STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
G Edward Welmaker, Circuit Court Judge

The State,

Respondent,

vs

Clifford Wylie,

Appellant

FINAL BRIEF OF RESPONDENT

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(FBOA, p 4)

RESPONDENT'S STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Clifford Wylie ("appellant") in April 2009 for the murder of Melissa Davis Wylie (R pp 532-533) The grand jury also indicted appellant in September 2009 for unlawful conduct towards a child and possession of weapon during the commission of a crime (R pp 528-531) A jury trial was held January 15, 19, and 20, 2010, before the Honorable G Edward Welmaker The jury convicted as charged (R p 508, lines 2-19) The trial judge sentenced appellant to ten (10) years imprisonment for the unlawful conduct towards a child, a consecutive life sentence for murder, and, five (5) years imprisonment, concurrent and subsumed by the life sentence, on the weapon charge (R p 511, lines 1-13)

This appeal follows

RESPONDENT'S STATEMENT OF FACTS

On February 13, 2009, appellant shot and killed his wife in presence of their eight year old son At approximately 8 57 p m , wife was on the phone with the Clemson Police Department requesting help Wife stated that her husband had a gun and was going to shoot her (R p 74, lines 22-24) The dispatcher testified that while trying to calm the wife, she heard wife begin to scream (R p 77, lines 17-19) The dispatcher testified the first sounds were quite loud, then she "could hear her place the phone actually down, like it fell against something," then her voice became "more indistinct," before stopping altogether (R p 84, line 22 - p 85, line 13, p 76, lines 20-22)

Officers responded within approximately two minutes of the dispatch call (R p 111, lines 2-5) Appellant opened the door for the officers, after having pushed the body away from the front door Wife had apparently fell against the door and partially blocked it (R p 112, line 21 - p 113, line 16, p 199, lines 21-25, p 340, lines 8-15, p 382, line 21 - p 383, line 1, p 387, lines 2-10) The telephone was off the hook, in a chair, and still indicated the 911 call (R p 239, lines 14-22, p 387, lines 2-16) When asked where the shooter was, appellant admitted that he was the shooter (R p 115, lines 5-10) Appellant advised the responding officer where he placed the gun in the home (R p 117, lines 9-13) The gun was subsequently recovered in the described location (R p 241, lines 11-20) Ballistic testing confirmed the fragments collected from autopsy bore markings indicating the bullet had been fired by the gun, with the possibility of a match to another weapon "way below" what the analyst considered "possible " (R p 302, line 22 - p 303, line 8) Gun powder residue on the wife's shirt indicated that she was one to three feet away from the muzzle

when shot (R p 445, lines 22-25) Wife was already dead when the first responders entered (R p 201, line 15 - p 202, line 5) Emergency medical personal arriving approximately ten minutes after the officers, confirmed the victim was dead at the scene (See R p 162, line 1 - p 164, line 17)

The responding officers also noticed appellant's son in the hallway, and asked the child to go into his bedroom (R p 118, lines 7-15) When approached in the bedroom, the child asked about his mother (R p 119, lines 11-22) Officers attempted to shield the young boy while taking him from the murder scene (R p 119, line 24 - p 120, line 13) The child was told of his mother's death at the police station He became pale, looked as if he would faint, and became ill (R p 369, lines 15-19) The child's therapist opined the child suffered from post-traumatic stress disorder (R p 428, lines 14-15) The child was still undergoing treatment therapy at the time of trial (R p 428, lines 15-21)

ARGUMENT

I

The trial judge did not abuse his discretion in denying appellant's motion for a continuance where the trial judge had confirmation from DMH that the evaluating doctor opined appellant was competent to stand trial and found appellant demonstrated criminal responsibility and that he did not lack sufficient capacity to conform his conduct on the day of the murder There was no dispute appellant was properly evaluated, and no objection that the lack of the formal report hampered the defense In short, appellant failed to show cause to continue the matter

Relevant Facts

On November 25, 2009, the trial judge issued an "Order for Competency to Stand Trial Evaluation Pursuant to State v Blair " (R p 512) At the time of the January 15, 2010 pre-trial hearing, the trial judge had no report directly from the evaluating doctor However, the State relied upon a faxed report from the evaluating doctor's immediate supervisor that confirmed the doctor found appellant "competent to stand trial, criminal responsibility," and did not lack sufficient capacity to conform his conduct on the day of the murder (R p 17, line 19 - p 18, line 8) The State also noted that appellant, though he noticed the possibility of an insanity defense, had not pursed the defense

> As you will recall, this is actually the second time that we have delayed this case for the defendant On November the 25th, the Court signed an order for him to be evaluated for criminal responsibility and competency to stand trial and a capacity to conform He was - - that order was signed by the Court November the 25th of '09
>
> On November the 30th of '09, I was served with notice of intent to use an insanity defense To this date, I've gotten no documents whatsoever No names of witnesses No names of anything or anybody Mr DeJong intends to use to prove that

