

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEVEN LEE MORGAN,

APPELLANT.

APPELLATE CASE NO. 2013-000895

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court erred in permitting a forensic analyst, who merely reviewed the non-testifying forensic analyst's notes, worksheets, and data and who did not personally conduct or observe any of the forensic testing, to offer an opinion based on the non-testifying analyst's work that the DNA profile developed from the semen on the rectal swabs taken from the complainant matched the DNA profile of Appellant where such testimony violated the Confrontation Clause of the Sixth Amendment.

- II. The Trial Court erred in refusing to charge the jury, as required by the United States Supreme Court in Williams v. Illinois, that (1) out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises; and (2) if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact, where in this case an expert based her opinion on inadmissible testing conducted by and inadmissible conclusions reached by a non-testifying expert.

STATEMENT OF THE CASE

On April 11, 2012, Appellant Steven Lee Morgan was indicted by the Berkeley County Grand Jury for (1) first degree burglary; (2) first degree criminal sexual conduct; (3) kidnapping; (4) attempted murder ; and (5) possession of a knife during the commission of a violent crime. R.392.

Appellant was tried before the Honorable R. Markley Dennis, Jr. and a jury on April 19-23, 2013. R. 1. Appellant was represented by Chad D. Shelton and Keisha V. White, and the State was represented by Deputy Solicitor Bryan A. Alfaro and Assistant Solicitor Anne M. Williams. Id.

The jury found Appellant guilty on all counts. R. 375, l. 7 – 376, l. 9. Judge Dennis sentenced Appellant to forty (40) years for first degree burglary and thirty (30) years each for the counts of first degree criminal sexual conduct, kidnapping, and attempted murder with those sentences to run concurrent to the forty year first degree burglary sentence. R. 383, ll. 5-19; R. 392 (Sentence Sheets). For possession of a knife during the commission of a violent crime, Judge Dennis sentenced Appellant to five (5) years which was to run consecutive to the forty year first degree burglary sentence. R. 383, l. 20 – 384, l. 6; R. 392 (Sentence Sheet).

Appellant timely filed and served his Notice of Appeal.

ARGUMENT

- I. The Trial Court erred in permitting a forensic analyst, who merely reviewed the non-testifying forensic analyst's notes, worksheets, and data and who did not personally conduct or observe any of the forensic testing, to offer an opinion based on the non-testifying analyst's work that the DNA profile developed from the semen on the rectal swabs taken from the complainant matched the DNA profile of Appellant where such testimony violated the Confrontation Clause of the Sixth Amendment.**

Relevant facts from trial

Rose Lampkin met Appellant several years prior to the trial. Lampkin met Appellant when he came from Georgia to visit his sister for the Thanksgiving holiday, and Appellant's sister introduced Lampkin to Appellant. R. 40, ll. 3-7. At some point, Lampkin and Appellant began to date and he moved in and lived with Lampkin for a little over two years. *Id.* at ll. 8-13. Eventually, the relationship did not work out and Lampkin "put him out" of their home. Lampkin packed up all of his things, put them in a truck, and took the truck to the truck stop. R. 40, l. 15 – 41, l. 5. Lampkin said this occurred on December 14, 2011. R. 41, ll. 8-16.

Lampkin also testified that she owned the truck in which she packed up all of Appellant's belongings and dropped off at the truck stop, but that she decided to "basically give [Appellant] the truck because [she] just didn't want to have anything else to have to do with him." R. 42, ll. 2-15.

On the evening of January 29, 2012, Lampkin went to a birthday party out in the country where she drank a couple of alcoholic beverages and got back home around 2:00 in the morning. R. 42, ll. 15 – 24; 98, ll. 17-20; 157, ll. 10-15; 162, ll. 16-18. After she went to bed, she was awakened by a loud noise and at first thought one of the mirrors in her house

had fallen from one of the walls. She jumped out of bed and ran to the top of the stairs. She alleged that she then saw Appellant running up the stairs. R. 44, ll. 3 – 15.

