

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I Whether it was error to deny a continuance seeking to allow the court ordered mental health examination reports regarding Wylie's competency and criminal responsibility to be furnished by the Department of Mental Health before trial?

- II Whether Wylie's Sixth Amendment Confrontation Clause right was violated when the autopsy report prepared by the doctor performing the autopsy was used in the testimony of a different doctor at trial?

- III Whether the psychologist's testimony regarding statements of the Child was impermissible hearsay, and violated Wylie's Sixth Amendment Confrontation Clause right, when the Child was an available witness but uncalled by the State?

- IV Whether the trial court imposed an illegal sentence upon Wylie by sentencing him to five (5) years for the charge of possession of a weapon during the commission of a violent crime when he was already sentenced to LWOP for the charge of murder?

STATEMENT OF THE CASE

On September 15, 2009, the Pickens County Grand Jury indicted Clifford Austin Wylie for the offenses of unlawful conduct towards a child, murder, and possession of a weapon during the commission of a violent crime. On January 15, 19, and 20, 2010, Wylie, represented by John DeJong, proceeded to trial before the Honorable G Edward Welmaker and a jury. Representing the State were Judith Munson, and Jenny Hamaker. The jury found Wylie guilty of all three charges, and the trial court sentenced Wylie to ten (10) years imprisonment for unlawful conduct towards a child, life imprisonment without possibility of parole (LWOP) for murder, to run consecutively to the sentence for unlawful conduct towards a child, and five (5) years imprisonment for possession of a weapon during the commission of a violent crime, to run concurrent with the sentence for murder.

STATEMENT OF THE FACTS

Shortly after 9 00 p m on February 13, 2009, Clifford Wylie was arrested in his home for the murder of his wife (Wife) (R p 109, ln 2, p 116, ln 8-13) Wylie's son (Child) was in the next room inside the home when the single shot was fired into the shoulder of Wife (R p 118, ln 6-17, p 180, ln 6-7)

An autopsy of Wife was conducted the next day by Dr Michael Ward, Pickens County Chief Medical Examiner (R p 179, ln 9-11) Also present at the autopsy was Officer James Maw, evidence custodian for the Clemson Police Department (R p 170, ln 5-13)

At a pretrial conference on November 25, 2009, Judge Welmaker signed orders to have Wylie evaluated by the South Carolina Department of Mental Health (DMH) regarding issues of competency to stand trial, and criminal responsibility at the time of the alleged incident (R p 17, ln 9-12, App 1 and 2) Wylie was later evaluated by Dr Cross at DMH (R p 17, ln 20-21, p 18, ln 13-14) Further, on November 30, 2009, Wylie served the State with his notice of intent to use insanity as his defense (R p 17, ln 14-15)

However, the mental evaluation reports were never submitted by Dr Cross before Wylie's trial on January 15, 2010 (R p 17, ln 19-21) Moreover, Dr Cross was on vacation at the time the State elected to call Wylie's case for trial (R p 16, ln 1-5) The only information from DMH was a letter sent via facsimile the day before trial to the State by Dr Musick, Dr Cross' supervisor who was not the evaluating doctor, indicating Wylie was competent (R p 17, ln 22 – p 18, ln 1-3)

After hearing arguments by counsel regarding this matter on the first day of trial, the court conducted an impromptu competency hearing without the DMH reports (R p 22, ln

8 – p 26, ln 4) The trial court acknowledged it previously ordered Wylie’s mental evaluations for both competency and criminal responsibility, and was “somewhat distressed that the Department of Mental Health didn’t fulfill its duty,” to provide the reports (R p 24, ln 19 – p 25, ln 1-3) The trial court concluded as follows “[B]ased on what I have now before me, I don’t think there’s any issue as to the competency of Mr Wylie as far as standing trial or of his responsibility at the time of the alleged offense” (R p 25, ln 12-16) Wylie’s motion for continuance based on lack of the court ordered mental evaluation reports was denied (R p 25, ln 17 – p 26, ln 4)

During the trial, the State called Dr James Fulcher, Pickens County Deputy Medical Examiner Dr Fulcher neither performed the autopsy on Wife, nor was he present for it (R p 185, ln 7-11) The primary resource Dr Fulcher admittedly utilized was the autopsy report prepared by Dr Ward (R p 185, ln 12-14) Dr Ward was also on vacation at the time the State elected to call the case for trial and was due back during the week of trial¹ (R p 43, ln 18-22) Over Wylie’s objection, Dr Fulcher was permitted to testify regarding the cause of Wife’s death based primarily upon the autopsy report (R p 44, ln 4 – p 45, ln 1-21, p 56, ln 8-10, p 173, ln 15-21)

Psychologist Hope Threadgill was also a witness for the State Before allowing Dr Threadgill to testify, the trial court gave an admonition to the State that “the witness not get into any of the factual allegations about this particular incident” (R p 331, ln 9-12) On direct examination, over the objections of Wylie, Dr Threadgill was permitted to testify as to what the Child said to her (R p 328, ln 3-24, p 429, ln 6-17, p 483, ln 20 – p 484,

