STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Charleston County

Honorable Patrick Cleburne Fant, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ISRAEL ROBINSON,

APPELLANT

APPELLATE CASE NO. 2024-002140

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in allowing the elected coroner to testify about findings from an autopsy report without requiring the pathologist who conducted the autopsy to testify when the evidence included testimonial hearsay in violation of the Sixth Amendment right to confront witnesses?
2. Did the trial judge err in refusing to instruct the jury on the law of self-defense?

## STATEMENT OF THE CASE

In June of 2024, the Charleston County Grand Jury indicted Appellant, Israel Malachi Robinson, for murder, attempted murder, and possession of a weapon during the commission of a violent crime, indictments #2024-GS-10-03096, 97, 98. (R. pp. **). On December 9, 2024, Appellant proceeded to jury trial before the Honorable Patrick C. Fant, III. Karla C. Martinez and Jason T. King represented Appellant. Lemuel C. Zeigler and Daniel W. Cooper prosecuted the case. The jury returned verdicts of guilty. Judge Fant sentenced Appellant to fifty-five (55) years for murder, thirty (30) years concurrent for attempted murder, and five (5) years concurrent for the weapon charge. (R. pp. **). A timely notice of intent to appeal was served on December 18, 2024. This appeal follows.

## STATEMENT OF FACTS

On June 22, 2021, Jaquez Butler died from multiple gunshot wounds at the Pinecrest Apartments in North Charleson. Butler had been staying with his grandmother at the Pinecrest Apartments for about two weeks. (Tr. p. 129, lines 16-19). Saguni Dotson testified that on June 22, 2021, she was with her former boyfriend, Eugen "E.J." Morgan[1], and his cousin, the deceased, Jaquez "Quez" Butler. (Tr. p. 299, line 20 – p. 300, lines 1-12). Dotson testified that when they returned to the Pinecrest Apartments E.J. and Quez got out of the car. (Tr. p. 300, lines 13-15). She testified that both E.J. and Quez had weapons. (Tr. p. 301, lines 18-22). Dotson testified that Quez was going to meet with "Cal."[2] (Tr. p. 305, lines 1-2). Cal Lockwood testified that on June 22, 2021, she drove to the Pinecrest Apartments because she had been texting with the person who got shot and killed about smoking weed but she left because he was taking too long. (Tr. p. 193, line 6 – p. 194, lines 1-10).

An officer with the North Charleston Police Department testified that the Pinecrest Apartment was a "very, very high crime area." (Tr. p. 129, lines 4-5). When asked about video surveillance at the apartments the officer testified, "So we had to go there so often to download footage that they actually give us a website where we can access their footage remotely. So we'd go to – be in our office. We can log into their camera systems and play back or watch live from their video system." (Tr. p. 130, line 24 – p. 131, lines 1-3).

Dotson testified that a couple minutes after E.J. and Quez got out of the car she saw somebody who was tall and skinny with dreads run around the building and then E.J. ran back to

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[1] Morgan did not testify at trial.

[2] Pretrial the Judge granted the State's motion to exclude evidence that the deceased planned to rob Cal. (Tr. pp. 50-62). The defense proffered Dotson's testimony about the planned robbery. (Tr. pp. 310-313).

the car and said two people were shooting at them. Video surveillance from the apartments, as well as from a beauty supply store next to Max's Quick Stop near the apartments, show Appellant's car being present at the time of the shooting. (Tr. pp. 133-147; pp. 88-89). Officers with the North Charleston Police Department found the car eight days after the shooting at the Pinecrest Apartments. (Tr. p. 251, lines 3-25). Officer Bernard testified that as the car was getting ready to be towed, Appellant came out and asked why his car was being towed. (Tr. p. 252, lines 1-9). The officer told Appellant, " 'This vehicle is of interest for a homicide', and that 'We're also interested in talking to you in reference to that homicide as well.' " (Tr. p. 252, lines 11-13). Appellant agreed to talk with officers, waived his *Miranda* rights and answered their questions. (Tr. p. 252, line 14 – pp. 253-256).

Appellant eventually admitted to driving to Max's Quick Stop and driving back into the Pinecrest Apartments but stated that he bailed out of the car and did not drive the car out of the Pinecrest Apartments after the shooting. (Tr. p. 257, line 9 – p. 258, lines 1-12). Appellant told the officers he was with the co-defendant, Framon "D.J." Frasier, and Soso. (Tr. p. 258, lines 13-20). He also told the officers that his brother was beaten up a few days earlier. (Tr. p. 259, lines 5-9).