(R p 17, lines 6-19)

Defense counsel objected only to the extent that a formal report by the evaluating doctor had not been received (R p 18, line 11 - p 20, line 21) The trial judge addressed appellant directly to determine whether he understood the proceedings (R p 21, line 8 - p 24, line 18) In consideration of the faxed summary, and appellant's responses to the trial judge's questions on procedure and court functions, the trial judge found appellant competent to stand trial (R p 24, line 19 - p 25, line 22) The trial judge specifically provided that he would allow appellant to "re-raise[]" the issue during trial, and cautioned that he would revisit the ruling if "anything occurs that may give me some trepidation or hesitancy about that ruling " (R p 25, lines 7-12) Defense counsel never raised any issue on competency during the trial, and offered no evidence of insanity In fact, at sentencing, defense counsel stated as to appellant's background

> No real history of mental health history I think there was some peripheral history of mental health

(R p 509, line 24 - p 510, line 2)

Discussion

Appellant complains the trial judge erred in granting his request for a continuance in order to receive a formal report from the Department of Mental Health ("DMH") (FBOA, p 9) As a first matter, his complaint centers merely on receipt of the report, not on any substantive finding or supportive evidence (See R p 18, lines 11-12, " I have a copy of the letter, but I have a problem with the process ") All the parties understood the doctor's findings, and there was no objection to the findings, or defense evidence presented that would rebut those findings (R p 17, line 22 - p 18, line 22) *Compare Pate v Robinson*, 383 U S 375, 384 (1966)("counsel throughout the proceedings insisted that Robinson's

present sanity was very much in issue With this record we cannot say that Robinson waived the defense of incompetence to stand trial ") Moreover, the lack of objection as to the merits of the mental health evidence is consistent with appellant's position at sentencing, that there was no history of significant mental health issues "The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance " *State v Weik*, 356 S C 76, 81, 587 S E 2d 683, 685 (2002), *adhered to on reh g*, 354 S C 382, 581 S E 2d 834 (2003) See also S C Code Ann § 17-24-10 ("The defendant has the burden of proving the defense of insanity by a preponderance of the evidence ") The only evidence presented was the report of findings that supported, along with the trial judge's colloquy with the appellant, the trial judge's ruling that appellant was competent to stand trial Indeed, a hearing is not required at all where there is no evidence of controversy *State v Hall*, 312 S C 95, 99, 439 S E 2d 278, 281 (1994)("Prior to trial, the State's psychologist determined that Hall was, in fact, competent Moreover, Hall himself indicated that he understood the proceedings The evidence of record negates the necessity of a competency hearing ") The trial judge did not abuse his discretion in finding appellant competent and that he demonstrated criminal responsibility with ability to conform, and the trial judge's ruling should be upheld *Weik*

At any rate, the "process" defense counsel complained of is not the denial of an evaluation or a hearing on the findings, but rather the form and completeness of the report relied upon by the trial judge It is this process, and purported failure to present a report as required by statute, that appellant argues entitles him to relief (See FBOA, p 11 (reciting

"statutory scheme" and "statutorily mandated procedures") Based on the completely speculative nature of the request for evaluation,[1] and in light of appellant's reasonable and appropriate responses to the trial judge concerning "the pending charges, the purpose of the proceedings, and the roles of the individuals involved,"[2] it would not have been an abuse of discretion to decline to order an evaluation at all *State v Burgess*, 356 S C 572, 574-576, 590 S E 2d 42, 43-44 (Ct App 2003) However, one was ordered, a report of the findings was made, an in-court evaluation of appellant by the trial judge was made, and the trial judge considered all the evidence in finding appellant competent with no evidence he lacked criminal responsibility or ability to conform This included the summary report of findings

Second, the basis for the motion for a continuance is suspect, not only because there was no objection raised as to interference with defense evidence, but also because the case had been continued once before over the State's objection (R p 8, lines 1-6), and appellant made two other motions to continue Appellant attempted to fire counsel because he believed he needed more time, (R p 14, lines 3-16)(See also R p 483, lines 1-5), and, appellant sought a continuance based on a reporter's passing contact with two potential

---

[1] In upholding in habeas a state court decision denying a continuance, the Fourth Circuit has noted that an appointment "three months before trial" allows time for independent research into facts supportive of the defense *Hutchins v Garrison*, 724 F 2d 1425, 1433-34 (4th Cir 1983) Again, appellant presented no evidence to rebut the findings during the hearing Moreover, the solicitor noted, without objection or qualification, that the evaluation was ordered out of an abundance of caution rather than real concern, and there is no evidence of a real psychiatric disorder (R p 20, line 23 - p 22, line 7)