¹ The State indicated to the defense that Dr Ward was expected to be available by either Wednesday or Thursday January 20 or 21 2009 (R ln p 43 17 22) The trial occurred from Friday January 15 2009 to Wednesday January 20 2009 (R 1)

In 2) Specifically, the following question and answer was admitted over Wylie's objections

Q And you started to say one of the first things he told you

A One of the first things he said to me is he believed this to be his fault

(R p 430, ln 2-5) Additionally, Dr Threadgill later stated the following on cross examination "He was actually in the home He heard the gunshot He heard his parents fighting He heard his mother talk on the phone to the police and say he has a gun Those are facts that I'm getting from the child" (R 435, ln 11-15)

The jury returned a verdict of guilty on all three charges (R p 508, ln 19) Wylie was sentenced to 10 years for unlawful conduct towards a child, LWOP for murder, to run consecutively to the sentence for unlawful conduct towards a child, and 5 years for possession of a weapon during the commission of a violent crime, to run concurrent with the sentence for murder (R p 511, ln 1-10) This appeal follows

ARGUMENT

I The trial court erred by denying a continuance seeking to permit the court ordered mental health examination reports regarding Wylie’s competency and criminal responsibility to be furnished by the Department of Mental Health before trial

The trial court abused its discretion² by violating Section 44-23-430 of the South Carolina Code (West, Westlaw current through End of 2010 Reg Sess), as well as Wylie’s due process right to fair trial, when it denied Wylie’s motion for continuance and forced his trial forward without the court ordered mental examination reports regarding his competency at the time of trial, and his criminal responsibility at the time of the incident (R p 17-26) Because a defendant’s competency to stand trial and his criminal responsibility “are separate mental health issues,” each will be addressed separately Monahan v State, 365 S C 130, 133, 616 S E 2d 422, 423 (2005)

A Once the trial court ordered Wylie to submit to a mental examination to determine his competency to stand trial, the plain and unambiguous language of the relevant statutes mandate that the trial court perform a competency hearing “upon receiving the report” from the DMH designated examiners

The trial court’s impromptu voir dire of Wylie to determine his competency violated the plain and unambiguous language of Section 44-23-430, as well as Wylie’s “right to a fair trial by a due process determination of his competency and fitness to stand trial,” because it was conducted well after a mental health examination was ordered, yet without

² See State v Patterson 324 S C 5 12 482 S E 2d 760 763 (1997) (“ A trial judge s refusal of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion) State v Colden 372 S C 428 435 641 S E 2d 912 917 (Ct App 2007) (An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law)

benefit of the statutorily mandated written report State v Blair, 275 S C 529, 533, 273 S E 2d 536, 538 (1981)

The question of whether it is necessary to order a competency examination is within the discretion of the trial court State v Locklair, 341 S C 352, 364, 535 S E 2d 420, 426 (2000), State v Buchanan, 302 S C 83, 85, 394 S E 2d 1 (Ct App 1990) Pursuant to Section 44-23-410 of the South Carolina Code (West, Westlaw current through End of 2010 Reg Sess), “circuit court judges have the inherent duty to order a competency examination if there is reason to believe that the person charged with the criminal offense is not fit to stand trial ”³ Locklair, 341 S C at 363, 535 S E 2d at 426 (emphasis added)

Once the trial court exercises its discretion to order such an examination, a written report must be made for the court by the designated examiners at DMH S C Code Ann § 44-23-420 (West, Westlaw current through End of 2010 Reg Sess) (“Within ten days of examination , the designated examiners shall make a written report to the court ”) As such, the designated examiners are required to prepare a written report for the court regarding the person’s competency issues, as well as criminal responsibility issues if so ordered by the court Id Finally, “[u]pon receiving the report of the designated examiners,” the court itself is tasked with the duty of setting a hearing date, of which it must notify the

³ Section 44 23 410 provides in pertinent part as follows

(A) Whenever a judge of the circuit court or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall

(1) order examination of the person by two examiners designated by the Department of Mental Health

S C Code Ann § 44 23 410 (West Westlaw current through End of 2010 Reg Sess) (emphasis added)

person examined and his counsel S C Code Ann § 44-23-430 (West, Westlaw current through End of 2010 Reg Sess) (“Upon receiving the report of the designated examiners the court shall set a date for and notify the person and his counsel of a hearing on the issue of his fitness to stand trial”) If the accused is deemed fit to stand trial after this hearing, then the trial court shall resume the criminal proceedings Id In short, once the trial court orders a competency evaluation pursuant to Section 44-23-410, the clear and unambiguous language of the statutory scheme indicates that the court may resume criminal proceedings only after the statutorily mandated procedures are completed—which specifically includes receipt of the report from the designated examiners prior to conducting the competency hearing ⁴