According to Lampkin, Appellant was upset and grabbed her, allegedly choking and slapping her. He was apparently upset because Lampkin had “put [him] out of this house and [he] had no place to go.” R. 45, ll. 3 – 5. Lampkin alleged that Appellant sexually assaulted her and continued to physically assault her, at one point holding a knife to her neck. R. 45 – 48.

Lampkin testified that Appellant finally left and took her keys with him. R. 65, ll. 11-13. Appellant was apprehended by law enforcement on January 29, 2012 and the truck Appellant was driving – the truck Lampkin had given Appellant when she put him out of the house – was returned to Lampkin. Before the truck was returned to Lampkin, it was searched but no evidence was found. Lampkin sold this truck to a friend named Victor Mazyck around the end of March 2012 – approximately two months after she alleged Appellant attacked her. Therefore, this truck was in the sole possession of Lampkin for about two months after the incident. When Mazyck was changing out the center console of the truck, he found Lampkin’s keys and a knife under the console. R. 65, l. 14 – 66, l. 18; 68, ll. 15 – 22; 69, ll. 7-20; 89, ll. 18-24; 177, ll. 9-21; 182, ll. 9-18; 185, ll. 4-7; 192, l. 16 – 193, l. 4. Law enforcement obtained custody of the knife on April 3, 2012 and obtained the keys on April 6, 2012. R. 177, l. 22 – 178, l. 16.

Lampkin was examined by a sexual assault nurse examiner (“SANE”) who collected swabs from areas of Lampkin’s body thought to perhaps contain DNA, including oral, vaginal, rectal, and external genital swabs. The SANE nurse also collected a known DNA swab from Lampkin R. 147, ll. 4 – 5; 149, l. 13 – 156, l. 11. The SANE nurse noted that

there were no injuries to Lampkin's back area, wrists, ankles, vagina or anus. R. 161, l. 8 – 162, l. 1.

A DNA analyst from Intelligenetics, Dr. Daniel DeMiers, testified that DNA of Appellant was found on certain items taken from Lampkin's home by law enforcement for analysis, including a green corduroy jacket belonging to Lampkin, torn pieces of a white towel, wire hangers, and two cigarette butts. R. 229, l. 6 – 232, l. 14; 242, l. 4 – 248, l. 23. DeMiers acknowledged that if someone had lived in a home, DNA of that person could be transferred to certain objects within the home. R. 262, l. 1 - 266, l. 8.

DeMiers also ran tests on the knife found in the truck by Victor Mazyck. The knife blade contained a DNA mixture of three people. Lampkin matched the mixture profile found on the knife blade, but Appellant was excluded from the knife blade. DeMiers testified that Appellant did not match the mixture profile found on the knife blade R. 248, l. 24 – 249, l. 17; 272, l. 22 – 273, l. 13. The knife was a flip open knife that had to be touched by the blade to open it. R. 273, ll. 6 – 10. While DeMiers could not say who else handled the knife blade, he could say “with certainty that there were three people – three people who handled or were in contact with [the] blade at some point.” Appellant was not one of those three people. R. 249, l. 18 – 250, l. 1.

DeMiers also tested the handle of the knife. He again obtained a mixture of at least three people and could not exclude Lampkin or Appellant as one the contributors. DeMiers testified that the third person was unknown. R. 250, ll. 8-18; 273, l. 14 – 274, l. 8. DeMiers also testified that Mazyck, the person who found the knife, was excluded as a contributor of the DNA mixture found on both the knife blade and handle. R. 250, l. 19 – 251, l. 1.

The last witness to testify at trial was Amanda Webb. She was employed by the South Carolina Law Enforcement Division (“SLED”) as a DNA case analyst. R. 278, ll. 6-14. Analyst Webb was not the SLED forensic analyst who tested the evidence collected by the SANE nurse during the sexual assault examination of Lampkin. Rather, this evidence was tested by Mary Boehm, another forensic analyst in the DNA department of SLED. R.*(State’s Motion *in Limine* to Include Expert Testimony).