[2] The record also shows a continuing ability, and no destabilization during trial, supported by appellant's appropriate interaction with the trial judge when discussing appellant's right to testify (R pp 480-483) *See State v Colden*, 372 S C 428, 442, 641 S E 2d 912, 920 (Ct App 2007)("court's inquiry during the waiver of his right to testify, indicated that Colden had no difficulty conversing effectively")

jurors, when the only reference was to the type of case (murder), not any facts, (R p 2, line 15 - p 11, line 15) The pattern of seeking delay is curious, but, the pattern of delay in conjunction with the total lack of evidence as to insanity or even a history of severe mental illness as cause for seeking a continuance for receipt of a fuller report indicates the continuance was little more than another attempt to slow the trial At any rate, the trial judge specifically informed counsel that he was willing to revisit the issue at any time during trial as necessary (R p 25, lines 4-22) This record does not support appellant was pushed forward unfairly and to his prejudice

Again, the issue is squarely one of sufficiency of the report pursuant to statute – not a denial of the right to a hearing The State is obliged to offer an opportunity for the defendant claiming lack of competency an opportunity to be heard *State v Blair*, 275 S C 529, 533, 273 S E 2d 536, 537 (1981)("Section 44-23-430 provides a competency to stand trial hearing 'shall' be held after a psychiatric examination has been ordered under s 44-23-410") *See also Thomas v Cunningham*, 313 F 2d 934, 938 (4th Cir 1963) ("procedural due process requires that a state shall afford him adequate opportunity to raise the issue") A particular form of report, though, is not required

It should not be lost in the arguments on appeal that a hearing was held, and that the findings of the evaluator were considered, along with any evidence the defense wished to offer – the defense simply offered none Again, there is no due process violation The issue here simply boils down to whether the trial judge could accept the assertions of DMH without a formal, detailed report There is no bar to the receipt of this evidence While defense counsel argued below that the failure to receive a detailed report should prevent the

hearing, (R p 20, lines 6-21), the only clear argument made in objection to the summary report of the findings was "hearsay" (R p 18, lines 20-23, p 20, line 12) It is well settled that the report is not hearsay *State v Franklin*, 318 S C 47, 50, 456 S E 2d 357, 359 (1995)("report is a statutory exception to the rule against hearsay") Defense counsel did argue that "without either the Blair hearing or a copy of that evaluation" to be made an exhibit, the trial court could not rule (R p 20, lines 6-21) Respondent interprets the argument as the summary report is not a report as required by statute to prompt the statutorily required hearing It is this argument appellant appears to make on appeal (See FBOA, pp 10-13) To make such an argument, however, appellant reads much into the statutory requirement of the report that simply is not there

The statute requires a "report" – not any particular form or completeness to the report S C Code Ann § 44-23-420 requires only the barest of reports to include 1) any "diagnosis of the person's mental condition" and 2) "clinical findings bearing on the issues of whether or not the person is capable of understanding the proceedings against him and assisting in his own defense" (or could obtain the ability) While certainly there is an accepted customary expectation to form of the report, the statute does not mandate the form of the report Moreover, at least one other case references a letter from other staff relating findings by another *See State v Bradley*, 343 S C 461, 462-63, 539 S E 2d 720, 721 (Ct App 2000)(referencing both a report, and "DMH letter accompanying the evaluation" in which " an Associate Director"advised "'the hospital staff finds that [Bradley] shows Mild Mental Retardation'") Again, it is not disputed that the evaluation was made, (R p 18, lines 13-14), and the examiner, through his supervisor, made a report of his findings to the trial court

The dispute was the absence of "underlying data" (R p 18, lines 22-23) Such data is not required, by statute, to be attached to the report

In a similar vein, the Idaho Court of Appeals, in *State v Wells*, 645 P 2d 371 (Idaho Ct App 1982), evaluated a completeness issue in regard to the report received The report in *Wells* failed to state the required statutory finding, but "did state that the psychiatrist found no mental disease or defect" 645 P 2d at 374 As the trial judge did here, the *Wells* trial judge allowed the defendant to present any and all information that he wished to present at trial The court of appeals specifically noted that no challenge to the "adequacy of the evaluation" was made, nor was Wells' "fitness to stand trial" made an issue *Id* The court held "that appellant was not deprived of due process He was afforded every reasonable opportunity to prepare for, and to present, a defense on the grounds of mental disease or defect We find no fundamental error on the part of the trial court" 645 P 2d at 375 Similarly, there is no fundamental error here The report, as it is, supports that the evaluation was made, and the findings – on both competency to stand trial and criminal responsibility – were reported to the court Like *Wells*, there is no "fundamental error" Unlike *Wells*, though, there was a report here of the findings Thus, this case is stronger, and even more removed from the possibility of "fundamental error"