Additionally, the statutory competency evaluation scheme utilizes the word “shall,” indicating the procedures are mandatory See Pittman, 373 S C at 561, 647 S E 2d at 161 This understanding is supported by South Carolina common law In State v Blair, 275 S C 529, 532-33, 273 S E 2d 536, 537-38 (1981), the South Carolina Supreme Court examined the use of this term as it applies to the competency hearing statute After reasoning that “a statutory provision is generally regarded as mandatory where the power or duty to which it relates is for the security or protection of private rights,” the Blair Court concluded the statute pertaining to competency hearings “is designed to protect the accused’s right to a fair trial by a due process determination of his competency and fitness to stand trial ” Id 275 S C at 533, 273 S E 2d at 538 Accordingly, once a trial court exercises its discretion to

⁴ All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used State v Pittman 373 S C 527 561 647 S E 2d 144 161 (2007) Where the statute s language is plain and unambiguous and conveys a clear and definite meaning the rules of statutory interpretation are not needed and the court has no right to impose another meaning Id Therefore

order an evaluation, the plain and unambiguous language of the statutory scheme provided by the General Assembly mandates the following (1) that the accused be examined, (2) that the designated examiners generate a written report, (3) that, upon receipt of the written report, the court schedule and perform the competency hearing, and (4) that the criminal proceedings against the accused resume if he is found to be competent after the hearing. In this way, the accused's right to a fair trial by a due process determination of his competency is protected. Id.

In the case at bar, one of the orders issued by the trial court on November 25, 2009, was for Wylie to undergo mental evaluations to determine his competency to stand trial (R p 17, ln 9-12, App 1). This order reflects the fact that the trial court had reason to believe a competency evaluation was necessary under Section 44-23-410. See, e.g., Buchanan, 302 S C at 86, 394 S E 2d at 2. Additionally, the State admitted that it consented to Wylie's court ordered evaluation based on representations that he exhibited paranoia (R p 20, ln 25 – p 21, ln 1-4).

However, on the day the State called the case to trial, the court had not yet received the written report from the designated examiners at DMH who performed Wylie's mental examination (R p 17, ln 19-21). The only item produced to the trial court regarding the matter was a facsimile sent to the State by a supervisor at DMH ostensibly sent because the examining doctor was on vacation (R p 17, ln 22-25 – p 18, ln 1-3). This informal document, signed and sent by a non-treating examiner to the State rather than the court, is not the full written report required by law to be furnished to the trial court prior to the

under the plain and unambiguous language of the statutes the court must follow the procedures established as intended by the General Assembly

defendant's competency hearing See S C Code Ann § 44-23-410, -420, and -430 (West, Westlaw current through End of 2010 Reg Sess)

Moreover, the State openly advocated that the trial go forward without the report from DMH in spite of its previous consent to the court ordered evaluations (R p 21, ln 20-25 – p 22, ln 1-7) The State placated the trial court with an erroneous expectation, saying “the report itself will be here, so I don't see that is an issue,” yet, in almost the same breath, it opined there was no need to delay the trial because “there is absolutely nothing for this court to examine as to whether or not [Wylie] is competent or that he has psychiatric problems” (R p 20, ln 24-25, p 21, ln 24-25 – p 22, ln 1-2) In this way, the State exploited the absence of the DMH written reports by pressuring the court into going forward with Wylie's competency hearing and trial without benefit of the requisite information

Despite the trial court's concern that it “raised the issue about timeliness of a report and was assured that it would be here,” and that it was “somewhat distressed that the Department of Mental Health didn't fulfill its duty,” it still performed an impromptu competency hearing of Wylie without the written report mandated by law at the urging of the State, and ultimately declared Wylie both competent to stand trial and criminally responsible at the time of the alleged incident (R p 24, ln 21-25, p 22, ln 8 – p 24, ln 18, p 25, ln 12-16) Such action was in direct contradiction to the plain and unambiguous language of Section 44-23-430, and in violation of Wylie's “right to a fair trial by a due process determination of his competency and fitness to stand trial” Blair, 275 S C at 533, 273 S E 2d at 538 Accordingly, Wylie requests reversal of his convictions, and a new trial

B Because Wylie’s only defense to the charges was insanity, forcing him to trial without benefit of the court ordered DMH report regarding criminal responsibility denied him his right to a fair trial

Wylie was denied sufficient opportunity to develop his only defense, insanity, when the trial court denied his efforts, through a motion for continuance, to obtain the DMH report regarding his criminal responsibility at the time of the incident (R p 25, ln 12 – p 26, ln 4) See United States v Walker, 537 F 2d 1192, 1195 (4th Cir 1976)

“The trial judge has the discretion to order a mental health evaluation where the defendant indicates an intent to introduce evidence at trial that he lacked criminal responsibility” Monahan, 365 S C at 133, 616 S E 2d at 424 The trial court’s order of November 25, 2009, reflects the fact that Wylie’s mental condition may be made an issue at trial—an impression which was confirmed when Wylie filed his notice of intent to use insanity as his defense five days later See, e.g., Buchanan, 302 S C at 86, 394 S E 2d at 2