Prior to trial, the State filed a motion *in limine* seeking to admit the testimony of Analyst Webb contending that Analyst Webb “reviewed the results, work sheets, specimens, procedures and protocols used in the original testing and formulated her own expert opinion based on the review.” Id. The Stated based its motion in part on the opinion issued by the Supreme Court of the United States in Williams v. Illinois, 132 S. Ct. 2221 (2012) which permitted an expert witness from the Illinois State Police Laboratory to testify that a DNA profile produced by an independent, outside laboratory from a vaginal swab of the victim matched a DNA profile produced by the state police lab using a sample of the defendant’s blood. Id.

The State asserted in its motion *in limine* that the introduction of Analyst Webb’s testimony would not violate the Confrontation Clause of the United States Constitution and requested the Trial Court to admit the expert opinion of Analyst Webb regarding Appellant’s DNA profile compatibility with evidence collected in the sexual assault kit. The State also asserted in this motion that the original analyst would be on medical leave. Id.

The State also argued in its motion that Analyst Webb’s testimony would be proper under Rule 703, SCRE which 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.” Id.

During pre-trial hearings, the solicitor raised the motion *in limine* to the Trial Court and argued that the recent opinions of the United States Supreme Court supported allowing a forensic scientist to testify about the results of tests conducted by another forensic scientist. R. 6, l. 23 – 7, l. 4. The solicitor acknowledged that he could bring in the original analyst, but that she was on maternity leave so he did not want to have to bring her in to testify about her test results. R. 7, l. 25 – 8, l. 5.

Defense counsel objected “on the grounds that this is essentially a backdoor way for the Solicitor to get in the analyst’s opinions without the analyst being present.” R. 8, l. 22 – 9, l. 2.

The Trial Court ruled against Appellant:

This isn’t foreign to me either. This happens every day in civil court. Doctors typically in malpractice cases review files and then render opinions. This is what we are talking about. I mean, it really is nothing new insofar as the world of expert testimony. As we know, the Rule doesn’t even say that it has to be admissible, that they can consider anything. You can’t bring out inadmissible evidence. You can in cross-examination, or the Court can. But clearly a witness – if the witness is qualified and then meets the other requisite tests that are outlined in Watson¹ and its progeny, then, folks, I have no problem with it.

R. 7, ll. 6-19.

¹ Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010).

The Trial Court went on further:

[T]o my knowledge, it's the law. I was involved in this case, indirectly. I sat right over there and watched the trial, *Jackson v. Humble Oil*. My former doctor – I guess that he was – he was a part-time physician, Dr. Robert Solomon. He was contacted on Friday. The case went to trial on Monday. I think Buster Holland and Tommy Tisdale were the defense counsel. George Bishop and Bob Wallace tried the case – Big George, not Little George. The issues were whether or not this witness could render an opinion. He never saw the plaintiff in his life, he just read the records. But he rendered an opinion about the injuries that the plaintiff sustained.

...

[T]hat's just a common practice, at least in the civil side, that's been done for years. We typically – and I'll tell you the strategy behind it. We have a doctor from Charleston that before – before county lines really disappeared, if you tried a case in Berkeley before a Berkeley jury you wanted a doctor that a Berkeley jury was likely familiar with. That was the reason that you their faces and their opinions, because it might carry a little more weight than somebody that they didn't know.

But – so it's not . . . uncommon

R. 9, l. 3 – 10, l. 10.

The Trial Court therefore permitted Analyst Webb to testify about the DNA testing conducted by another SLED forensic analyst and express an opinion about whether the swabs taken from Lampkin matched the semen DNA profile of Appellant. Analyst Webb testified that she conducted a peer review of the testing conducted and report prepared by the other analyst, Analyst Boehm, in this case. Analyst Webb also testified that she reviewed the whole case file before her trial testimony. R. 280, l. 1 – 281, l. 1.

Analyst Webb testified that for this case, she reviewed the following: (1) the case report, which contained a list of all the items that were submitted to SLED for this case for analysis; (2) the incident report and crime scene information; (3) medical notes, including the SANE nurse's medical notes; and (4) the lab bench notes and scientific data that the

Analyst Boehm used to perform her analysis and reach her conclusions for her report. R. 281, l. 22 – 282, l. 14. Analyst Webb also testified that she review the sexual assault kit received from Lampkin and the oral swab taken from Appellant. R. 282, l. 15 – 283, l. 1. The notes and results of Analyst Boehm were not admitted into evidence.