Further, appellant's reliance on *United States v Walker*, 537 F 2d 1192 (4th Cir 1976), (FBOA, pp 14-16), is misplaced As appellant correctly states, competency to stand trial and criminal responsibility are separate and distinct concepts (FBOA, p 9) The trial judge here ordered evaluations for both competency and responsibility with capacity to

conform [3] (R pp 512-519) As noted above, the letter from DMH addressed both (See R p 18, lines 2-3) Relief in *Walker* (which was simply a remand), was premised on the fact that while ordered to report on both, the doctor "failed to state any conclusion as to Walker's mental capacity to commit the offense " *Walker*, 537 F 2d at 1194 Here, appellant cannot point to a failure to report on either *Walker* is factually different

As to appellant's assertion that he was denied access to evidence, (FBOA, p 15), this issue is procedurally barred *See e g State v Dunbar*, 356 S C 138, 142, 587 S E 2d 691, 693 (2003)("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge ") Defense counsel's argument below remained squarely on the procedural necessity of receipt of a detailed report (See R p 19, lines 4-14) There was no objection to denial of access to evidence, or even a request for another evaluation And, again, appellant failed to pursue an insanity defense at trial, and, at sentencing, conceded a lack of significant history of mental health issues at all (R p 509, line 24 - p 510, line 2) There is no basis for an assertion he was denied access to evidence supportive of an available defense

Lastly, if entitled to anything, appellant is entitled to a hearing on remand to determine competency after receipt of the detailed report *State v Blair*, 275 S C at 534, 273 S E 2d at 538 ("on remand, if the hearing reveals Blair was incompetent to stand trial, an order reversing his conviction should be entered and a new trial granted when he is presently

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[3] "Section 44-23-410 does not apply to evaluations for criminal responsibility, it governs only evaluations to determine competency to stand trial" but "[t]he 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 v State*, 365 S C 130, 133, 616 S E 2d 422, 423-24 (2005)

competent to stand trial However, if the hearing reveals Blair was competent to stand trial, the conviction will stand ") *See also State v Evans*, 309 S C 471, 476, 424 S E 2d 512, 515 (Ct App 1992)(remanding and directing evaluation with provision "if the hearing reveals that Evans was competent to stand trial, the conviction stands") The same is true if this Court should determine error as to the report on criminal responsibility *United States v Walker*, 537 F 2d at 1196 ("we remand the case to the district court with directions to appoint a psychiatrist to determine whether there exists a substantial question as to Walker's criminal responsibility If the report of the examining psychiatrist indicates such a question, and if the defense counsel represents that he intends to rely upon it on retrial, the judgment will be vacated and a new trial granted Otherwise, the judgment will stand affirmed ") It would be inconceivable to grant a new trial on an issue where an appellant demonstrated no prejudice and suffered no prejudice Here, such relief would be particularly egregious where the parties and the judge were well aware of the DMH findings which showed findings appellant was competent and demonstrated criminal responsibility with capacity to conform at the time of the murder There is not one iota of evidence or opinion that would support a lack of competence or criminal responsibility and capacity to conform However, appellant is not entitled to any relief, including such a remand

"The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion " *State v Colden*, 372 S C 428, 435, 641 S E 2d 912, 916 (Ct App 2007) Petitioner has shown no abuse of discretion Therefore, the trial judge's ruling should not be disturbed on appeal

Appellant's argument to the contrary must be rejected

II

The trial judge did not abuse his discretion in allowing Dr Fulcher to testify as an expert in forensic pathology where Dr Fulcher merely used the autopsy report of another pathologist as part of the basis for his own opinion on the manner or cause of death There is no confrontation clause infringement where appellant had the opportunity to cross-examine Dr Fulcher on his own opinion

Relevant Facts

During pre-trial motions, defense counsel objected to another pathologist (Dr Fulcher) testifying based on the examining pathologist's (Dr Ward's) report He argued a confrontation issue and relied upon the United States Supreme Court ruling in *Melendez-Diaz*[4] (R p 43, line 18 - p 45, line 22) The solicitor initially relied upon *State v Cutro*,[5] which found that an autopsy report was a business record and not inadmissible hearsay (R p 47, line 1 - p 107, line 4) The solicitor continued, however, that even if that were not the case, the Dr Fulcher would be testifying to his own opinion, thus a hearsay exception would not be necessary (R p 49, lines 1-9) The trial judge conditionally ruled that the issue may be "moot," but took the matter under advisement (R p 150, lines 9-17) Dr Fulcher was qualified as an expert in forensic pathology without objection (R p 177, lines 17-23) Dr Fulcher testified that he did not perform the autopsy, however, he reviewed the files from the autopsy – photographs and report – and also reviewed crime scene photographs provided by the coroner (R p 178, line 24 - p 179, line 23) As a result of his review, he determined "[t]he manner of death in this case is a gunshot wound to the back, the right shoulder