“The test for criminal responsibility relates to the time of the alleged offense, while competency to stand trial relates to the time the defendant is before the court for trial” Monahan, 365 S C at 133, 616 S E 2d at 423 Further, “an inquiry into the possible lack of criminal responsibility at the time of commission of the offense involves a complex evaluation of his total personality at a previous point in time It requires that the expert have a substantial opportunity to observe the defendant and his mental process” Walker, 537 F 2d at 1195 (emphasis added) Accordingly, without the report from the DMH expert who had “a substantial opportunity to observe [Wylie] and his mental process,” the trial court lacked an adequate basis to perform such “a complex evaluation of Wylie’s total personality

at a previous point in time” for determining whether he was criminally responsible at the time of the incident Id at 1195-96

The United States Court of Appeals for the Fourth Circuit addressed the issue of whether the appellant was afforded sufficient opportunity to develop a defense of lack of criminal responsibility in United States v Walker, 537 F 2d 1192 (4th Cir 1976) In Walker, as here, the appellant sought and received a pretrial court ordered psychiatric examination to determine both competency to stand trial, as well as criminal responsibility at the time of the alleged offense Id at 1193-94 The examination occurred one week before trial, and the report was provided to the court thereafter, however, the report “failed to state any conclusion as to Walker’s mental capacity to commit the offense,” and was provided to Walker’s attorney only a “relatively short time before trial ” Id at 1194 The morning of trial, Walker’s motion for a continuance was denied, and the case proceeded to trial “where no insanity defense was raised because counsel did not have sufficient information upon which to base such a defense ” Id at 1194

The Walker court concluded that the examination report “had not met the requirements of the district court’s order that the psychiatrist determine Walker’s mental capacity to commit the crime ” Id Thus, “Walker’s right to a fair trial was violated because his counsel was deprived of an adequate opportunity to determine the existence of a substantial insanity defense ” Id Accordingly, the trial “court erred in refusing to grant a continuance for the purpose of permitting the defense the opportunity for further investigation of Walker’s mental capacity to commit the offense ” Id at 1196

In the present case, as in Walker, the trial court ordered pretrial mental evaluations of Wylie for both competency and criminal responsibility (R p 17, ln 9-12) Also, no

mental evaluation report touching the issue of criminal responsibility was provided by the trial date despite the fact that such a report was previously ordered by the court (R p 18, In 13-14) Moreover, even though Wylie filed his notice to use insanity as his defense (R p 17, In 14-15), the fact that Wylie did not indicate during the trial that he may have been insane at the time of the offense is “unpersuasive as we cannot speculate on what possible avenues of defense an adequate examination might have revealed” Id

In sum, here, as in Walker, “[t]he procedures followed failed to provide either defense counsel or the court with an adequate basis for determining whether (the defendant) ultimately should be regarded and treated as incorrigibly criminal or desperately ill” Id at 1195-96 (emphasis added) Accordingly, the trial court erred in denying Wylie’s motion for continuance, Wylie’s right to a fair trial was violated because his counsel was deprived of an adequate opportunity to determine the existence of a substantial insanity defense—without which, as in Walker, he had no meritorious defense and was thus prejudiced by the court’s erroneous decision Wylie therefore requests reversal of his convictions, and a new trial granted ⁵

⁵ Wylie asserts that such relief is appropriate because ultimate acceptance or refusal of an insanity defense is a question for the jury See, e.g. State v Milian Hernandez 287 S C 183 185 336 S E 2d 476 477 (1985) (stating when evidence of insanity is introduced the presumption that the defendant was sane disappears and it is incumbent on the State to present evidence from which the jury could find the defendant sane) Accordingly a new trial is necessary to preserve Wylie’s fundamental rights to a fair trial by a jury

II Wylie’s Sixth Amendment Confrontation Clause right was violated when the autopsy report produced by Dr Ward was used in the testimony of a different doctor at trial

The Confrontation Clause guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him” U S Const amend, VI “The right to confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial” State v Gillian, 360 S C 433, 449, 602 S E 2d 62, 71 (Ct App 2004) “[I]t is a procedural rather than substantive guarantee It commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination” Crawford v Washington, 541 U S 36, 61, 124 S Ct 1354, 1370 (2004) Thus, a witness’ testimony against the accused is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination Id 541 at 54, 124 S Ct at 1365-66

Included in the “core class” of testimonial statements covered by the Sixth Amendment are “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” Melendez-Diaz v Massachusetts, 129 S Ct 2527, 2531 (2009) Although prior South Carolina jurisprudence specifically excluded autopsy reports from classification as testimonial statements by virtue of their categorization as a business or public record hearsay

exception,⁶ recent interpretation of the Confrontation Clause by the United States Supreme Court calls such per se classification of autopsy reports into serious doubt⁷