Analyst Webb said she also reviewed Analyst Boehm's laboratory evidence worksheet and notes and did not find anything written by Analyst Boehm that indicated any of the evidence was compromised, such as evidence not properly being sealed. R. 283, l. 16 – 284, l. 25.

Analyst Webb testified that she reviewed the case notes of all the preliminary testing conducted by Analyst Boehm to test for the presence of sperm or semen on the slides and that based off her review of these case notes, she formed an expert opinion as to what was identified on these slides in the preliminary testing. R. 285, l. 23 – 286, l. 7. Analyst Webb testified that based on her review of the case notes, her expert opinion was the following:

Semen was indicated on the vaginal swabs. No semen was identified on the oral swabs. Semen was identified on the rectal swabs. Semen was indicated on all of the following:

External genitalia swabs.

Another set of vaginal swabs.

Perianal swabs.

Perineum swabs.

R. 286, l. 8 – 16.

Analyst Webb further testified that based on her review of the records, that only DNA from Lampkin was found on the vaginal swabs and that a male profile could not be developed. R. 288, ll. 5-16.

Based on her review of the records of the rectal swabs, Analyst Webb testified that she formed an expert opinion as to a male profile on the semen that was found on the rectal swabs and that in her opinion, the “DNA profile developed from the semen on the rectal swabs matche[d] the semen profile of [Appellant].” R. 289, l. 21 – 290, l. 6.

On cross-examination, Analyst Webb admitted that she was not present when the items were first run through the machines and analyzed and that she was not with Analyst Boehm when Boehm was conducting the laboratory work. Analyst Webb only reviewed Analyst Boehm’s “notes, worksheets and data.” R. 290, ll. 18 – 24. Therefore, Analyst Webb acknowledged that she was completely relying upon all of Analyst Boehm’s work and data that Analyst Boehm produced in reaching her own opinions and conclusions. Analyst Webb further acknowledged that she had to assume that everything Analyst Boehm did was correct. R. 290, l. 25 – 291, l. 6.

Analyst Webb also testified that SLED had procedures and guidelines that must be followed so that there is not cross-contamination or any type of transfer of DNA or cells. R. 292, ll. 5-9. Some of these procedures including wearing personal protective equipment such as gloves, lab coats, masks, and safety goggles. It is mandatory to change gloves between samples in different cases and in between evidence such as buccal swabs so there cannot be any cross-contamination. Instruments such as scissors have to either be changed or cleaned with a bleach and water solution, followed by an ethanol and alcohol wipe.

Analysts needs to make sure not to sneeze, cough, touch their face, or talk over the evidence they are analyzing. R. 292, l. 10 – 293, l. 23.

In this case, Analyst Webb conceded that since she did not perform any of the analysis of the evidence in the case, she had to rely on Analyst Boehm doing everything correctly. R. 293, l. 24 – 294, l. 2.

At the close of the evidence, the Trial Court stated that all pre-trial and objections made during trial were noted and preserved for the record. R. 309, ll. 6-20.

Discussion

The Trial Court's admission of Analyst Webb's expert testimony that a DNA profile generated from an oral swab taken from Appellant matched a DNA profile obtained from the semen on a rectal swab taken from Lampkin was erroneous where the admission of Analyst Webb's expert testimony violated Appellant's Confrontation Clause rights. Analyst Webb was not the actual analyst who conducted the testing and concluded that there was a DNA match. The Trial Court based his ruling on the fact that this is done all the time in civil cases, but this is not a civil case and the Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Therefore, as an initial matter, the Trial Court erred in applying what may be done in civil cases to a criminal trial in which the accused defendant is guaranteed certain rights under the United States Constitution.

Secondly, the Trial Court erred in allowing Analyst Webb's testimony where the Confrontation Clause prohibits a forensic expert, who merely reviewed a non-testifying forensic analyst's reports, notes, and results and who did not personally conduct or observe

any of the relevant analysis, from testifying regarding the non-testifying analyst's procedures and conclusions and opine on the non-testifying analyst's results.

