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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC EMANUEL ENGLISH,

APPELLANT

APPELLATE CASE NO. 2022-000760

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in affirming Petitioner's conviction for criminal sexual conduct with a minor where the trial court admitted test results showing Petitioner had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratory responsible for the analyses testified, since pursuant to *State v. James*, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971), test results offered to "connect a defendant directly with the commission of a crime" "must be substantiated by the person who conducted the tests?"

STATEMENT

On October 16, 2017, a Lexington County Grand Jury indicted Petitioner for first-degree criminal sexual conduct with a minor. Petitioner was tried in his absence before the Honorable Eugene C. Griffith, Jr., and a jury from January 8 – 10, 2018. Petitioner was convicted as indicted. On April 9, 2018, Petitioner appeared before the court and Judge Griffith unsealed his sentence. Petitioner was sentenced to forty years imprisonment. On April 27, 2018, the parties appeared before the court for a motion to reconsider the sentence, which was denied.[1]

The court of appeals affirmed in a published opinion, *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 82). Petitioner moved for rehearing. The court of appeals denied rehearing.[2] Petitioner sought a writ of certiorari to the court of appeals and this Court granted certiorari. This brief of petitioner follows.

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[1] R. 246 – 247; R. 1; R. 199, ll. 3-6; R. 205; R. 208, ll. 5-15; R. 218; R. 220, ll. 6-9; R. 229, ll. 7-10.

[2] App. 54 – 60; App. 61.

STANDARD OF REVIEW

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz,* 346 S.C. 114, 120, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000).

ARGUMENT

The Court of Appeals erred in affirming Petitioner's conviction for criminal sexual conduct with a minor where the trial court admitted test results showing Petitioner had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratory responsible for the analyses testified, since pursuant to *State v. James*, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971), test results offered to "connect a defendant directly with the commission of a crime" "must be substantiated by the person who conducted the tests."

The Court of Appeals incorrectly concluded the test results were admissible. Because the results were used to directly connect Petitioner with the crime, the analyst was required to substantiate the results as a prerequisite to admission. *State v. James*, 255 S.C. at 370, 179 S.E.2d at 43.

Relevant facts

Petitioner's seven-year-old daughter, the minor, was sexually abused. On or about March 4, 2014, the minor visited her school nurse and complained that her "private area" hurt. The minor's mother took her to the doctor and the minor was diagnosed with gonorrhea. The child was interviewed at the Dickerson Center, and she alleged Petitioner "put his private in [her] private." The minor claimed this occurred while her younger brother was present.[3]

An expert in public health would later testify that a child was likely to show symptoms of gonorrhea within two to five days from the time of exposure. The minor said the assault occurred during the last weekend visit she had at Petitioner's home. However, there was no testimony by an adult that the minor visited Petitioner shortly before her symptoms appeared.[4]

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[3] R. 84, l. 9 – 88, l. 5; R. 128, ll. 5-10; R. 58, l. 2; R. 65, l. 23 – 66, l. 5; R. 56, l. 19 – 59, l. 17.

[4] R. 159, ll. 16-21; R. 65, l. 21 – 66, l. 1.

The minor was interviewed at the Dickerson Center a second time and at that time she disclosed sexual abuse by her mother's boyfriend, Jamie Stroman. The parties stipulated that the minor had been sexually abused by Stroman. Stroman had admitted to digitally penetrating the child and he was convicted of first-degree criminal sexual conduct with a minor prior to Petitioner's trial. The minor said she had not disclosed the sexual abuse by Stroman because she thought Stroman would hurt her mother if she did so.[5]

After the minor's mother learned the child had gonorrhea but before any charges were filed, both Petitioner and Stroman were tested to see if they had a sexually transmitted disease. Reports showed Petitioner's test results were positive for gonorrhea and Stroman's were negative. The urgent care offices visited by Petitioner and Stroman for testing were both affiliated with the Lexington Medical Center, and their samples were sent to the same laboratory for analyses.[6]