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[4] *Melendez–Diaz v Massachusetts*, 557 U S ——, 129 S Ct 2527 (2009)

[5] 365 S C 366, 377, 618 S E 2d 890, 896 (2005)

specifically" (R p 180, lines 6-7) He described the wound to the shoulder, and the evidence of blood from the mouth as shown in the crime scene photographs, and opined that the bullet severely damaged the aorta, leading to death within seconds (R p 180, line 10 - p 184, line 12)

On cross-examination, Dr Fulcher also confirmed that his testimony was based upon his own medical opinion (R p 187, lines 5-6) Further, defense counsel twice acknowledged – through the form of the question – that Dr Fulcher's testimony consisted of his own observations and opinions based on his medical training, though part of that review was review of the autopsy report (See R p 188, lines 17-19, p 189, lines 14-17)

On redirect, Dr Fulcher testified that it was not "unusual" for one doctor to use another doctor's autopsy report in forming an opinion on cause of death (R p 192, lines 16-25)

Appellant complains on appeal that his right to confrontation was violated by allowing Dr Fulcher to testify as to cause of death when the testimony was "based primarily upon the autopsy report prepared by Dr Ward" (FBOA, p 18)

Discussion

A defendant certainly has the right to confront his accusers However, the facts here do not show that Dr Ward's opinion and results were simply admitted through Dr Fulcher Rather, Dr Fulcher used the report of facts from the autopsy, along with photographs of the crime scene as provided by the coroner, to form his own opinion concerning the cause of death As such, there was no confrontation clause issue This issue is best resolve by review

of *Melendez-Diaz* the latest *Melendez-Diaz* based ruling, *Bullcoming v New Mexico*, 131 S Ct 2705, 2709 (2011)

In *Melendez-Diaz*, the Supreme Court held that an affidavit prepared by the analyst showing the results of laboratory drug testing could not be introduced without the analyst testifying at trial unless the testing analyst was "unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine" the testing analyst 129 S Ct at 2532 In *Bullcoming*, the Supreme Court similarly found that the analyst who tested defendant's blood-alcohol concentration level was required to testify Specifically, the Court found that substituting another analyst for the testing analyst was not sufficient to satisfy the constitutional guarantee of the right to confront the witness *Bullcoming*, 131 S Ct at 2710 ("We hold that surrogate testimony of that order does not meet the constitutional requirement ") However, the Court underscored an important fact in why the substitution was not sufficient – that "the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample " 131 S Ct at 2709 In other words, the witness offered had no personal knowledge of the testing or validity of the result 131 S Ct at 2715 ("surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, i e , the particular test and testing process he employed Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part ") The witness was available, essentially, to read from the report of another There was no assertion that the testifying analyst "had any 'independent opinion' concerning Bullcoming's BAC " 131 S Ct at 2716

The factual premise here is directly contrary to the impermissible "surrogate" testimony in *Bullcoming* Here, Dr Fulcher repeatedly testified that he formed his own opinion, and Dr Ward's report was not admitted into evidence Further, Dr Fulcher testified that it is a common practice in forensic pathology to use the medical finding from an autopsy performed by another in support of an opinion on cause of death Dr Fulcher's use of Dr Ward's report fits squarely under Rule 703, SCRE ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to the expert* at or before the hearing If of a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data *need not be admissible in evidence* ") Thus, Dr Fulcher's use of the report, regardless of whether it is admissible on its own,[6] was proper in forming his opinion Dr Fulcher was entitled to testify as to his opinion Id See also Rule 702, SCRE (experts may testify based on "knowledge, skill, experience, training, or education in the form of an opinion or otherwise ") Therefore, the testimony was properly admitted under the rules governing expert testimony, and there was no infringement on appellant's confrontation rights

Further, the testimony tracks almost precisely one of three exceptions carefully proposed in the Justice Sotomayor's concurring opinion, which was written in part, to set out the parameters and limitations of the majority's decision

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[6] Though not at issue in the instant case, an autopsy is arguably not included in the *Melendez-Diaz* ruling 129 S Ct at 2546 (KENNEDY J dissenting)(citing to law review comment that "that every court post-Crawford has held that autopsy reports are not testimonial") Moreover, our state supreme court has found such reports to be business records and not barred as hearsay *State v Cutro*, 365 S C 366, 377, 618 S E 2d 890, 896 (2005)