Over Wylie’s objection, Dr Fulcher was permitted to testify regarding the cause of Wife’s death based primarily upon the autopsy report prepared by Dr Ward (R p 44, ln 4 – p 45, ln 1-21, p 56, ln 8-10, p 173, ln 15-21) Therefore, Wylie’s Sixth Amendment rights under the Confrontation Clause were violated and his right to a fair trial prejudiced because (1) Dr Ward’s autopsy report should properly be considered testimonial rather than nontestimonial, (2) Dr Fulcher not only relied upon it in formulating his opinion, but also referred to and read from it at trial (R p 173, ln 13-21, p 179, ln 17 – p 181, ln 1, 24-25, p 188, ln 3-11, p 189, ln 6-11), and (3) this testimony explained how a gunshot to the shoulder killed Ms Wylie due to the internal injuries in her chest—a position relied upon by the State in its closing argument to the jury (R p 488, ln 5-6, 12-16)

A As clarified by Melendez-Diaz, the autopsy report by Dr Ward should be deemed testimonial in nature

The autopsy report in Wylie’s case was created by Dr Ward “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” As such, it is testimonial in nature, regardless of any potential designation as a business or public record document

⁶ See, e.g. State v Cutro 365 S C 366 378 618 S E 2d 890 896 (2005) (indicating an autopsy report (1) is a public record (2) public records are much like business records and thus (3) it is not testimonial under Crawford) This case law was the primary basis of the State’s argument to the trial court for admission of Dr Fulcher’s testimony and formed the basis of the court’s subsequent ruling (R p 47 ln 1 – p 48 ln 4 p 56 ln 6 10) As discussed below this was error

⁷ See Melendez Diaz v Massachusetts 129 S Ct 2527 (2009)

The Melendez-Diaz Court specifically listed autopsies as a forensic test/analysis that cannot be repeated⁸ when it stated that “there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test [9]” But the Constitution guarantees one way confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.” Id. at 2536. Although there may have been alternate ways to challenge or verify the results of a forensic test or analysis, which according to the Melendez-Diaz Court includes autopsies, the Constitution guaranteed Wylie the right to challenge the results by confrontation—i.e. Wylie had the right to subject Dr. Ward to the crucible of cross-examination, as the autopsy report was the result of his forensic examination of Wife’s remains. (R. p. 185, ln. 7-11). This right was denied when the trial court permitted Dr. Fulcher to testify from Dr. Ward’s autopsy report.

Moreover, the Melendez-Diaz Court clarified the misunderstood relationship between “business-and-official-records hearsay exceptions” and the Confrontation Clause. Id. at 2539. As stated by the Court, “Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” Id. at 2539-40 (emphasis added). In short, just because a document may normally fall within a hearsay exception does not automatically remove it from the inquiry regarding its testimonial nature; the court must still examine whether it falls within the “core class” of testimonial statements,

⁸ Id. at 2536 n. 5

⁹ An autopsy performed by a forensic pathologist like other forensic tests/analyses requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. Id. at 2537. As a result

which necessarily includes statements “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”¹⁰ Id. at 2531

In the case at bar, Dr. Ward’s autopsy report squarely fits within this “core class” of testimonial statements barred by Crawford. Dr. Ward conducted the autopsy of Wife on February 14, 2009 (R. 179, ln. 9-11). Dr. Ward was not accompanied by the Deputy Medical Examiner during the autopsy, but by law enforcement, it was attended and witnessed by Officer James Maw, the evidence custodian for the Clemson City Police Department, indicating law enforcement had a direct interest in the results of the autopsy—one which involved a gunshot resulting in death (R. p. 170, ln. 1-13). Additionally, a simple visual inspection of the body would reveal that it had a gunshot wound in the back of the shoulder that was readily identified even by Officer Maw—a non-doctor (R. p. 170, ln. 19-21). Therefore, there can be no doubt that Dr. Ward was aware his report “would be available for use at a later trial.” Crawford, 541 U.S. at 52.

Further, the fact that in homicides Dr. Ward had another doctor review his report after he completed it also indicates his awareness that the report is likely to be used at trial (R. p. 174, ln. 4-6), it marks a formality characteristic of documents to be introduced in court. United States v. Williams, 740 F. Supp. 2d 4, 7 (D.D.C. 2010) (citing Melendez-

there is little reason to believe that confrontation will be useless in testing analysts’ honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts. Id. at 2538.

¹⁰ The United States Supreme Court’s subsequent clarification between hearsay exceptions and the Confrontation Clause, coupled with the Court’s interpretation of autopsies as forensic analyses, effectively overrules prior South Carolina jurisprudence interpreting and applying the Confrontation Clause to autopsy reports. See, e.g., State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005). Simply stated, it is a misapplication of law to automatically classify an autopsy report as a nontestimonial document solely by virtue of its categorization as a traditional hearsay exception.