This procedural protection provided under the Sixth Amendment applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, (1965). In Crawford v. Washington, 541 U.S. 36, 68–69 (2004) the Supreme Court of the United States unanimously found the criminal defendant's Confrontation Clause rights had been violated by the admission into evidence a tape recording of a non-testifying person's "testimonial" statement to police. The Court in Crawford held that the Confrontation Clause guarantees a defendant's right to confront those "who bear testimony" against him. Id. at 51. Crawford changed the law to prohibit the admission of testimonial, out-of-court statements unless two conditions are met: the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. Id. at 68. Otherwise, a witness's testimony against a defendant is inadmissible at trial. Id.

Thereafter, in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) the Supreme Court found sworn certificates from forensic analysts, which were admitted at trial to attest that the substance seized from the criminal defendant was cocaine, were testimonial in nature and thus subject to the Confrontation Clause. The Supreme Court noted "the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance," and held that the analysts were "witnesses" for the purposes of the Confrontation Clause and that the testimonial statements were "against" the criminally accused because they proved a fact necessary for his conviction—namely, that the substance he possessed was cocaine. Id. at 311–12. The defendant was entitled to "be confronted with" the analysts at trial. Id. at 311. The Court recognized that

the analysts who conducted the testing and swore in affidavits as to the results of the test were subject to confrontation, no matter how reliable they were and even if they possessed the “scientific acumen of Mme. Curie and the veracity of Mother Theresa.” *Id.* at 319, n.6.

Two years later, the Supreme Court decided Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). Bullcoming was arrested on charges of driving while intoxicated (“DWI”). The principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming’s blood-alcohol concentration (“BAC”) was above the threshold for aggravated DWI. At trial, the prosecution did not call the analyst who signed the certification as a witness, but instead called another analyst who was familiar with the laboratory’s testing procedures but who had neither participated in nor observed the testing of Bullcoming’s blood sample. The New Mexico Supreme Court held that although the BAC analysis was testimonial, the Confrontation Clause did not require the certifying analyst’s in-court testimony. Rather, the New Mexico Supreme Court held that live testimony of another analyst satisfied the constitutional requirements where this analyst was available for cross-examination regarding the operation of the testing machine, the results of the BAC test, and the laboratory’s procedures *Id.* at 2709-10, 2713.

The United States Supreme Court reversed the New Mexico Supreme Court and held that the Confrontation Clause prohibited the prosecution from introducing a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the in-court testimony of an analyst who did not sign the certification or perform or observe the testing of the defendant’s blood sample. The Court affirmed the accused’s right to be confronted with the analyst who made the certification

unless the analyst was unavailable at trial and the accused had a pre-trial opportunity to cross-examine the analyst who conducted the testing. Id. at 2710, 2713.

This case is fundamentally indistinguishable from Bullcoming, even though the State did not seek to introduce the actual report and results of Analyst Boehm regarding the match of Appellant's DNA to the rectal swabs taken from Lampkin. As in Bullcoming, the State sought to admit into evidence the results of Analyst Boehm's testing without calling her at trial but instead by calling another analyst who was familiar with SLED's testing procedures but who had neither participated in nor observed the testing conducting by Analyst Boehm. It is undisputed that Appellant never had an opportunity prior to trial to cross-examine Analyst Boehm. In addition, State never made a proper showing that Analyst Boehm was unavailable and acknowledged that she could be called to trial but the State just did not want to do that since Analyst Boehm was on maternity leave. R. 8, ll. 1-3.

That Analyst Webb may have given her own opinion as to Analyst Boehm's testing is also of no matter. The constitutional violation in Bullcoming stemmed from the introduction of the non-testifying analyst's testimonial statements, not any failure of the testifying analyst to offer his personal opinion about them. Bullcoming, 131 S. Ct. at 2715-16. As the Court in Bullcoming put it, "when the State elected to introduce [the non-testifying analyst's] certification, the [non-testifying analyst] became a witness Bullcoming had the right to confront." Id. at 2716. Once the prosecution introduced that evidence, nothing that the testifying witness did in preparation for testifying, or that he might have said on the witness stand, could erase the defendant's right to confrontation. Id.