Co-defendant Framon "D[3].J." Frasier testified, "Somebody went after his brother, and he went back for – okay. Somebody went after his brother, and they came to his place and a shooting happened." (Tr. p. 319, lines 21-23). Frasier testified that Appellant lived at the Pinecrest Apartments. (Tr. p. 320, lines 23-24). Frasier testified that he and Appellant both had AR weapons. (Tr. p. 321, line 22 – p. 322, lines 1-3). When asked who shot first, Frasier answered, "They did." (Tr. p. 326, lines 17-23). He then testified that he was not sure if it was

[3] The transcript reflects E.J. but this appears to be a typographical error. (Tr. p. 318, line 12).

fireworks or shots. (Tr. p. 326, lines 20-23). When asked why he shot, Frasier answered, "I just – I just shot back to protect myself." (Tr. p. 327, line 24 – p. 328, lines 1-2). Frasier confirmed that he initially told the detectives that they were shot at first. (Tr. p. 331, lines 1-2). Later, while meeting with prosecutors, Frasier told them that Appellant "Izzy" shot first, and then he shot, and the others might have shot back. (Tr. p. 331, lines 1-20). Frasier was charged with murder, attempted murder, and possession of a weapon during the commission of a violent crime, but the murder charge was reduced to voluntary manslaughter, and the other charges were dismissed. (Tr. p. 333, lines 14-22). Frasier pled guilty to voluntary manslaughter and was awaiting sentencing of fifteen to twenty years at the time of trial. (Tr. p. 333, lines 23-25). Records from the South Carolina Department of Corrections reflect Frasier's admission date as November 12, 2025. The sentence was not available at the time of writing the initial brief.

## ARGUMENTS

1. **The trial judge erred in allowing the elected coroner to testify about findings from an autopsy report without requiring the pathologist who conducted the autopsy to testify when the evidence included testimonial hearsay in violation of the Sixth Amendment right to confront witnesses.**

### STANDARD OF REVIEW

"[W]hether a statement is testimonial and therefore subject to the confrontation clause is a question of law reviewed de novo. See United States v. Mathis, 932 F.3d 242, 255 (4th Cir. 2019) (noting an alleged confrontation clause issue presents a question of law)." State v. Brewer, 438 S.C. 37, 44, 882 S.E.2d 156, 160 (2022).

### DISCUSSION

The co-defendant, Framon "D.J." Frasier, gave conflicting statements about who shot first. (Tr. pp. 326-331). The judge denied the defense request for a self-defense charge, as will be discussed in issue two. (Tr. p. 437, line 11 – p. 438, lines 1-25). Pre-trial the State moved to call Coroner Bobbi Jo O'Neal to testify about the results of the autopsy report instead of the pathologist who performed the autopsy. (Tr. p. 43, line 9 – pp. 44-47). The prosecutor told the judge, "Candidly, Dr. Downs has been somewhat difficult in the preparations and, in all candor, seeks payment for his testimony." (Tr. p. 43, lines 13-15). The State advised that they did not intend to call the coroner as an expert. (Tr. p. 44, lines 9-10). The State told the judge, "The only, quote/unquote, 'opinion testimony' that we may elicit is some of the words are very medical terms – 'posterior,' 'anterior,' things like that –that we would just ask her in her experience to define. She would be merely stating the findings of the report and in no way offering any expert opinion one way or the other on the validity of them." (Tr. p. 44, lines 11-17). Defense counsel objected to allowing the coroner to testify because the findings in the

autopsy report were testimonial, and pursuant to Crawford,[4] and its progeny,[5] the pathologist's testimony was necessary under the Confrontation Clause. (Tr. pp. 48-49).

The judge granted the State's motion stating, "I am going to – I guess – well, defense, ya'll have filed a motion in opposition, so I will – I'm going to deny that motion. I am going to allow Bobbi Jo O'Neal to testify as the county coroner as to findings specifically. And I do find under 803(8) and 803(9) that it is allowed in. Also, it will -- I find that it is relevant under 404. Also, I find that it is not testimonial and does not implicate the confrontation clause." (Tr. p. 49, lines 15-22).

The State called the coroner as a witness at trial instead of calling the pathologist. (Tr. p. 404, line 16). The coroner testified that the cause of death was listed as multiple gunshot wounds. (Tr. p. 408, lines 17-19). During the testimony the State asked the coroner, "Okay. I want to walk through each of these wound paths Dr. Downs located, and if you could help explain that for the jury." (Tr. p. 409, lines 17-19). The State asked, "Regarding the first wound path that I think encompasses – as he has in his report – wounds A, B, and C, will you tell us where that entry wound is located." (Tr. p. 409, lines 21-23). The coroner answered, "So wounds A, B, and C are going to the right arm." (Tr. p. 409, line 24). Defense counsel objected based on hearsay and confrontation. (Tr. p. 409, line 25). The trial judge overruled the objection stating, "Overruled. I'm going to allow her to testify as to the findings of the report, as has previously been ruled on. But your objection is noted for the record." (Tr. p. 410, lines 1-3). The coroner went on to testify about bullet pathways, defects, entrance and exit wounds, a wound being "through and through," and wound locations. (Tr. pp. 410-416). The State went so

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[4] Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[5] Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); Bullcoming v. New Mexico, 564 U.S. 647, 671–72, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).

far as to ask the coroner if the direction or path of a bullet would be consistent with someone running or falling when shot to which the coroner opined, "It could be consistent. It's possible, yeah." (Tr. p. 414, lines 3-36). She later testified, "They'd either have to be laying down so there [sic] sole is available or they'd have to have their foot turned in such a way that the sole can get hit. Correct." (Tr. p. 416, lines 2-6).

The trial judge erred in allowing the coroner to testify about findings from the autopsy report and not requiring the pathologist who conducted the autopsy to testify. The testimony went beyond the public records and vital statistics hearsay exceptions found in Rule 803(8)(9), SCRE. The testimony from the coroner constituted impermissible testimonial hearsay. The testimony violated Appellant's right of confrontation under the Sixth Amendment.

