STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-002129

Indictment No. 2012-GS-10-6844-06845, 06846

STATE OF SOUTH CAROLINA, **Appellant,**

v.

MARVIN BROWN, **Respondent.**

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT ON REPLY

I. In response to the asserted additional sustaining ground, the statement made by the deceased as a dying declaration is not inadmissible as a violation of the Confrontation Clause.

In the Brief of Respondent Marvin Brown, he contends that even if the trial judge erred in excluding the statement as a dying declaration, it would still be inadmissible as a testimonial statement in violation of the Confrontation Clause. The State submits that the assertion of additional sustaining ground is without merit in this appeal.

The Appellant recognizes that Respondent, as prevailing party in the trial court, may raise on appeal any additional reasons the appellate court should affirm the trial court's ruling, regardless of whether those reasons have been presented to or ruled on by the trial court, although the basis for respondent's additional sustaining grounds must appear in the record on appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). However, it remains a discretionary decision for the court.

For the reasons set forth below, the issue is not a sustaining ground because a dying declaration does not violate the Confrontation Clause.[1]

HOW THIS ISSUE WAS RAISED BELOW

Respondent Brown is correct that in addition to moving to exclude the deceased's statement to police as not falling within the hearsay exception of a dying declaration, he moved to exclude the statements as violating his right to confront his accusers under the Sixth

[1] The State of South Carolina incorporates by reference its Initial Brief of Appellant in support of its position that the statement was admissible as a dying declaration because it was made with an imminent belief of death. The evidence reflected in the grandfather's statements reveals that he had lost any expectation of living. Further, contrary to the Respondent's assertion, the State's argument concerning "imminent death at the time the declaration is made" is that it is a factor, but that there is not defined time as shown by the caselaw.

Amendment's Confrontation Clause. R. *(Memo at 2). Further, Brown moved to exclude the statements as violating the South Carolina Constitution. R.*(Memo in Support of Motion to Suppress Hearsay Testimony, dated March 25, 2013 at 2-13)(*citing State v. Green*, 269 S.C. 657, 239 S.E.2d 485 (1977) and S.C. Constitution, art. I, § 14). ROA p. _. The Solicitor's Office responded that it was not a violation of the Confrontation Clause, citing *Crawford v. Washington*, 124 S.Ct. 1354, n. 1367, n. 6 (2004). State's "Source Citations in Response to Defense Motion to Suppress Statement. ROA p. _.

On March 26, 2013, a suppression hearing was held before the Honorable Stephanie McDonald, then Circuit Court Judge. At the hearing, testimony was received from former investigator Jerome Fleming (Tr. 8-44), the victim's grandfather, David Allen Brunson, Jr. (Tr. 45-48), 67-70, the victims' father, David Allen Brunson, III (Tr. 49-57), the victim's sister, Dendria Brunson, (Tr. 57-59) and the victim's brother, Desmonte Brunson, (Tr. 59-62). After testimony, argument was heard from counsel. Tr. 63-67. At that point, the victim's grandfather was recalled concerning the timing of his conversations with the victim. Tr. 67-70.

At that point, further argument was heard on the Confrontation Clause and "dying declaration" issue. Tr. 70-90. [Argument was also heard on a Neil v. Biggers issue concerning the identification procedures concerning a separate motion. Tr. p. 90-96. Judge McDonald orally found the identification was not "unduly suggestive" and reliable. Judge McDonald concluded she "would not exclude the identification under *Neil v. Biggers*. Tr. p. 96, ll. 2-25]. Judge McDonald took under advisement the issue of whether the statement qualified as a "dying declaration" and whether it was a Confrontation Clause violation under *Crawford v. Washington*, 541 U.S. 36 (2004).

On December 10, 2013, a hearing was convened to address the dying declaration issue and bond. At the hearing Judge McDonald made an oral ruling concluding it did not qualify within Rule 804(b)(2), SCRE concerning a statement upon belief of impending death. Dec. 10, 2013 Tr. p. 3, 14-15. The trial court did not address the Confrontation Clause issue. Tr. 3-8.

On August 18, 2014, Judge McDonald filed a written Order styled "Order Granting Defendant's Motion to Exclude Hearsay Testimony of victim's Identification." In particular, Judge McDonald concluded that: "neither the medical records nor other evidence in the case demonstrates that the victim was aware of his imminent death when identifying the photograph of the defendant in a six-pack line-up." Order, p. 4. Although the lower court summarized the arguments by the State and Defense concerning the Confrontation Clause, it did not address the merits based upon its conclusion.

ANALYSIS OF THE CONFRONTATION CLAUSE ISSUE

Assuming the evidence meets the elements of a dying declaration, it does not violate the Confrontation Clause of either the United States Constitution or South Carolina Constitution. Therefore it is not appropriate as an additional sustaining ground. The Confrontation Clause of the Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him" in a criminal prosecution. U.S. Const. amend. VI. The provision is applicable to the states under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The South Carolina constitution provides the same protection to a defendant. S.C. Const. art. I, § 14. *See State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009). While testimonial statements under Crawford are not subject to the exceptions to the hearsay rules, they may nevertheless be admissible under one of the two historical exceptions to

the Confrontation Clause recognized by the U.S. Supreme Court—forfeiture by wrongdoing and dying declarations. *See Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).