Therefore, when Analyst Webb testified that based on her review of the records of Analyst Boehm, including Analyst Boehm's notes, worksheets and data, that she came to

the conclusion that the “DNA profile developed from the semen on the rectal swabs matche[d] the semen profile of [Appellant],” Agent Webb was merely just repeating Agent Boehm’s findings. R. 289, l. 21 – 290, l. 6; 290, ll. 20-22.

The United States Constitution guarantees that a defendant be able to challenge or verify the results of a forensic test through confrontation. Melendez-Diaz, 557 U.S. at 318. The Supreme Court in Melendez-Diaz expounded on the importance of a defendant’s ability to confront the analyst who conducted the forensic test:

Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 6–1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” *Id.*, at S–17. A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of ensuring accurate forensic analysis. While it is true . . . that an honest analyst will not alter his testimony when forced to confront the defendant, post, at 2548, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as *Amicus Curiae* 15–17 (discussing cases of documented “drylabbing” where forensic analysts report results of tests that were never performed); National Academy Report 1–8 to 1–10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See Coy v. Iowa, 487 U.S. 1012, 1019, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that

“[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.” Metzger, Cheating the Constitution, 59 Vand. L.Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L.Rev. 1, 14 (2009). And the National Academy Report concluded:

“The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.” National Academy Report P-1 (emphasis in original).

...

Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Id. at 318-20.

Analyst Webb’s testimony in this case demonstrates the limitations on Appellant’s ability to confront the actual analyst who conducted the tests on the swabs taken from Lampkin and himself. Analyst Webb acknowledged that SLED had many procedures and guidelines that had to be followed for the testing of DNA evidence to prevent any cross-contamination, but she had no idea what procedures Analyst Boehm used or what precautions Analyst Boehm took to ensure there was no cross-contamination between Appellant’s DNA sample and the swabs taken from Lampkin. She had to simply assume that Analyst Boehm conducted her testing correctly. R. 290, 1. 25 – 294, 1. 2. Confrontation is necessary in “testing analysts’ honesty, proficiency, and methodology – the features that are commonly the focus in the cross-examination of experts.” Melendez-Diaz, 557 U.S. at 321.

The State, in its motion *in limine*, relied on the recent United States Supreme Court opinion in Williams v. Illinois, 132 S. Ct. 2221 (2012) for the admission of Analyst Webb’s testimony. The Court’s opinion in Williams, however, is wholly distinguishable from this case.

In Williams, the defendant was accused of abducting, raping, and robbing the alleged victim. Id. at 2229. The doctors who treated the victim took vaginal swabs for a sexual assault kit; a police detective collected the kit, and sent it to the Illinois State police laboratory. Id. The State police laboratory sent the swabs to Cellmark in Maryland for DNA testing, and Cellmark “sent back a report containing a male DNA profile produced from semen taken from those swabs.” At this time, the defendant was not under suspicion for the rape. Id. A forensic specialist at the State police laboratory then conducted a computer search to determine if the Cellmark profile matched any entries in the State DNA database. Id. The search revealed a match with a DNA profile produced by the State police laboratory from a sample of the defendant’s blood taken after he had been arrested on unrelated charges. Id.

At the bench trial of the defendant in Williams, the prosecutor called a forensic analyst at the State police laboratory who testified that she developed a DNA profile from a known blood sample of the defendant. Id. The prosecutor did not call as a witness any employee of Cellmark who participated in developing the DNA profile taken from the semen on the vaginal swabs, or who knew the procedures and protocols used by Cellmark in developing a DNA profile. Id. at 2229–2230. Instead, the prosecutor called an expert witness in forensic biology and DNA analysis from the State police laboratory who “admitted she had not seen any of the calibrations or work that Cellmark had done in

deducing a male DNA profile from the vaginal swabs,” but trusted Cellmark to do reliable work because it was an accredited laboratory. Id. at 2230. Over objection, this expert testified, based on her comparison of the two DNA profiles, that there was a “match” between the DNA profile found in semen from the vaginal swabs taken from the victim and the known DNA profile of the defendant, and that the probability of a random match was one in 8.7 quadrillion in the black population, one in 390 quadrillion in the white population, and one in 109 quadrillion in the Hispanic population. Id. at 2230, 2236. The Cellmark report was neither admitted in evidence nor shown or read to the judge; moreover, it was not identified as a source of any of the expert's opinions. Id. at 2230.