In State v. Cutro, 365 S.C. 366, 377–78, 618 S.E.2d 890, 896 (2005), the South Carolina Supreme Court wrote:

> Further, autopsy reports are not hearsay under Rule 803, SCRE. Subsection (8) of this rule excepts from hearsay public records and reports containing matters there is a duty to report. Autopsies are required in cases of SIDS if law enforcement deems it necessary. S.C.Code Ann. § 17–5–540 (2003) and § 20–7–5915 (Supp.2004). Additionally, subsection (9) of Rule 803 specifically exempts from hearsay records of vital statistics, including "reports ... of ... deaths ... if the report thereof was made to a public office pursuant to requirements of law." Autopsy reports are required to be kept by the medical examiner's office. S.C.Code Ann. § 17–5–280 (2003). Accordingly, an autopsy report is not inadmissible hearsay.

A jury found Gail Cutro guilty of two counts of homicide by child abuse for the death of two infants, Parker C. and Ashlan D., who died in the home daycare operated by Gail and her husband Josh Cutro. The autopsy reports in question in the Cutro case were used by the State's medical expert, Dr. Ophoven, to distinguish 274 autopsy reports of SIDS deaths that did not show petechial hemorrhages with the autopsy reports of the two deceased infants in question that did show petechial hemorrhages. In addition to Rule 803 (8) and (9), SCRE, the Court also

relied on Rule 703, SCRE to find the autopsy reports admissible under the Rules of Evidence writing, "In addition, Rule 703, SCRE, specifically provides: '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 inferences upon the subject, the facts or data need not be admissible in evidence.' We conclude evidence of the autopsy reports was admissible under the Rules of Evidence." Cutro, 365 S.C. at 378, 618 S.E.2d at 896.

The Court in Cutro then addressed the Confrontation Clause writing:

> Finally, in Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court noted the hearsay exception for business records and observed that business records are not "testimonial" and therefore do not implicate the Confrontation Clause. A public record, very much like a business record, is not testimonial and its admission similarly does not violate the defendant's confrontation rights. Moreover, appellant was able to cross-examine Dr. Ophoven regarding the possible inaccuracies in these autopsy reports and presented extensive expert testimony reinterpreting the significance of their findings. We find appellant's confrontation rights were not infringed.
>
> We hold the trial judge did not err in allowing Dr. Ophoven's testimony regarding the autopsies of other deaths.

365 S.C. at 378, 618 S.E.2d at 896 (n. 7 omitted).

Cutro is distinguished from the present case. First, Cutro was decided before Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), where the United States Supreme Court held that a forensic laboratory report stating that an unknown substance was cocaine qualifies as testimonial evidence to which the Confrontation Clause applies. Second, in Cutro, Dr. Daniel, who performed the initial autopsy on Parker C., and Dr. Reynolds, who performed the initial autopsy on Ashlan D., both testified at trial and were subject to cross-examination. The pathologist who conducted the autopsy in the present case did not testify and was not subject to cross-examination. The coroner's testimony in the present case was

testimonial as it went to the pathologist's autopsy findings as opposed to the State's medical expert in Cutro who testified about a summary of autopsies from other SIDS deaths. The coroner's testimony in the present case went beyond the public records and vital statistics hearsay exceptions found in Rule 803(8)(9), SCRE.

Additionally Rule 703, SCRE does not allow admission of the testimony in the present case as it did in Cutro where the State's medical expert, who was cross-examined, relied on the other autopsy reports in forming an opinion. While the coroner was erroneously allowed to give opinion testimony, the State did not offer her, or anyone else as an expert in forensic pathology. Rule 703, SCRE, provides, "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 inferences upon the subject, the facts or data need not be admissible in evidence." Rule 703, SCRE does not apply in the present case because the State failed to call an expert witness. The coroner's testimony in the present case was inadmissible testimonial hearsay.

In State v. Brewer, 438 S.C. 37, 48–49, 882 S.E.2d 156, 162 (2022), the South Carolina Supreme Court wrote:

> "The Sixth Amendment to the United States Constitution guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' " State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013) (quoting U.S. Const. amend. VI). Whether the Confrontation Clause applies "turns on whether the challenged out-of-court statement is testimonial ... [and] 'applies to "witnesses" against the accused—in other words, those who "bear testimony." ' " Id. at 342, 751 S.E.2d at 654 (quoting Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). In determining whether an out-of-court statement is testimonial, courts employ the primary purpose test, which consists of "where the primary purpose of an out-of-court statement is to serve as evidence or 'an out-of-court substitute for trial testimony,' the statement is considered testimonial." Id. (quoting Bullcoming v. New Mexico, 564 U.S. 647, 671–72, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) (Sotomayor, J., concurring)). If the primary purpose is not to

> serve as evidence at a later trial or as a substitute for in person testimony, the Confrontation Clause does not apply and admissibility is left to the rules of evidence. Id. at 342, 751 S.E.2d at 654–55. To make that determination, courts review "not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.' " Id. at 342–43, 751 S.E.2d at 655 (internal citation omitted).