> this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence See Fed Rule Evid 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted) As the Court notes, ante, at 2715 – 2716, the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration Rather, the State explains, "[a]side from reading a report that was introduced as an exhibit, Mr Razatos offered no opinion about Petitioner's blood alcohol content " Brief for Respondent 58, n 15 (citation omitted) Here the State offered the BAC report, including Caylor's testimonial statements, into evidence We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence

131 S Ct at 2722 (SOTOMAYOR, J concurring) [7]

Again, the constitutional limitation is not at issue on these facts The record simply cannot support appellant's assertion on appeal that the doctor simply read from the autopsy report (See FBOA, p 22, allegation Dr Fulcher "parroted portions of Dr Ward's report") The doctor freely admitted that he used the report, in part, in forming his opinion But the record does not support he "surrogate witness" procedure denounced in *Bullcoming* Consequently, appellant has failed to show error at all Lastly, even if the evidence was improper, the error could only be harmless

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[7] The United States Supreme Court has granted certiorari in a similar case which relied upon this distinction *See People v Williams*, 939 N E 2d 268 (Ill 2010), *cert granted*, 10-8505, 2011 WL 2535081 (U S June 28, 2011) The Illinois court recognized the traditional exception " This Court has long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion " 939 N E 2d at 278 Further, the court rejected the *Melendez-Diaz* ruling as affecting same, noting the expert at issue was not simply reading from the report but giving her own opinion 939 N E 2d at 281-282

A ruling that is in "violation of the Sixth Amendment right to confrontation is not a per se reversible error" but subject to a harmless error analysis *State v Smith*, 315 S C 547, 552, 446 S E 2d 411, 414 (1994) Here, the error could only be harmless based on the nature of the testimony and the wealth of evidence of guilt in the record For instance, the testimony simply established a gunshot wound that killed the victim Officer James Maw of the Clemson City Police Department had previously identified a photograph from the autopsy, which he had attended, as showing the entry wound on the victim's body (R p 170, lines 5-21) Further, the responding officers, at the home with minutes of the victim having called 911, found the victim slumped on the floor, already dead (R p 194, lines 1-22, p 199, lines 21-25, p 201, line 10 - p 202, line 5) Emergency paramedics were at the scene at 9 09 (the victim's 911 call having been received at 8 57, (R p 74, lines 3-24)), and concurred that the victim had already died (R p 162, line 1 - p 164, line 17) The doctor's testimony regarding a quick death by shooting was, in this case, cumulative *State v Haselden* 353 S C 190, 577 S E 2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence), *State v Evans*, 378 S C 296, 299, 662 S E 2d 489, 491 (Ct App 2008)(evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless) Further, there was substantial and overwhelming evidence of guilt

"[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached " *State v Price* 368 S C 494, 500, 629 S E 2d 363, 366 (2006), *citing State v Bailey* 298 S C 1, 5, 377 S E 2d 581, 584 (1989), *Arnold v State* 309 S C 157, 172, 420 S E 2d 834, 842 (1992) Where the record shows any error to be harmless beyond a

reasonable doubt, the error will not afford relief *Price*, 368 S C at 499, 629 S E 2d at 366, *citing State v Pickens* 320 S C 528, 531, 466 S E 2d 364, 366 (1996) The evidence of guilt not only depends upon the evidence above mentioned, but also appellant's own statement to responding officers that he was the shooter (R p 115, lines 1-10, p 144, lines 9-12) Further, appellant related the location of the gun that fired the fatal shot (R p 117, line 9-13, p 241, lines 5-8, p 302, line 22 - p 303, line 8) Here, there is substantial and solid evidence of guilt Even so, respondent maintains the record shows no error

Appellant's argument to the contrary must be rejected

III

Appellant preserved no issue regarding Dr Threadgill's testimony relating a statement by the child victim – that "he believed this to be his fault" – in support of her opinion that testifying would be detrimental to the child The only evidence in the record is that appellant, after initially objecting, withdrew his objection

Relevant Facts

Appellant objected *in limine* to any hearsay statement presented in Dr Threadgill's testimony Appellant referenced the doctor's report that set out, in detail, the various statements from the child and from others, such as family and teachers, which supported her opinion (R p 327, lines 6 - p 329, line 10) The State agreed that the report contained such hearsay and further agreed the hearsay should not be presented (R p 329, lines 13-20) The trial judge asked if any statements regarding the facts of the murder would be elicited, to which the assistant solicitor answered "Absolutely not, Your Honor I agree that would be improper " (R p 330, lines 14-18) Defense counsel agreed with the proposed scope of the testimony, and conditionally agreed on admissibility depending upon whether the testimony at trial conformed to the agreement (R p 331, line 19 - p 429, line 8)