In considering the admissibility of the expert's testimony, five of the nine Supreme Court Justices concluded in Williams that the trial judge did not err in admitting this evidence, with the plurality opinion being authored by Justice Alito and joined by three other Justices. The plurality opinion concluded that the evidence was admissible on two independent grounds. First, the plurality determined that the expert witness's statement that the DNA profile generated by Cellmark that matched the defendant's profile was “found in semen from the vaginal swabs” was not offered for the truth of the matter asserted. Id. at 2236–2237. Rather, the plurality stated that the expert witness “simply assumed” this to be true when she offered her opinion that there was a match between the two DNA profiles, and that the judge, who was the finder of fact at the bench trial, understood it to be nothing more than an assumption. Id. Because the confrontation clause of the Sixth Amendment to the United States Constitution does not bar the admission of testimonial statements unless they are offered for the truth of the matter

asserted, the plurality concluded that there was no Confrontation Clause violation. Id. at 2235, 2240. .

Second, the plurality concluded that even if the expert's statement were admitted for its truth, there still would be no Confrontation Clause violation because Cellmark's DNA report regarding the vaginal swab “plainly was not prepared for the primary purpose of accusing a targeted individual.” Id. at 2243. The plurality reasoned:

Here, the primary purpose of the Cellmark report, viewed objectively, was not to accuse [the defendant] or to create evidence for use at trial. When the [Illinois State police laboratory] sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculcate [the defendant]—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no ‘prospect of fabrication’ and no incentive to produce anything other than a scientifically sound and reliable profile.”

Id. at 2243–2244.

What occurred in Appellant’s case is materially distinguishable from those facts presented to the Supreme Court in Williams.” First, the analyst in Williams conducted her own testing based upon the DNA information she had received from Cellmark. Id. at 2237. Analyst Webb did not conduct any of her own testing.

Second, unlike in Williams, the fact finder in this case was a jury, not a judge.

The plurality in Williams acknowledged that:

[T]he putatively offending phrase in [the analyst’s] testimony was not admissible for the purpose of proving the truth of the matter asserted— i.e., that the matching DNA profile was “found in semen from the vaginal swabs.” Rather, that fact was a mere premise of the prosecutor's question, and [the analyst] simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles. There is no reason to think that the trier of fact took [the

analyst's] answer as substantive evidence to establish where the DNA profiles came from.

The dissent's argument would have force if [the defendant] had elected to have a jury trial. In that event, there would have been a danger of the jury's taking [the analyst's] testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs. Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury.

Id. at 2236. Here, the jury likely considered Analyst Boehm's notes, worksheets and data that Analyst Webb relied upon for their truth, rather than as an assumption applied to reach Analyst Webb's conclusion. The testing Analyst Boehm conducted was done for the purpose of proving the truth of what her testing asserted – that Appellant's DNA profile matched the semen found in the rectal swabs taken from Lampkin. This is no different from than the purpose of the forensic reports admitted in Bullcoming and Melendez-Diaz: in Bullcoming that the defendant's blood alcohol level exceeded the legal limit and in Melendez-Diaz that the substance in question contained cocaine. When Analyst Webb referred to Analyst Boehm's notes, worksheets, and data, Analyst Webb did so to prove the truth of the matter asserted in Analyst Boehm's findings. Cf. Williams, 132 S. Ct. at 2240 (“[The analyst] referred to the [Cellmark report] not to prove the truth of the matter asserted in the report, *i e*, that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood.”).