In Brewer, the pathologist who performed the autopsy, Dr. Fulcher, submitted blood and tissue samples to the National Medical Services [NMS] laboratory for further testing because he could not determine a cause of death. After receiving the toxicology results from the NMS lab, Dr. Fulcher concluded the cause of death was "acute oxycodone toxicity." Dr. Fulcher was allowed to testify about the NMS lab results without the State calling a witness from NMS. The South Carolina Supreme Court found that the NMS lab results were testimonial in nature and Brewer should have had an opportunity to cross examine the person who performed the testing. "Without being afforded that right, Brewer lost her constitutional right to "force[ ] the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.' California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (internal citation omitted)." Brewer, 438 S.C. at 54–55, 882 S.E.2d at 165. "Accordingly, the State violated Brewer's Sixth Amendment right to confront the witnesses against her because it was permitted to use a surrogate witness to explain the results of a test involving a key fact at issue and to essentially vouch for the accuracy of that lab without undergoing the 'crucible of cross-examination.' Crawford, 541 U.S. at 61, 124 S.Ct. 1354." Brewer, 438 S.C. at 54, 882 S.E.2d at 165.

The findings from the autopsy report in the present case, like the lab results in Brewer, were testimonial in nature. The primary purpose of the autopsy results was to be used as evidence at trial. The trial judge erred in allowing the coroner to testify as a surrogate about the

results from the autopsy without calling the pathologist who performed the autopsy. Appellant lost his constitutional right to force the pathologist to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth."

The Court in Brewer noted:

> Other state appellate courts have looked to their respective statutes governing autopsies, and many have reasoned that if an autopsy is legally required in order to investigate a death, then its primary purpose is for a criminal investigation and thus, is testimonial. See State v. Frazier, 229 W.Va. 724, 735 S.E.2d 727, 731 (2012) ("The next logical question is whether Dr. Belding's autopsy report was prepared to establish or prove past events potentially relevant to later criminal prosecutions and, therefore, meets the primary purpose test. The answer to this is an unqualified yes."); Cuesta-Rodriguez v. State, 241 P.3d 214, 228 (Okla. 2010) (finding that an autopsy report in a suspicious death was testimonial where state law mandated an autopsy be performed and noting that it was "obvious" that a medical examiner would reasonably understand that any statements in that report could be used in a later criminal prosecution); State v. Locklear, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009) (holding the Confrontation Clause barred the state from introducing evidence of forensic analysis from a pathologist and dentist who did not testify); but see Ackerman v. State, 51 N.E.3d 171, 189 (Ind. 2016) (concluding that an autopsy report was not testimonial).

Brewer, 438 S.C. at 52–53, 882 S.E.2d at 164–65.

The federal and state courts appear split on whether autopsy reports are testimonial. The United States Courts of Appeals for First and Second Circuit found that autopsy reports are nontestimonial. United States v. De La Cruz, 514 F.3d 121 (1st Cir. 2008); Nardi v. Pepe, 662 F.3d 107 (1st Cir. 2011); United States v. Feliz, 467 F.3d 227 (2d Cir. 2006); United States v. James, 712 F.3d 79, 87-88 (2d Cir. 2013). In De La Cruz, decided before Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the medical examiner testified about the cause of death based on an autopsy report prepared by another. In Nardi v. Pepe, the prosecution did not call the doctor who performed the autopsy but instead called another doctor with extensive experience as a medical examiner who reviewed the original autopsy report.

In Feliz, also decided before Melendez–Diaz v. Massachusetts, the Government offered nine autopsy reports through the testimony of a doctor with the Office of the Chief Medical Examiner of New York who did not conduct the autopsies. Under similar facts, the Court in James found the "surrogate testimony" did not violate the Confrontation Clause as the autopsy report was not testimonial because it was not prepared primarily to create a record for use at a criminal trial. Surrogate testimony, as discussed in the cases above, was found insufficient to satisfy the Confrontation Clause in Bullcoming v. New Mexico, 564 U.S. 647, 661, 131 S. Ct. 2705, 2715, 180 L. Ed. 2d 610 (2011). After the confusion following the Court's opinion in Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221, 2227, 183 L. Ed. 2d 89 (2012) abrogated by Smith v. Arizona, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024), the Court clarified writing:

> Our holding today follows from all this Court has held about the Confrontation Clause's application to forensic evidence. A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See Crawford, 541 U.S., at 68, 124 S.Ct. 1354; Melendez-Diaz, 557 U.S., at 311, 129 S.Ct. 2527. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See Bullcoming, 564 U.S., at 663, 131 S.Ct. 2705. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

Smith v. Arizona, 602 U.S. 779, 802–03, 144 S. Ct. 1785, 1802, 219 L. Ed. 2d 420 (2024).

Smith v. Arizona and Bullcoming found surrogate testimony insufficient to satisfy the Confrontation Clause. The elected coroner in the present case, while a registered nurse with experience in the emergency room, was not an expert and could not be considered an equally qualified surrogate to a forensic pathologist, even if such surrogate testimony was sufficient. It appears that the surrogates who testified in De La Cruz, Nardi v. Pepe, Feliz, and James were all

doctors or medical examiners who were qualified to testify about autopsy reports and were subject to cross-examination about the autopsy report even though they did not perform the autopsy. The coroner in the present was not subject to the same type of cross-examination. The coroner's testimony in this case constituted testimonial hearsay. Additionally, unlike the finding in James, the autopsy on the shooting victim in the present case should reasonably have been expected to be used at a criminal trial.