Pretrial, the State moved to introduce the test results of both Petitioner and Stroman pursuant to Rule 803(6), SCRE. The State argued the results were business records of tests done for the purposes of medical diagnosis and treatment. The State also cited to *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 565 S.E.2d 293 (2002) (hereinafter *Ex parte DHEC*). Defense counsel argued the results should be suppressed as inadmissible hearsay pursuant to *State v. James*, 255 S.C. 365, 179 S.E.2d 41, absent testimony by the analyst who performed the tests. Defense counsel quoted the *James* case: "Where the tests or analyses are offered to prove

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[5] R. 70, l. 11 – 71, l. 3; R. 24, l. 21; R. 231; R. 38, l. 24 – 39, l. 15; R. 77, ll. 10-18.

[6] R. 24, ll. 20-21; R. 145, ll. 5-7; R. 136, ll. 22-24; R. 134, l. 16 – 135, l. 1; R. 140, ll. 8-22; R. 143, ll. 2-6; R. 242 – 244.

an essential element of the crime or to connect the defendant directly with the commission of a crime, such results must be substantiated by the person that conducted the test or analysis."[7]

In ruling, the trial judge noted he had been the trial judge in *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), and that the *Chisholm* case was not reversed although records of the defendant's HIV status kept by DHEC were admitted as business records. The trial court therefore found the tests results here were admissible as business records.[8]

Pamela Levi, a nurse practitioner who worked at an urgent care center in Swansea where Stroman's sample was taken, testified Stroman was seen by another medical provider who took the sample and sent it to the laboratory for testing. Levi said two days later she saw Stroman's test results in the office computer system and "reviewed them and signed off on them because no additional treatment was needed." Levi's testimony that Stroman's gonorrhea test was negative, and the laboratory report stating the same, were admitted over objection.[9]

Dr. Wesley Frierson, who worked at a Lexington urgent care center, saw Petitioner when he came in for a test. Frierson said he took a swab and submitted it to the laboratory. Frierson said he later viewed and "verified" the results on his computer system. Frierson did not perform the testing, he did not work at the laboratory where the sample was tested, and he did not treat Petitioner for gonorrhea. Frierson's testimony that Petitioner's results were positive for gonorrhea, and the laboratory report stating the same, were admitted over objection.[10]

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[7] R. 24, l. 23 – 26, l. 15; R. 76, ll. 10-11; R. 27, l. 19 – 28, l. 13.

[8] R. 26, l. 16 – 27, l. 5; R. 29, ll. 7-12; R. 134, l. 12; R. 144, l. 21.

[9] R. 130, ll. 9-16; R. 132, l. 7 – 134, l. 1; R. 134, l. 5 – 135, l. 10; R. 136, ll. 22-24; R. 241 – 243.

[10] R. 140, l. 19 – 141, l. 3; R. 142, l. 16 – 143, l. 20; R. 145, l. 15 – 146, l. 6; R. 244; R. 144, l. 14 – 145, l. 7.

Interestingly, the prosecution knew how to properly substantiate test results since it did so with the minor's test results. When the State introduced the minor's test results, it presented testimony from a pathologist who was the medical director at the (different) laboratory that analyzed the minor's samples. That witness testified about that laboratory's oversight, accreditation, laboratory inspections by various entities, how the laboratory maintained specimen integrity, how the records were generated, and the types of testing that were done, as well as the fact that both an initial and a confirmatory test were performed on the samples. However, the prosecution did not do the same for Petitioner's test results or for Stroman's test results even though the laboratory was in Lexington and the case was tried in Lexington.[11]

The solicitor relied heavily on this evidence in closing, arguing, "[Y]ou heard testimony from Ms. Pamela Levi that Jamie Stroman tested negative for gonorrhea, so he did not do this." "When y'all go back to deliberate, just remember [the minor] tested positive, [Stroman] tested negative. [Petitioner], who [the minor] identified as her perpetrator, tested positive. Positive plus a positive equals a positive and I'm positively sure that you will come back guilty."[12]