Diaz, 129 S Ct at 2543) Accordingly, the autopsy report completed by Dr Ward qualifies as a testimonial statement under Crawford and Melendez-Diaz, regardless of any categorization as a business document or public record hearsay exception, because it was made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial ” Melendez-Diaz, 129 S Ct at 2531

B The testimonial nature of the autopsy report is not changed by qualifying a different witness as an expert, therefore, Wylie’s Sixth Amendment Confrontation Clause right was violated when Dr Fulcher testified from the autopsy report

Although Dr Fulcher was qualified as an expert witness under Rule 702, SCRE, his repeated references to and recitation of statements in the autopsy report effectively provided an end run around Crawford in the guise of expert opinion

“[T]he question when applying Crawford to expert testimony is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay ” United States v Ayala, 601 F 3d 256, 275 (4th Cir 2010) (internal quotations omitted) Therefore, although a statement barred by Crawford may not itself be introduced into evidence, an expert may use such evidence to formulate his own opinions pursuant to Rule 703, SCRE, “as long he is applying his training and experience to the sources before him and reaching an independent judgment,” however “[a]llowing a witness to simply parrot out-of-court statements directly to the jury in the guise of expert opinion

would provide an end run around Crawford” United States v Johnson, 587 F 3d 625, 635 (4th Cir 2009) ¹¹

In the present case, although Dr Fulcher was qualified as an expert pursuant to Rule 702, SCRCE, he nonetheless parroted portions of Dr Ward’s report. Not only did Dr Fulcher make direct reference to Dr Ward’s autopsy report, but he also read directly from the document in answering questions throughout his testimony on both direct and cross-examination after his testimony was ruled admissible (R p 173, ln 13-21, p 179, ln 17 – p 181, ln 1, p 188, ln 3-11, p 190, ln 6-11)

Dr Fulcher’s impermissible references and recitations extended even to descriptions of photos from Dr Ward’s autopsy, for example, when asked whether he could see anything in a picture from the autopsy report regarding the gunshot wound, Dr Fulcher replied, “I do I see an abrasion collar here, which my partner has, uh, described” (R p 181, ln 24-25). He then continued to describe the wound. Additionally, even though Dr Fulcher previously indicated he used photos from Dr Ward’s autopsy and from the crime scene in formulating his opinion (R p 179, ln 17-19), he affirmed on cross-examination that what he was going on was basically Dr Ward’s report (R p 185, ln 12-14)

In sum, Dr Fulcher acted as a mere conduit for Dr Ward’s autopsy report—a document that was testimonial in nature, this parroting of out-of-court statements extended to descriptions of autopsy photographs as well, and constituted an end run around Crawford. Accordingly, Wylie’s Sixth Amendment Confrontation Clause right was violated.

¹¹ Other jurisdictions have applied the same or similar test when confronted with the issue of a medical expert at trial relying upon an autopsy report produced by a different doctor. See, e.g. Williams 740 F Supp 2d at 9-10; Commonwealth v Mercado 922 N.E.2d 140-151 (Mass 2010); Commonwealth v Avila 912 N.E.2d 1014-1029 (Mass 2009); State v Walkup 290 S.W.3d 764-767 (Mo Ct App 2009); State v Bell 274 S.W.3d 592-595 (Mo Ct App 2009)

C The violation of Wylie’s Sixth Amendment Confrontation Clause right was not harmless beyond a reasonable doubt, as it could reasonably have affected the result of trial

Dr Fulcher’s testimony explained the cause of death to the jury, and was relied upon by the State in its closing argument. As such, the error could have reasonably affected the result of the trial, and cannot be deemed harmless beyond a reasonable doubt.

When a violation of the defendant’s Sixth Amendment right to confront the witness occurs, “the appellate court ‘must determine whether the error was harmless beyond a reasonable doubt.’” State v Mitchell, 378 S C 305, 316, 662 S E 2d 493, 499 (Ct App 2008) (quoting State v Davis, 371 S C 170, 181, 638 S E 2d 57, 63 (2006)). Harmless beyond a reasonable doubt means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt.” State v Gillian, 360 S C 433, 455, 602 S E 2d 62, 74 (Ct App 2004). Thus, error is harmless “where it could not reasonably have affected the result of the trial.” Id.

In Wylie’s case, Dr Fulcher’s testimony essentially explained how a person ostensibly shot in the shoulder—not a vital organ—died due to the specific internal injuries detailed in Dr Ward’s autopsy report. His testimony was important enough to obtain Wylie’s conviction that the State specifically mentioned it in its closing argument to the jury (R p 488, ln 12-16). Therefore, the error could reasonably have affected the result of the trial, the error was not harmless beyond a reasonable doubt. Accordingly, Wylie requests reversal of his convictions, and a new trial granted.

III Psychologist Hope Threadgill’s recitation of the Child’s statements was both impermissible hearsay and a violation of the Confrontation Clause when the Child was an available witness, yet not called by the State

Psychologist¹² Hope Threadgill’s testimony regarding the Child’s statements to her violated the rules governing hearsay, as well as the Sixth Amendment Confrontation Clause. Moreover, the substance of these statements was devastating as to the charges of both unlawful conduct toward a child, and murder. As such, the statements were not only impermissible, but they were also prejudicial and reasonably affected the result of the trial.

A Admission of Dr Threadgill’s testimony regarding the Child’s statements was improper hearsay

The trial court abused its discretion by permitting the Child’s psychologist to make several impermissible hearsay statements in her testimony.¹³ “‘Hearsay’ is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Generally, hearsay is inadmissible. Rule 802, SCRE.