Dr Threadgill testified that the child suffered from post-traumatic stress disorder (R p 428, lines 14-21) The defense objected only once, during the doctor's opinion as to what affect testifying would have on the child – specifically, when the doctor stated "one of the first things he said was - - " (R p 428, line 22- p 429, line 6) After a bench conference, the doctor was allowed to testify as follows

A I believe it would be detrimental to Pierson because of some of the symptoms that he experienced after the event and that he may have a recurrence of some of those symptoms

Q Okay 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 429, line 21 - p 533, line 5)

Discussion

As a first matter, appellant has not preserved an issue for review in this Court regarding the counsel's testimony Appellant raised an objection but after a bench conference, and subsequent hearing of the limited testimony, made no further comment or argument on admissibility of the testimony In fact, when the solicitor referenced the bench conference, and asked if the discussion was on the record, defense counsel declined the opportunity to place a full objection on the record (R p 483, line 22 - p 484, line 11)

"In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground " *State v Holliday*, 333 S C 332, 338, 509 S E 2d 280, 283 (Ct App 1998), Rule 103, SCRE ("Error may not be predicated upon a ruling which admits or excludes evidence unless" in addition to prejudice, there is a timely and specific objection, or the ground is otherwise clear from the context) "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review " *York v Conway Ford Inc* , 325 S C 170, 173, 480 S E 2d 726, 728 (1997)

Appellant certainly failed to place any specific argument on the record to preserve the issue for appellate review on any testimony from this witness Therefore, the issue is procedurally barred from review *Id* It is not a foregone conclusion that the objection was to hearsay, as that could have been an objection based on context The objection could also have been on the scope of the witnesses expertise, or the inadmissibility of the underlying

facts of the opinion See generally Rule 702, SCRE, (confining expert opinion to that which based upon "scientific, technical, or other specialized knowledge" that will "assist" the jury "to understand the evidence or to determine a fact in issue"), Rule 703, SCRE("expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data ") To the extent the context would support an objection on the grounds of hearsay, the issue, if preserved, would be without merit

The State maintained below and continues to maintain here, that the doctor should not be allowed to be used as a conduit for hearsay statements relating facts from the shooting (See R p 329, line 13- p 330, line 18) The statement at issue, however, though attributed to the child, did not relate facts of the shooting and cannot be hearsay

Hearsay is an out of court statement offered as proof of the stated matter Rule 801(c), SCRE "Evidence is not hearsay unless it is offered to show the truth of the matter asserted " *State v Sims*, 304 S C 409, 420, 405 S E 2d 377, 383 (1991) See also *State v Plyler*, 275 S C 291, 294, 270 S E 2d 126, 127 (1980)(testimony not barred by hearsay rules as "the challenged evidence does not appear to have been offered for the substantive truth of the matter asserted, but rather to place appellant at the scene of the crime") The statement presented was not offered to prove the murder was the child fault, rather, the child's statement reflected a emotion guilt and or emotion strain that may be exacerbated by reliving the event through testimony Moreover, the impact of the murder on the child was the very basis of the charge of unlawful conduct toward a child Thus, the child's present statement of mind was very much a fact for the jury to consider At any rate, the statement was offered for state of mind and not for the truth of the matter Therefore, it was not hearsay *Id See*

also State v Edwards, 373 S C 230, 236-37, 644 S E 2d 66, 69 (Ct App 2007), *aff d as modified*, 383 S C 66, 678 S E 2d 405 (2009)(child victim's statement indicating defendant had hit her mother not hearsay, where statement offered "to explain why the victim behaved as she did") Respondent notes that the record supports the trial judge was very careful to protect the record from the hearsay statements that could have negatively and prejudicially affected the jury's consideration of the evidence of murder For example, the trial judge denied the state's request to offer the child's statements made in the patrol car to the effect "that he heard his mother screaming He had heard a loud bang Didn't know what was going on Came out and said he saw his father with a gun or with a weapon He wasn't sure what kind of weapon it was It was a firearm in his hand " (R p 52, lines 3-10, Tr p 133, lines 11-19, R p 54, line 13 - p 55, line 13) The trial judge, in reconsidering his initial ruling excluding the evidence stated "I think a good argument could be made that we also have a charge of unlawful conduct toward a child and the child is a victim However, since it is a joint trial with a murder case, the prejudice just concerns me more than the right of confrontation " (R p 56, line 24 - p 58, line 2)

At any rate, the issue presented is not preserved for review, but if the Court should consider the issue preserved for review, the issue is without merit If the Court should find the issue preserved, and find error, the admission of testimony could only be harmless in light of the wealth of evidence of guilt