Discussion

The trial court erred when it admitted the test results of Petitioner and of Stroman, since the analyst or analysts did not substantiate the results, and the solicitor used the results to directly connect Petitioner with the crime. To be clear, Petitioner did not object to the chain of custody. Instead, Petitioner objected to the admission of the results pursuant to *James*, 255 S.C. 365, 179 S.E.2d 41, since no one from the laboratory was present to explain their methods and qualifications.

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[11] R. 109, l. 2 – 120, l. 3.

[12] R. 171, ll. 11-13; R. 179, ll. 4-8.

"Where the results of tests or analyses are offered to . . . connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses." *James*, 255 S.C. at 370, 179 S.E.2d at 43. The United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 361 (2009), observed *James* illustrates that South Carolina is among states that "interpret state hearsay rules to require confrontation of the results of routine scientific tests or observations of medical personnel."

The defendant in *James* was tried for attempting to poison her husband by putting arsenic in his Christmas dinner coffee and attempting to poison him again while he was in the hospital. A sample of the husband's urine was taken at the Greenville hospital and sent to a lab in California for chemical analysis. Over a hearsay objection, two Greenville doctors testified the California lab report showed arsenic in the husband's urine. The California analyst was not called as a witness and the doctors admitted that they did not know the method used for determining arsenic content, the analysis was not done under their supervision, and they could not vouch for the validity of the report. *James*, 255 S.C. at 367-69, 179 S.E.2d at 42-43.

In holding the analyst was required to admit the test results, this Court explained, "Where tests or analyses are conducted the cogent elements are the results, methods used and qualifications of the tester. The method used and qualifications of the tester give the results their veracity." *Id.* at 370, 179 S.E.2d at 43. That was because the doctors "knew nothing about such analysis other than what they read in the report . . . they knew nothing save through hearsay." *Id.* This Court explained hearsay testimony is not subject to the tests that can usually be applied to ascertain truth, such as the requirement of an oath and the opportunity for cross-examination. *Id.*, 255 S.C. at 369, 179 S.E.2d at 43 (quoting *Cooper Corporation v. Jeffcoat*, 217 S.C. 489, 61

S.E.2d 53 (1950)). This Court noted the effect of the admission deprived the defendant of the right to confront and cross-examine her accusers. *Id.*

Here, the court of appeals concluded that *James* was distinguishable since the testing was conducted at an "in-house" laboratory, the providers viewed and verified the results, and there was no Confrontation Clause problem since the test results were non-testimonial under *Davis v. Washington*, 547 U.S. 813 (2006). App. 49 – 50; *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 87). *Davis v. Washington*, 547 U.S. at 822, held that statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *See also Crawford v. Washington*, 541 U.S. 36, 68 (2004) (nontestimonial hearsay may be exempted from Confrontation Clause scrutiny but "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.")

Davis v. Washington should not distinguish Petitioner's case from *James*. The test results in *James*, 255 S.C. at 367-68, 179 S.E.2d at 42, would have also been considered non-testimonial under *Davis* since the medical testing in *James* was ordered for purposes of diagnosis and treatment, not for purposes of criminal prosecution. Here, as in *James*, the tests were ordered by medical providers, not law enforcement. And, although cross-examination was a significant concern for this Court in deciding *James*, this Court identified other concerns underpinning its decision, including the requirement that a declarant be under oath and responsible to answer for perjury. *James*, 255 S.C. at 369, 179 S.E.2d at 43. Another concern identified by this Court was the jury's role in determining credibility by observing the demeanor of the declarant. *Id.* These reasons exist apart from confrontation—they would also apply in a civil case, for example.