The State directly and intentionally elicited the Child’s statements from Dr Threadgill despite giving assurances it would not. Out of the presence of the jury, the State said the following to both the trial court and defense counsel: “I intend to ask [Dr Threadgill] what her qualifications are. I intend to offer her to the Court as an expert in the field of post-traumatic stress disorder, I intend to ask her what that is and in her opinion,

¹² Dr Threadgill is a non medical doctor qualified as a post traumatic stress disorder expert at trial. (R 420 ln 24 – p 421 ln 1 p 423 ln 19 21)

does [the Child] have it? And that's it” (R p 330, ln 8-13) However, these assurances rang hollow when, on direct examination, the following colloquy between the State and Dr Threadgill occurred after the court overruled Wylie's objection

Q - Okay, and you started to say one of the first things [the Child] told you

A - One of the first things he said to me is he believed this to be his fault

[The State] Nothing further at this time, Your Honor

(R p 429, ln 6-17, p 430, ln 2-7) This hearsay statement was offered to prove the truth of the matter asserted, without it, the State would have had to rely upon mere observations made by Dr Threadgill to meet the element of mental harm to the Child rather than a forbidden statement which, only if taken as true, would help prove the offense As such, the statement, “he believed this to be his fault” was offered to prove just that, that the Child believed the shooting of his mother was his fault

Additionally, Dr Threadgill continued to produce hearsay statements of the Child after the trial court overruled Wylie's original objections For example, despite the trial court's prior admonition to the State “to instruct the witness not to get into any of the factual allegations about the incident” (R p 331, ln 9-12), Dr Threadgill responded as follows on cross-examination

Q - Okay Now, you have this [criterion] as set forth in the DSM [Diagnostic Statistical Manual] that using that

¹³ State v Garner 389 S C 61 65 697 S E 2d 615 617 (Ct App 2010) (“Evidentiary rulings are within the sound discretion of the trial court and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant)

[criterion] to meet [criterion] is basically subjective with a person looking at the person and that [criterion]

A - It would not be subjective if there are facts that are present. And what we're looking at is that there were facts present. [The Child] was actually in the home. He heard gunshots. He heard his parents fighting. He heard his mother talk on the phone to the police and say he has a gun. Those are the facts that I'm getting from the child.

(R p 435, ln 11-15) These are precisely the types of prejudicial statements the trial court cautioned against. Yet, once the trial court permitted Dr. Threadgill to use the Child's hearsay statements over Wylie's objections made both preliminarily and during direct examination, the fetters were improperly removed and she blatantly asserted the hearsay statements going directly to the factual allegations of the incident. Moreover, Dr. Threadgill's testimony validated the concern expressed by Wylie's trial counsel: "it is a somewhat veiled attempt of getting the minor child to testify via this psychologist as to the allegation of the murder," without having opportunity to cross-examine the Child. (R p 328, ln 7-11) Such testimony was improper, inflammatory, and impermissible.

Not only was admission of these statements error, but it was also highly prejudicial to Wylie's case. "Whenever hearsay which has some probative value as to a material fact is erroneously admitted into evidence, prejudice is presumed." Orangeburg County Dept. of Soc. Servs. v. Schlins, 291 S.C. 477, 479, 354 S.E.2d 388, 390 (1987). As indicated above, the hearsay statements in question were probative to prove material facts going to the elements of the offenses for which Wylie was charged. As such, prejudice is presumed.

Additionally, the State's reliance upon the Child's statements through Dr. Threadgill to prove its case is made abundantly clear by its closing argument: "An eight-year old kid's

mother dies Who does he want besides his mother? His father His father is the one that killed his mother You heard the therapist He thinks it's his fault How much more unlawful can the conduct be of this man towards his eight-year old son?" (R p 492, ln 5-9) (emphasis added) Thus, the error permitting the Child's hearsay statements prejudiced Wylie and likely affected the outcome of the trial Wylie therefore requests his convictions be reversed, and a new trial granted

B Dr Threadgill's recitation of the Child's statements violated Wylie's rights under Crawford

Dr Threadgill's testimony as to the Child's out-of-court statements also violates Wylie's Sixth Amendment rights under the Confrontation Clause "A witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had prior opportunity for cross-examination" Melendez-Diaz, 129 S Ct at 2531 (citing Crawford, 541 U S at 54) A declarant is a witness within the meaning of the Sixth Amendment if he bears testimony against the defendant Crawford, 541 U S at 51

First, the statements were testimonial in that they "were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial" Crawford, 541 U S at 52 This much is evident based upon the facts surrounding the Child's statements in this case, which include the following (1) the Child began making the statements to Dr Threadgill within a month of the incident and his father's arrest (R p 426, ln 16), (2) the Child was the only other person, besides his parents, at the Wylie residence when the incident occurred (R p 118, ln 6-17), (3) the

Child's therapy sessions stemmed directly from his personal experience and observations at the incident (R p 426, ln 9-13, p 428, ln 14-15), (4) the statements by the Child to Dr Threadgill directly addressed the events of the incident (R p 430, ln 4-5, p 435, ln 11-15), and (5) the State was clearly aware of these statements made by the Child, and utilized the therapist as a key witness in the case. Therefore, the statements were testimonial because they "were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial" Crawford, 541 U S at 52

