against him. Rule 801(d)(2), SCRE. There is no bar to admissibility based on the rules of evidence regarding prior testimony.

3. Further, S.C. Code Ann. § 19-11-50, the "Privilege against self-incrimination," requires no different result. The statute sets out: "The testimony of a defendant in a criminal case shall not be afterwards used against the defendant *in any other criminal case*, except upon an indictment for perjury founded on that testimony." (emphasis added). The provision, by its terms, does not bar testimony from a prior trial *in the same criminal case.* That is what we have here; this is the same criminal case. Interpretation of § 19-11-80 must be considered within the statutory scheme in which appears. *See, e.g., S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."). Thus, there is a difference in treatment between recognition of the venerable right against self-incrimination and the limitation on receipt of certain evidence in other contexts. While specifics in the text are limited, precedent helps to fill in the blanks.

Consider, for example, that in *State v. Chasteen*, 231 S.C. 141, 97 S.E.2d 517 (1957), our Supreme Court addressed the statute in terms of the admissibility of prior statements for purposes of cross-examination and resolved "there can be laid down no fixed rule as to what is admissible on cross-examination with respect *to the past conduct* of a defendant who takes the stand as a witness." *Id.*, at 145; 97 S.E.2d at 519 (emphasis added). *See also State v. Williamson*, 65 S.C. 242, 43 S.E. 671, 672 (1903) (concerning the prosecution's question whether the defendant had been previously indicted for

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perjury). This demonstrates the intent to limit the details of past conduct for impeachment. Further, the most recent case from our Supreme Court considering the provision, *State v. Tucker*, 334 S.C. 1, 12, 512 S.E.2d 99, 105 (1999), is similarly consistent with the interpretation of separate conduct as opposed to retrial in the same criminal case.

Tucker was convicted and sentenced to death, but the death sentence alone was reversed on appeal and new sentencing followed. At resentencing, the trial court admitted testimony from the prior trial. On appeal, Tucker argued the testimony was hearsay. The Court disagreed since it was his own statement offered in evidence against him citing Rule 801(d)(2), SCRE. As a second argument on appeal, Tucker cited to § 19-11-50, but the Court found the statute inapplicable since it was used in "the same criminal case," and concluded that "the trial judge did not err in admitting this evidence." 334 S.C. at 13, 512 S.E.2d at 105. It is the same here. There is no doubt that the retrial Defendant faces is for "the same criminal case," and, in fact, on the same criminal indictments.

Moreover, the above interpretation of the statute and caselaw is consistent with the history of the most recent amendment which references "conformity with the rules" of evidence adopted September 3, 1995. *See* H.B. No. 3632, South Carolina 1995 Session Laws. The statutory section, thus, speaks to propriety of use of testimony from other criminal cases, not retrial. For all these reasons, § 19-11-50, when properly construed, requires no different result.

4. Based on the foregoing, *Harrison* is controlling and Defendant's trial testimony is not inadmissible simply because the testimony was sworn to and presented in the prior trial of this criminal case. *See Byford v. State*, 994 P.2d 700, 707 (Nev. 2000) ("Generally, a defendant's testimony at a former trial is admissible" such that "a

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defendant's prior testimony may be introduced at a second trial as part of the state's case-in-chief.") (citing *Harrison*, 392 U.S. at 222 and *Turner v. State*, 98 Nev. 103, 106, 641 P.2d 1062, 1064 (1982)). "Having voluntarily taken the stand," Defendant "was under an obligation to speak truthfully and accurately[.]" *Harris v. New York*, 401 U.S. 222, 225–26 (1971). Nothing allows a defendant to simply erase the sworn testimony because he may wish he had not taken the stand previously.

Respectfully submitted,

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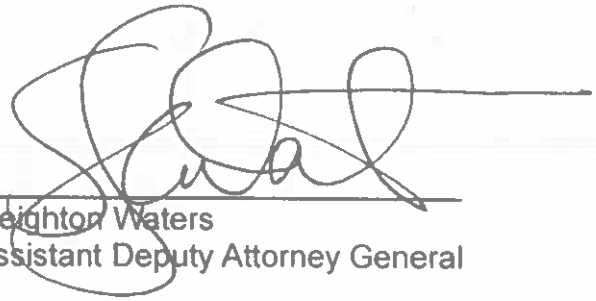

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