Other federal courts have found autopsy reports are testimonial. The United States Courts of Appeals for the Eleventh Circuit and D.C. Circuit both found autopsy reports are testimonial. United States v. Ignasiak, 667 F.3d 1217, 1231 (11th Cir. 2012); United States v. Moore, 651 F.3d 30, 73 (D.C. Cir. 2011). In United States v. Ignasiak, 667 F.3d 1217, 1230 (11th Cir. 2012), the Eleventh Circuit wrote:

> Forensic reports constitute testimonial evidence. To wit, in Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the Supreme Court held that a forensic laboratory report stating that an unknown substance was cocaine qualifies as testimonial evidence to which the Confrontation Clause applies. Id. at 2532. The Court reasoned that because the certificates are "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact," they "are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination"—i.e. offering proof that the substance was cocaine. *Id.* (quotation marks and citations omitted). As a result, and because scientific evidence is no more neutral or reliable than other testimonial evidence, confrontation serves to ensure its accuracy by "weed[ing] out not only the fraudulent analyst, but the incompetent one as well." Id. at 2537.

Like the forensic lab reports in Melendez-Diaz, the autopsy reports in Ignasiak, and the autopsy report in the present case constitute testimonial evidence.

The Court in Ignasiak, went on to write:

> Applying the reasoning of Crawford, Melendez–Diaz, and Bullcoming, we conclude that the five autopsy reports admitted into evidence in conjunction with Dr. Minyard's testimony, where she did not personally observe or participate in those autopsies (and where no evidence was presented to show that the coroners

> who performed the autopsies were unavailable and the accused had a prior opportunity to cross-examine them), violated the Confrontation Clause. For background, *see* Melendez–Diaz, 129 S.Ct. at 2538 (business record exception does not encompass documents generated by an entity that regularly "produc[es] ... evidence for use at trial").

Ignasiak, 667 F.3d at 1231 (n. 15 omitted). In note 15 from Ignasiak the Eleventh Circuit wrote:

> Even before Bullcoming many states which had considered the issue concluded that autopsy reports are testimonial and subject to the Confrontation Clause. See Smith v. Alabama, 898 So.2d 907, 917 (Ala.Crim.App.2004) (holding that admission of autopsy evidence and reports, without testimony of medical examiner who performed autopsy, violated defendant's Sixth Amendment right to confrontation but was harmless error); Commonwealth v. Avila, 454 Mass. 744, 912 N.E.2d 1014, 1029 (2009) (holding that the autopsy report was testimonial hearsay); Cuesta–Rodriguez v. State, 241 P.3d 214, 228 (Okla.Crim.App.2010) (holding that admission of autopsy report was testimonial); State v. Locklear, 363 N.C. 438, 681 S.E.2d 293, 305 (2009) (holding that the trial court erred under Crawford by admitting "forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify"); Wood v. Texas, 299 S.W.3d 200, 209–10 (Tex.Crim.App.2009) (holding the autopsy report was testimonial where police suspected the death was a homicide); but see People v. Cortez, 402 Ill.App.3d 468, 341 Ill.Dec. 854, 931 N.E.2d 751, 756 (2010) (holding that autopsy reports are non-testimonial business records).
>
> Furthermore, although the First Circuit held United States v. Feliz, 467 F.3d 227 (1st Cir.2006) that an autopsy report is admissible as a business record, id. at 236–37, the Feliz case came before Melendez–Diaz, which as discussed below rejected that same business record argument as applied to the forensic evidence at issue in that case. *See* 129 S.Ct. at 2538. As such, we conclude that Feliz has little persuasive value on this issue.

Ignasiak, 667 F.3d 1217, 1231.

In United States v. Moore, 651 F.3d 30, 71 (D.C. Cir. 2011), Dr. Arden, then-Chief D.C. Medical Examiner, testified as to the contents of approximately 30 autopsy reports authored by other medical examiners in his office, but he neither performed nor observed the autopsies. The D.C. Circuit found that the autopsy reports were testimonial in nature and the admission of the reports violated the Confrontation Clause in part because each autopsy found the manner of death to be homicide caused by gunshot wounds, "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 2532 (citation and quotation marks omitted).

As in Moore, the autopsy report in the present case was testimonial in nature as the cause of death was multiple gunshot wounds, a circumstance which would lead an objective witness to reasonably believe the report would be used in court. (Tr. p. 408, lines 17-19). The admission of the report through the coroner violated the Confrontation Clause. Unlike Moore, the error is not harmless when there was a question as to who shot first and information from the autopsy report went to that question. Appellant was prevented from cross-examining the pathologist about bullet pathways, defects, a wound being "through and through," and wound locations.

Like the federal courts, the state courts appear split on whether autopsy reports are testimonial. The state courts of Massachusetts,[6] Michigan,[7] Missouri,[8] New Mexico,[9] North

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[6] (Commonwealth v. Avila, 912 N.E.2d 1014, 1029 (Mass. 2009)) ("In the present case, and in accordance with Nardi, we conclude that the judge correctly permitted Dr. Flomenbaum to offer his opinions concerning issues related to the autopsy, but erred in allowing Dr. Flomenbaum to testify on direct examination about the findings in Dr. Philip's autopsy report--both because these findings were inadmissible hearsay and because they violated the confrontation clause.").