The minor had gonorrhea, and both Petitioner and Stroman had been accused of separately sexually abusing her, although Stroman only admitted to digital penetration, which would not have transmitted gonorrhea. The prosecution used Petitioner's positive test result and Stroman's negative test result as proof Petitioner was the perpetrator. *James* was on point—the test results directly connected Petitioner to the crime and the results were admitted through medical providers who viewed the results after the tests had been completed. But viewing something is not the same thing as creating it. The fact that the laboratory was affiliated with the urgent cares was irrelevant since the providers who testified about the results simply read the results. They did not know the methods or qualifications of the testers, and the analyses were not done under their supervision. Both men's samples were in the same laboratory during the same time period for testing, but no one from the laboratory was present to say how they kept the samples from getting mixed up or otherwise maintained specimen integrity.[13]

The court of appeals found that Rule 803(6), SCRE, and *Ex parte DHEC*, 350 S.C. 243, 565 S.E.2d 297 (2002), permitted admission here because Dr. Frierson said he relied on the records to treat patients, and law enforcement was not involved. App. 50 – 52; *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 89). The court of appeals also cited to *Jamison v. Morris*, 385 S.C. 215, 684 S.E.2d 168 (2009), for the proposition that medical records are presumed reliable as business records. App. 52. The court of appeals concluded, "Although we acknowledge *James* has not been expressly overruled, the South Carolina Rules of Evidence, which provide exceptions to the rule against hearsay, were enacted subsequent to *James*. We believe this point distinguishes this case from *James* and supports the

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[13] R. 38, l. 24 – 39, l. 15; R. 231; R. 171, ll. 11-13; R. 179, ll. 4-8; R. 140, l. 19 – 146, l. 6; R. 241 – 244; R. 130, l. 9 – 136, l. 24.

trial court's ruling that the evidence is admissible under Rule 803(6)." App. 52, n. 5; *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 89 n. 5).

Trustworthiness is at the heart of both *James* and Rule 803(6), SCRE. Rule 803(6) provides an exception to the general prohibition on hearsay for records of regularly conducted activity. This Court has explained that to be admissible under Rule 803(6), SCRE,

> memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and **(5) found to be trustworthy by the court**.

Ex parte DHEC, 350 S.C. at 249–50, 565 S.E.2d at 297 (2002) (emphasis added). Here, neither witness who testified about the results knew the methods and qualifications of the testers. Ms. Levi, who testified she viewed and "signed off" on Stroman's test results, and Dr. Frierson, who testified he viewed and "verified" Petitioner's test results, could only say that a specimen was taken and submitted to a laboratory, and they later read the results. There was no testimony on what constituted "verifying" or "signing off" on the results. There was no testimony about laboratory accreditation or inspection, specimen integrity, or type of testing.[14]

Without that critical information the records could not be found trustworthy by the trial court. (The trial court did not explicitly make a finding of trustworthiness, but it found the results to be business records.) Notably, the records were made in the course of the laboratory's business, not the urgent care's business—the urgent cares were not in the business of analyzing samples. Defense counsel correctly argued that someone from the laboratory, not someone from

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[14] R. 140, l. 19 – 146, l. 6; R. 241 – 244; R. 130, l. 9 – 136, l. 24.

the urgent care, should be present to substantiate the results. The court of appeals erred in finding the results were admissible as business records pursuant to Rule 803(6).

The court of appeals overbroadly interpreted *Ex parte DHEC*. The holding of that case was limited to the disease HIV, the agency DHEC, and the offense of exposing others to HIV. The issue addressed in *Ex parte DHEC* was chain of custody—not the applicability of *James*. Similarly, the Court of Appeals erred by relying on *Jamison v. Morris*, 385 S.C. at 227, 684 S.E.2d at 174. *Jamison* is not controlling as the Court there addressed chain of custody. Petitioner did not challenge the evidence's admissibility based on chain of custody. In *Ex parte DHEC*, 350 S.C. at 246, 565 S.E.2d at 295, Doe was indicted for knowingly transmitting HIV to another and for criminal sexual conduct with a minor. This Court held that "HIV tests taken for purposes of medical diagnosis before any charges are pending are trustworthy and should be admitted as business records without a chain of custody." *Id.* at 251, 565 S.E.2d at 297. This Court found the trustworthiness of medical records to be presumed since the test was relied on for diagnosis and treatment. *Id.* at 250, 565 S.E.2d at 297.