Second the Child was available as a witness, yet the State chose not to call him (R 330, ln 1-2), see Rule 804(a)(1)-(5), SCRE (listing the five limited circumstances where a witness is unavailable) Finally, Wylie had no prior opportunity to cross-examine the Child regarding his statements (R p 328, ln 7-11) Thus, permitting Dr Threadgill to act as a conduit for the Child's statements was error, as the statements constituted inadmissible testimonial evidence Johnson, 587 F 3d at 635 (cautioning trial courts "to recognize the risk that a particular expert might become nothing more than a mere transmitter of testimonial hearsay and exercise their discretion in a manner to avoid such abuses")

Moreover, the error in admitting the statements was not harmless beyond a reasonable doubt Mitchell, 378 S C at 316, 662 S E 2d at 499 As previously indicated, the State specifically referred to Dr Threadgill's testimony regarding the Child's statements in its closing argument Additionally, the Child's statements, transmitted by Dr Threadgill, provided impactful evidence of what occurred at the Wylie residence as experienced from the perspective of a victim who was inside the home (R p 435, ln 11-15) Therefore, the error was not harmless beyond a reasonable doubt because it could reasonably have affected

the result of the trial Gillian, 360 S C at 455, 602 S E 2d at 74 Accordingly, Wylie requests reversal of his convictions, and a new trial granted

IV The trial court imposed an illegal sentence upon Wylie by sentencing him to five (5) years for the charge of possession of a weapon during the commission of a violent crime when he was already sentenced to LWOP for the charge of murder

The five year sentence for possession of a weapon during the commission of a violent crime is statutorily impermissible pursuant to Section 16-23-490(A) of the South Carolina Code when, as here, LWOP is imposed for the underlying violent crime¹⁴

Although the Court does not normally address illegal sentencing issues unless counsel timely objects, South Carolina courts have, in the past, “summarily vacated” concurrent sentences that are precluded by statute. See State v. Vick, 384 S C 189, 202-03, 682 S E 2d 275, 281 (Ct App 2009) (vacating concurrent sentence of kidnapping, when it was statutorily precluded, in the interest of judicial economy). Wylie submits that, as in Vick, it is likewise in the interest of judicial economy to vacate his concurrent sentence for possession of a weapon during the commission of a violent crime, as it is statutorily impermissible pursuant to Section 16-23-490(A).

At the sentencing phase of Wylie’s trial, the court imposed LWOP upon Wylie for the violent crime of murder (R p 511, ln 5-8). Immediately after, the trial court sentenced Wylie to five years imprisonment for the offense of possession of a weapon during the commission of a violent crime (R p 511, ln 9-13). Although the court structured this sentence to run concurrently with the sentence for murder, it was nonetheless impermissible

¹⁴ Section 16-23-490(A) provides as follows:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years in addition to the punishment provided for the principal crime. This five year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime. S C Code Ann § 16-23-490(A) (West Westlaw current through End of 2010 Reg Sess.) (emphasis added)

pursuant to Section 16-23-490(A) (“This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime”) (emphasis added) Accordingly, Wylie respectfully requests his five year sentence for possession of a weapon during the commission of a violent crime to be vacated in the interest of judicial economy

CONCLUSION

For the foregoing reasons, Clifford Wylie respectfully requests this Court to reverse his convictions, and grant a new trial

Respectfully submitted,

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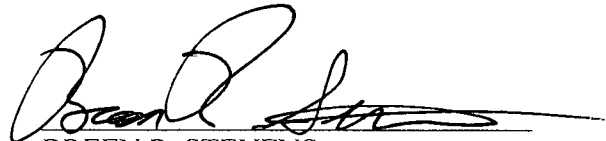
Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of October, 2011

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings "

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

BREEN R STEVENS
Appellate Defender

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

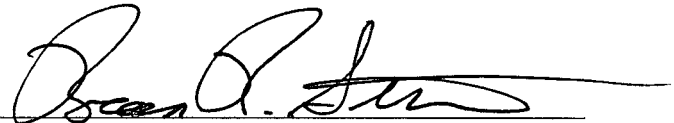
V

CLIFFORD WYLIE,

APPELLANT

CERTIFICATE OF SERVICE

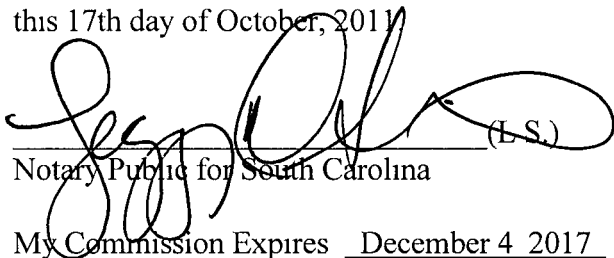
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 17th day of October, 2011



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2011



(L.S.)
Notary Public for South Carolina
My Commission Expires December 4 2017