[7] (People v. Lewis, 806 N.W.2d 295, 295 (Mich. 2011)) ("[W]e affirm the result reached by the Court of Appeals, but vacate that part of the Court of Appeals opinion holding that the autopsy report was not testimonial and, therefore, that its admission did not violate the defendant's Sixth Amendment right to be confronted with the witnesses against him. In particular, we disagree with the Court of Appeals' reliance on MRE 803(8) and its determination that the autopsy report was not prepared in anticipation of litigation.").

[8] (State v. Davidson, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007)) ("We conclude that the autopsy report in this case qualifies as a 'testimonial statement' under Crawford.").

[9] (State v. Jaramillo, 272 P.3d 682, 686 (N.M. Ct. App. 2011)) ("Because Dr. Natarajan's report was prepared to document a homicide and intended for use in prosecution of a criminal case, we conclude that the purpose of the autopsy report was to provide prosecutorial evidence. Thus, we hold that the statements contained in the report were testimonial."); State v. Navarette, 294 P.3d 435 (N.M. 2013) ([We]conclude that there was a Confrontation Clause violation because (1) the autopsy report contained statements that were made with the primary intention of establishing facts that the declarant understood might be used in a criminal prosecution, (2) the statements in

Carolina,[10] Oklahoma,[11] and West Virginia[12] have treated autopsy reports as testimonial. On the other hand, the state courts of Arizona,[13] California,[14] Florida,[15] Illinois,[16] Indiana,[17] Louisiana,[18] Ohio,[19] and South Carolina[20] have treated autopsy reports as nontestimonial.

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the autopsy report were related to the jury as the basis for the pathologist's opinions and were therefore offered to prove the truth of the matters asserted, and (3) the pathologist who recorded her subjective observations in the report did not testify at trial and Defendant Arnoldo Navarette did not have a prior opportunity to cross-examine her.").

[10] (State v. Locklear, 681 S.E.2d 293, 305 (N.C. 2009)) ("Here, the State sought to introduce evidence of forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify. The State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them. The admission of such evidence violated defendant's constitutional right to confront the witnesses against him, and the trial court therefore erred in overruling defendant's objections.").

[11] Cuesta-Rodriguez v. State, 241 P.3d 214, 228 (Okla. Crim. App. 2010) ("[I]t is obvious that a medical examiner's words recorded in an autopsy report involving a violent or suspicious death could constitute statements that the medical examiner should reasonably expect to be used in a criminal prosecution and therefore under the Crawford and Melendez-Diaz framework would be testimonial for Sixth Amendment confrontation purposes.").

[12] State v. Kennedy, 735 S.E.2d 905, 918 (W. Va. 2012) ("W. Va. Code § 61-12-3(d) compels the conclusion that, for purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial."); State v. Frazier, 735 S.E.2d 727 (W. Va.2012) ("The first error conceded by the State involves the defendant's fundamental constitutional right to confront the witnesses against him. The prosecution entered into evidence an autopsy report without testimony by the forensic pathologist who performed the autopsy." The court found the error was not harmless.).

[13] State v. Medina, 306 P.3d 48, 63 (Ariz. 2013) ("Under the plurality test, the autopsy report here is not testimonial because its purpose was not primarily to accuse a specified individual.").

[14] People v. Dungo, 286 P.3d 442, 449 (Cal. 2012) ("These statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature.").

Three of the state court cases treating autopsy reports as nontestimonial, including State v. Cutro discussed above, were decided before the Court's decision in Melendez–Diaz. State v. Russell, 966 So.2d 154, 165 (La. Ct. App. 2007); State v. Craig, 853 N.E.2d 621, 638 (Ohio 2006). All of the state court cases treating autopsy reports as nontestimonial were decided before the Court's decision in Smith v. Arizona, 602 U.S. 779, 802–03, 144 S. Ct. 1785, 1802, 219 L. Ed. 2d 420 (2024). The purpose of the autopsy report in the present case where an individual died of multiple gunshot wounds, unlike the findings in these other state court cases, was to provide evidence in a criminal case.

In Medina, Dungo, Banmah, and Ackerman, surrogate medical examiner/pathologists were allowed to testify, presumably as expert witnesses, about autopsy reports prepared by another medical examiner/pathologist. The witnesses were subject to cross-examination. In

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[15] Banmah v. State, 87 So.3d 101, 103 (Fla. Dist. Ct. App. 2012) ("[A]utopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution.").

[16] People v. Leach, 980 N.E.2d 570, 590 (Ill. 2012) ("We conclude that whichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case.").

[17] Ackerman v. State, 51 N.E. 3d 171 (Ind. 2106) ("Based upon the circumstances surrounding W.W.'s death, we are not persuaded that Dr. Eisele would have known that the autopsy would primarily serve to aid the investigation and prosecution of a crime").

[18] State v. Russell, 966 So.2d 154, 165 (La. Ct. App. 2007) ("The record reveals that the information contained in the report was routine, descriptive, nonanalytical, and thus, nontestimonial in nature.").

[19] State v. Craig, 853 N.E.2d 621, 638 (Ohio 2006) (holding that the admission of the autopsy report did not violate the Confrontation Clause because the document had been admitted under the public records hearsay exception, and it could have been admitted under the business records exception).