Third, in contrast with Williams, the “primary purpose” of the Analyst Boehm's work in the instant case was to accuse Appellant and create evidence for use at trial because the DNA testing was conducted with the knowledge that Lampkin had accused Appellant as the assailant. Because Appellant had already been identified as a suspect

and because his DNA sample had already been taken, there was a real possibility of sample contamination, sample switching or mislabeling when Analyst Boehm conducted her testing to determine whether Appellant's DNA sample matched the profile derived from Lampkin's rectal swabs. But because the State did not call Analyst Boehm to testify, Appellant was prevented from confronting her about her testing procedures and the precautions she took to determine if there were any deficiencies in her testing.

This is the exact opposite of what happened in Williams where when Cellmark produced a DNA profile from the semen found in the victim's vaginal swabs, the "[defendant] had not yet been identified as a suspect, and there [was] no suggestion that anyone at Cellmark had a sample of [the defendant's] DNA to swap in by malice or mistake." Id. at 2244.

Where none of the grounds relied on by the plurality in Williams would apply to the facts in the instant case, the testimony of Analyst Webb, which was based on the work conducted by Analyst Boehm, was inadmissible at Appellant's trial. The State's additional reliance on Rule 703, SCRE does not change the inadmissibility this testimony. While this rule permits expert witnesses to offer opinions on information that is otherwise inadmissible if it is of a type reasonably relied upon by other experts in the field, a defendant's Sixth Amendment right to confrontation is not subject to the "vagaries of the rules of evidence." Crawford, 541 U.S. at 61. Accordingly, Rule 703 cannot cure what is otherwise constitutionally impermissible. When the testifying expert relies upon the non-testifying expert's work and results, the testifying expert validates the testimonial evidence on which she relied, and the defendant cannot meaningfully challenge that evidence without access to the absent analyst.

Accordingly, the Trial Court erred in permitting Analyst Webb to testify where the Confrontation Clause prohibits a forensic expert, who merely reviewed the non-testifying forensic analyst's notes, worksheets, and data and who did not personally conduct or observe any of the forensic testing, to offer an opinion based on the non-testifying analyst's work. Appellant is entitled to a new trial.

II. The Trial Court erred in refusing to charge the jury, as required by the United States Supreme Court in Williams v. Illinois, that (1) out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises; and (2) if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact, where in this case an expert based her opinion on inadmissible testing conducted by and inadmissible conclusions reached by a non-testifying expert.

After the Trial Court ruled that Analyst Webb would be allowed to testify, defense counsel for Appellant asked the Trial Court to provide the jury instructions that the United States Supreme Court instructed to be given as safeguards in cases where an expert expresses an opinion based on factual premises not supported by any admissible evidence and which may also reveal the out-of-court statements on which the expert relied. R. 11, l. 1 – 18; William, 132 S. Ct. at 2241. Specifically, the Court stated in Williams:

Third, if [inadmissible] evidence is disclosed [to the jury by an expert], the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises. . . . And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact.

Williams, 132 S. Ct. at 2241.

The Trial Court refused to give these required jury instructions, ruling “[t]hat’s a charge on the facts.” R. 11, l. 19 – 13, l. 2. The Trial Court’s refusal to give these requested instructions mandated by the United States Supreme Court constituted reversible error.

“To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” State v. Mattison, 388 S.C. 469, 479,


697 S.E.2d 578, 583 (2010). “A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues.” State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court commits reversible error where it fails to give a requested charge on an issue raised by the evidence. Id. at 406, 649 S.E.2d at 50. When reviewing the trial court’s refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512–13 (2000).

Here, the evidence warranted the jury charges outlined by the United States Supreme Court in Williams. Analyst Webb’s opinion that the “DNA profile developed from the semen on the rectal swabs matche[d] the semen profile of [Appellant]” was palpably based on the work and results of Analyst Boehm which were not admissible at trial where Analyst Boehm did not testify. R. 289, l. 21 – 290, l. 6. The jury charges set forth by the Court in Williams were required and necessary to limit the jury from relying upon inadmissible evidence in rendering its verdict. The Trial Court’s refusal to give the jury charges set forth in Williams entitles Appellant to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Steven Lee Morgan respectfully requests this Court to reverse his convictions and remand for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of February, 2015.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN LEE MORGAN,

APPELLANT.

APPELLATE CASE NO. 2013-000895

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of February, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of February, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.