Critically, however, this Court reasoned that because HIV is a permanent condition, Doe could be retested at any time to refute the DHEC test results. *Id.* "If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition." *Id.* In contrast, a "person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection and, therefore, needs the indicia of reliability provided by a chain of custody." *Id.* Therefore, "HIV test results and other relevant medical information in DHEC's custody are admissible as business records without a chain of custody under Rule 803(6), SCRE, for purposes of S.C. Code Ann. 44-29-145." *Id.* at 252, 565 S.E.2d at 298. This was a narrow holding.

The trial court cited *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), as an authority for the admission of the results. However, *Chisholm*, like *Ex parte DHEC*, addressed the narrow matter of the chain of custody needed for DHEC's HIV records. The court of appeals recognized that *Chisholm* was "inapplicable" to Petitioner's case. App. 52, n. 6; *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 90 n. 6). However, *Chisholm* emphasized a rationale of *Ex parte DHEC* was that a distinctive characteristic of HIV—its permanency—allowed an accused to be retested at any time to refute the evidence. *Id.*, 395 S.C. at 270-71, 717 S.E.2d at 619-20. The appellate courts have explicitly taken a distinctive characteristic of HIV—that it is an incurable disease—into account.[15]

However, gonorrhea does not have HIV's distinctive permanency because it can be cured by antibiotics. *See Gonorrhea*, The Gale Encyclopedia of Medicine (Jacqueline L. Longe, ed., 4th ed. 2012). An accused cannot simply be retested for gonorrhea to refute an erroneous test result, since a negative result may only show successful treatment. These gonorrhea tests were a snapshot in time that could not be refuted with later tests and the trustworthiness of these records should not be presumed as it is presumed with HIV records.

The court of appeals also erroneously concluded that the adoption of the evidence rules should distinguish *James*. *James* should be read consistently with Rule 803(6), SCRE, to require testimony by an analyst when test results directly connect a defendant to the crime. *See State v. White*, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009) (analyzing admissibility of expert testimony by dog tracker under Rule 702, SCRE and principles from case law that existed prior

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[15] Although HIV treatments have become more effective over time, the disease was still considered incurable as of 2017. *See* Meiring de Villiers, *Acquired Immunodeficiency Syndrome: A Forensic Perspective*, 37 J. Legal Med. 389, 392 (2017).

to adoption of rules); *State v. Page*, 406 S.C. 272, 291 n. 7, 750 S.E.2d 623, 633 (Ct. App. 2013) (discussing admissibility of evidence under Rule 401, SCRE and applicable case law).

Finally, the admission of the test results was not harmless. "Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). An insubstantial error not affecting the result of the trial is harmless when "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Absent the test results, the case rested on the minor's credibility. No eyewitness testimony or other physical evidence corroborated the minor's allegation that it was Petitioner who abused her. The State also relied on the inadmissible evidence in its closing argument when it emphasized Petitioner's and Stroman's test results. R. 179, ll. 4-8. *See generally Ard v. Catoe*, 372 S.C. 318, 335, 642 S.E.2d 590, 598 (2007).

It was the State's burden to establish admissibility and the burden was not met. This Court should uphold *James* and continue to require that the party seeking admissibility of laboratory results show how careful the analysts were in the laboratory when those results are used to directly connect the defendant to the crime. *State v. James*, 255 S.C. at 370, 179 S.E.2d at 43.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

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This 21st day of December, 2022.