[20] State v. Cutro, 618 S.E.2d 890, 896 (S.C. 2005) (holding that an autopsy report admitted under the business records hearsay exception does not violate the Confrontation Clause).

Leach, Russell, Craig, and Cutro, the surrogate medical examiner/pathologists all testified as expert witnesses subject to cross-examination. In contrast, the elected coroner who testified in the present case did not testify as an expert witness and was not subject to cross-examination like the witnesses in the above cases. Additionally, both Medina, and Dungo discuss Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221, 2227, 183 L. Ed. 2d 89 (2012) later abrogated by Smith v. Arizona, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024). As discussed above with regard to the federal cases, in Smith v. Arizona, 602 U.S. 779, 802–03, 144 S. Ct. 1785, 1802, 219 L. Ed. 2d 420 (2024), the Court wrote:

> Our holding today follows from all this Court has held about the Confrontation Clause's application to forensic evidence. A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See Crawford, 541 U.S., at 68, 124 S.Ct. 1354; Melendez-Diaz, 557 U.S., at 311, 129 S.Ct. 2527. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See Bullcoming, 564 U.S., at 663, 131 S.Ct. 2705. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

Allowing the coroner to testify about autopsy findings without calling the pathologist who performed the autopsy violated Apellant's right to confrontation under the Sixth Amendment. The testimony went beyond the public records and vital statistics hearsay exceptions found in Rule 803(8)(9), SCRE. Rule 703, SCRE is inapplicable. The primary purpose of the autopsy results of an individual who died of multiple gunshot wounds was for use in a criminal trial. The evidence was testimonial. The admission of the inadmissible testimonial hearsay was not harmless, especially in light of the fact that there was evidence that Appellant acted in self-defense, as discussed below.

2. **The trial judge erred in refusing to instruct the jury on the law of self-defense.**

**STANDARD OF REVIEW**

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

**DISCUSSION**

At the close of trial Appellant requested a self-defense charge stating, "Again, Mr. Framon Frasier testified that they were shot at first. And he said it on direct. When Mr. Zeigler inquired why he shot, he said that he was defending himself." (Tr. p. 437, lines 12-15). The judge denied the request to charge self-defense saying, "I'm not going to charge self-defense. I can go ahead and just tell you. I mean, you're protected on the record, but, I mean, they came there with guns. There had been a phone call. And I don't see any way where self-defense is appropriate." (Tr. p. 437, line 22 – p. 438, line 1). Counsel for Appellant replied, "Well, the evidence showed that Mr. Robinson [Appellant] was living in the community, so he had a reason to be in the community." (Tr. p. 438, lines 2-4). The court reporter asked counsel to speak up and she said, "That Mr. Robinson lived at the apartment complex, so he had a reason to be there." (Tr. p. 438, lines 7-8). The State argued that Appellant brought on the difficulty by showing up with weapons. (Tr. p. 438, lines 11-22). The judge noted, "And I mean, I – there could have been a call to the police rather than, you know, showing up with guns." (Tr. p.

438, lines 23-25). The State later cited State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), in support of the argument that Appellant was not entitled to the self-defense instruction because he was not without fault in bring on the difficulty. (Tr. p. 448, line 18 – p. 449, lines 1-13).

The State's theory was that the deceased was mistaken for people who were "hunting" Appellant. In his opening statement, the prosecutor told the jury that Appellant and some associates from the Liberty Hill neighborhood had a disagreement over some money and the Liberty Hill people "beat up his little brother to show him they meant business." (Tr. p. 73, lines 1-5). The prosecutor told the jury that Appellant received a phone call from somebody at his apartment complex, Pinecrest, and told Appellant, "The people that are hunting you, the people that beat up your little brother, they're here." (Tr. p. 74, lines 1-4). Appellant returned to his apartment complex, armed. (Tr. p. 74, lines 4-9).

Co-defendant Framon "D.J." Frasier testified, "Somebody went after his brother, and he went back for – okay. Somebody went after his brother, and they came to his place and a shooting happened." (Tr. p. 319, lines 21-23). The prosecutor asked Frasier, "Okay. Sticking on the topic of his brother, do you remember if the hunters that were hunting his brother were actually looking for Mr. Robinson or were they looking for his brother? Did they stumble upon the brother in search of Mr. Robinson?" (Tr. p. 319, line 24 – p. 320, lines 1-3). Frasier agreed. (Tr. p. 320, line 4). Frasier testified that Appellant lived at the Pinecrest Apartments. (Tr. p. 320, lines 23-24).

Frasier testified that he and Appellant both had AR weapons. (Tr. p. 321, line 22 – p. 322, lines 1-3). The prosecutor asked Frasier, "Okay. So what happened – you get a phone – did Israel [Appellant] get a phone call from somebody? Or did you guys receive notice that somebody – that the hunters that you were talking about earlier, that they were back in

Pinecrest?" (Tr. p. 322, lines 19-22). Frasier agreed. (Tr. p. 322, line 23). Frasier confirmed that people were looking for Appellant at his apartment complex. (Tr. p. 324, line 21 – p. 325, lines 1-3). Frasier testified they returned to the apartment complex "looking for the guys who was supposedly running around his house." (Tr. p. 326, lines 3-4).