"[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached " *State v Price* 368 S C 494, 500, 629 S E 2d 363, 366 (2006), *citing State*

v Bailey 298 S C 1, 5, 377 S E 2d 581, 584 (1989), *Arnold v State* 309 S C 157, 172, 420 S E 2d 834, 842 (1992) "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed " *Price*, 368 S C at 499, 629 S E 2d at 366, *citing State v Pickens* 320 S C 528, 531, 466 S E 2d 364, 366 (1996) Respondent would first note to take the statement as true would mean the statement tends to prove the murder was the child's fault As such, admissibility of the statement could not have prejudiced appellant At any rate, there is substantial and solid evidence of guilt, not the least of which is appellant's own statement to responding officers that he was the shooter, and his statement relating the location of the gun that fired fatal shot as confirmed by ballistic testing (R p 115, lines 1-10, 117, lines 9-13, p 144, lines 9-12, p 241, lines 5-8, p 302, line 22 - p 303, line 8) If error, the admission of the statement could only be harmless However, respondent maintains the issue is not preserved for review, and, further, that the admission was not error

Appellant's argument to the contrary must be rejected

IV

Appellant failed to object to the sentence and no issue is preserved for this Court's review Even so, there is no factual basis for relief in regard to the five year sentence initially imposed for the weapons charge as the trial judge stated the sentence was subsumed within the life sentence imposed for murder

Relevant Facts

At sentencing, the trial judge imposed a ten year sentence for the unlawful conduct toward a child, and a consecutive life for the murder (R p 511, lines 9) As to the weapon conviction, the judge sentenced appellant as follows

> the sentence is five years It is to be concurrent to the last imposed sentence which under the law, I think, would be subsumed by that

(R p 511, lines 9-13)

Appellant raised no objection to the sentence

Discussion

The controlling statute provides for a mandatory five (5) years sentence except "where the death penalty or a life sentence without parole is imposed for the violent crime " S C Code Ann § 16-23-490 Appellant argues his sentence on the weapon charge should be vacated (FBOA, p 30) He admits the issue was not raised below but seeks an exception to the rule of issue preservation Id Appellant is not entitled to any relief

As a first matter, the trial judge correctly sentenced appellant in accord with the provisions of the statute Contrary to appellant's assertion on appeal, the sentence was not illegal as the trial judge specifically stated the sentence was subsumed in the life sentence The American Heritage Dictionary, 1355 (3rd ed 1993), defines "subsume" as a verb meaning, "To classify, include, or incorporate in a more comprehensive category or under

a general principal " In sum, the judge did not impose an active sentence Appellant's issue is without merit

As a second matter, there is no objection to the sentence (one would imagine because it is not illegal) Therefore, there is no issue preserved for the Court's review *Dunbar supra* Appellant's reliance on *State v Vick*, 384 S C 189, 201, 682 S E 2d 275, 281 (Ct App 2009), is misplaced for three reasons First, the sentence in *Vick* was incorrect 384 S C at 201, 682 S E 2d at 281 Second, the sentence was for kidnapping, not gun possession *Id* Third, the decision in *Vick* is anomaly This Court recognized that such issues would generally not be addressed on appeal 384 S C at 202, 682 S E 2d at 281 ("The State correctly notes that our courts have held a challenge to sentencing must be raised at trial to be preserved for appellate review ") To continue to accept and consider sentencing issues that have not been preserved by proper objection would turn the exception into the rule – a rule which is contrary to state supreme court precedent *See State v Johnston*, 333 S C 459, 461-64, 510 S E 2d 423, 424-25 n 3 (1999)(relaxing procedural bar requirement in exceptional circumstance where real danger appellant would be incarcerated beyond sentence maximum due to sentencing error not preserved for review on direct appeal, but noting "Our holding today is not intended to disrupt our settled rules on issue preservation and PCR applications The facts here are unique and demand an expedited result ")

At any rate, even if the Court should review the sentence here, the sentence is not illegal as the trial judge ordered the sentence was subsumed in the life sentence *Accord State v Owens*, 346 S C 637, 666-67, 552 S E 2d 745, 760 (2001), *overruled on other grounds by State v Gentry*, 363 S C 93, 610 S E 2d 494 (2005)(vacating weapon sentence

where appellant sentenced to death but preserving conviction, noting if resentenced to less than death or life without parole, shall be sentenced to the additional five years) Again, appellant is not entitled to any relief

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed

Respectfully submitted,

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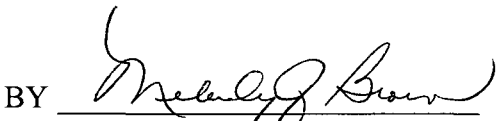
BY 
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October 17, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
G Edward Welmaker, Circuit Court Judge

The State,

Respondent,

vs

Clifford Wylie,

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007

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PROOF OF SERVICE

I, Melody J Brown, Senior Assistant Attorney General, certify that I have served the Final Brief of Respondent on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record

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