When asked who shot first, Frasier answered, "They did." (Tr. p. 326, lines 17-23). He then testified that he was not sure if it was fireworks or shots. (Tr. p. 326, lines 20-23). When asked why he shot, Frasier answered, "I just – I just shot back to protect myself." (Tr. p. 327, line 24 – p. 328, lines 1-2). Frasier confirmed that he initially told the detectives that the hunters shot at them first. (Tr. p. 331, lines 1-2). Later, while meeting with prosecutors, Frasier told them that Appellant "Izzy" shot first, and then he shot, and the others might have shot back. (Tr. p. 331, lines 1-20). Frasier pled guilty to voluntary manslaughter and was awaiting sentencing at the time of trial. (Tr. p. 333, lines 23-25).

In State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000), the South Carolina Supreme Court wrote:

> To establish self defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999).

If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error. State v. Muller, 282 S.C. 10, 10, 316 S.E.2d 409,

409 (1984). The trial judge reversibly erred in refusing to charge self-defense because there is evidence in the record from which it could reasonably be inferred he acted in self- defense.

Appellant did not bring on the difficulty by returning to his apartment complex armed after learning that the people who attacked his brother were back at his house. In State v. Slater, 373 S.C. 66, 644 S.E.2d 50, (2007), the South Carolina Supreme Court found that Slater was not entitled to a self-defense charge because Slater's unlawful possession of the weapon was the proximate cause of the homicide. "Slater was not merely in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement." Slater, 373 S.C. at 71, 644 S.E.2d at 53. The Court in Slater, relying on State v. Burris, 334 S.C. 256, 513, S.E.2d 104 (1999), wrote:

> Burriss, which deals with the defense of accident, is instructive in the instant case. In Burriss, this Court discussed the use of an accident defense where the defendant unlawfully possessed a gun. Burriss maintained that he was lawfully armed in self-defense when the gun accidentally fired. Id. at 259, 513 S.E.2d at 106. Because a defendant must be acting lawfully to use the defense of accident, we discussed whether a person in unlawful possession of a weapon may lawfully arm himself in self-defense. Id. at 262, 513 S.E.2d at 108. Clarifying an ambiguity in this Court's prior case law, we noted that where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense. Id. at 262 n. 5, 513 S.E.2d at 108 n. 5.

373 S.C. at 71, 644 S.E.2d at 53.

Appellant was lawfully armed in self-defense and had a right to return to his apartment complex. Once back at the apartment complex, there is evidence in the record that the "hunters" shot at Appellant and Frasier first. While there is no evidence that the deceased and his cousin were the "hunters," Dotson testified that they were both armed. (Tr. p. 301, lines 18-22). "A person has the right to act on appearances, even if the person's belief is ultimately mistaken. State v. Fuller, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989). 'Once the right to fire in self-

defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act.' State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (*citing* State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978))." State v. Dickey, 394 S.C. 491, 501–02, 716 S.E.2d 97, 102 (2011). The judge erred in refusing to charge self-defense because "they came there with guns." There is evidence in the record that Appellant was without fault in bringing on the difficulty because he was armed in self-defense when he returned to his apartment complex.

The present case is distinguishable from State v. Williams, 427 S.C. 246, 254, 830 S.E.2d 904, 908 (2019) where the Court wrote: .

> Where the unlawful possession of a weapon is not "merely incidental," as we found it was not in Slater, the unlawful possession of a weapon does foreclose a self-defense charge. Like Lord Byron, Williams illegally armed himself before he chose to enter a situation he knew to be unlawful, and which he knew was likely to be violent. Williams' actions proximately caused the difficulty[4] as a matter of established law because his act of taking a loaded, unlawfully-possessed pistol into an illegal drug transaction was not "merely incidental" to the act of arming himself in self-defense. Bryant, 336 S.C. at 345, 520 S.E.2d at 322; Slater, 373 S.C. at 71, 644 S.E.2d at 53; *see also* State v. Smith, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011) (holding, "Because Smith was acting unlawfully" in taking a loaded, unlawfully-carried pistol into an illegal drug transaction, "he was not entitled to an accident charge").

Appellant did not take a weapon to a drug deal, as in Williams. Appellant did not assert himself, while armed, into a fight that had nothing to do with him, as in Slater. Instead, according to Frasier, they, while armed, returned to the apartment complex, where Appellant lived, "looking for the guys who was supposedly running around his house." (Tr. p. 326, lines 3-4). Appellant was not at fault on bringing on the difficulty. The trial judge abused his discretion in refusing to charge self-defense. The error in refusing to charge self-defense requires reversal.

## CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of November, 2025.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Nov 26 2025
SC Court of Appeals

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Appeal from Charleston County

Honorable Patrick Cleburne Fant, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ISRAEL ROBINSON,

APPELLANT

APPELLATE CASE NO. 2024-002140

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**DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

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Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments and sentencing sheets;
(2) Trial transcript pages 1-11; 42-65; 72-528.

I certify that this designation contains no matter which is irrelevant to this appeal.

Kathrine H. Hudgins
Senior Appellate Defender

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ATTORNEY FOR APPELLANT

This 26th day of November, 2025.

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APPELLATE CASE NO. 2024-002140

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 26th day of November, 2025.

Kathrine H. Hudgins
Senior Appellate Defender

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