Assuming the statement would be admissible as a dying declarations and admissible under South Carolina Rule of Evidence, Rule 804(b)(2), the challenge by Brown in the Brief of Respondent under the Confrontation Clause of the Sixth Amendment is without merit as a sustaining ground for the trial court's rejection. See Initial Brief of Respondent, pages 36-45. First, in the landmark case of *Crawford v. Washington,* the United States Supreme Court held that "testimonial statements of a witness who did not appear at trial" are inadmissible "unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53–54, 124 S.Ct. at 1365. In a footnote, the Supreme Court acknowledged that a historical exception to the right of confrontation "involves dying declarations," specifically noting that "[t]he existence of that exception as a general rule of criminal hearsay law cannot be disputed" and that "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." *Id.* at 56 n. 6, 124 S.Ct. at 1367 n. 6. The Court reserved the question of whether the Sixth Amendment incorporated "an exception for testimonial dying declarations" and stated that such exception would be "*sui generis.*"[2] *Id.* at 56 n. 6, 124 S.Ct. at 1367 n. 6. Four years later, the Court examined the limited exceptions to a defendant's right of confrontation and observed that *Crawford* stands for the proposition "that the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.' " *Giles v. California,* 554 U.S. 353, 358, 128 S.Ct. 2678, 2682, 171 L.Ed.2d 488 (2008) (quoting

[2] Sui generis is Latin for "of its own kind" and means "[o]f its own kind or class; unique or peculiar." Black's Law Dictionary 1662 (10th ed. 2014).

Crawford, 541 U.S. at 54, 124 S.Ct. at 1354). The Court noted that it had "previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted" and that "[t]he first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying."[3] *Id.* at 358, 128 S.Ct. at 2682.

[29] The Court's statements in *Giles* have been accepted as providing an exception to a defendant's right of confrontation for dying declarations in other jurisdictions. Recently, the Court of Appeals of Maryland, its highest court, joined the chorus of jurisdictions that have formally held that the Confrontation Clause does not apply to dying declarations. *Hailes v. State,* 442 Md. 488, 113 A.3d 608, 621 (2015). The Maryland court discussed the relevant provisions of *Crawford* and *Giles* discussed above and further noted that those cases "were not the first cases in which the Supreme Court indicated that the Confrontation Clause does not apply to dying declarations," observing that:

> [f]or example, in *Maryland v. Craig,* 497 U.S. 836, 847–48, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Supreme Court stated:
>
> We have repeatedly held that the [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. *See, e.g., Mattox* [*v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895)] ("[T]here could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations"[4]); *Pointer v. Texas,* 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (noting exceptions to the confrontation right for dying declarations and "other analogous situations").

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[3] The Court termed the second exception, the scope of which was at issue in the case, as "forfeiture by wrongdoing," which "permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." *Giles*, 554 U.S. at 359, 128 S.Ct. at 2683.

[4] In *Mattox*, 156 U.S. at 243–44, 15 S.Ct. 337 the Supreme Court continued:

> [Y]et from time immemorial[, dying declarations] have been treated as competent [evidence], and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of [evidence], but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.

> Similarly, in *Snyder v. Massachusetts,* 291 U.S. 97, 107, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Supreme Court stated that the Confrontation Clause has not
>
> at any time been without recognized exceptions, as, for instance, dying declarations. *Dowdell v. United States,* 221 U.S. 325, 330, 31 S.Ct. 590, 55 L.Ed. 753 (1911) ("Dying declarations, although not made in the presence of the accused, are uniformly recognized as competent [evidence]." (Citing *Mattox* [ ], 156 U.S. at 243–44, 15 S.Ct. 337)). *Cf. Robertson v. Baldwin,* 165 U.S. 275, 282 17 S.Ct. 326, 41 L.Ed. 715 (1897) (The Confrontation Clause does not "prevent the admission of dying declarations[.]"); *Motes v. United States,* 178 U.S. 458, 472, 473 20 S.Ct. 993, 44 L.Ed. 1150 (1900)[5].
>
> (Italics added). Likewise, in *Kirby v. United States,* 174 U.S. 47, 61, 19 S.Ct. 574, 43 L.Ed. 890 (1899), the Supreme Court stated: "[T]he admission of dying declarations is an exception [to the Confrontation Clause] which arises from the necessity of the cause. **This exception was well established before the adoption of the [C]onstitution, and was not intended to be abrogated.**" (Emphasis added).

113 A.3d at 619–620 (some brackets omitted). The court stated that, as highlighted by the U.S. Supreme Court in *Kirby,* "the Confrontation Clause does not apply to dying declarations" because they "were an exception to the common law right of confrontation when the Sixth Amendment was ratified," and further observed that "[t]his accords with *Crawford* and its progeny, in which the Supreme Court has held that the Confrontation Clause applies to testimonial statements of types as to which—in contrast to dying declarations—there was no exception to the common law right of confrontation when the Sixth Amendment was ratified." *Id.* at 620–621 (citing *Crawford,* 541 U.S. at 40, 68, 124 S.Ct. 1354 (statements against penal interest); *Giles,* 554 U.S. at 357, 359, 377, 128 S.Ct. 2678 ("forfeiture by wrongdoing" under California law); *Davis v. Washington,* 547 U.S. 813, 819, 821, 834, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (excited utterances); *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 324, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (purported business records and public records)). The court held that the victim's identification of defendant Hailes was a dying declaration, that "thus, the Confrontation Clause does not apply," and that accordingly "we need not, and do not, address

whether [the victim's] identification of Hailes was testimonial or non-testimonial, as the distinction is irrelevant in the context of dying declarations." *Id.* at 623.

In the same matter, the Court of Special Appeals of Maryland, as affirmed by the Maryland Court of Appeals, provided a thorough recitation of what it termed a "juggernaut of persuasive authority" for excepting dying declarations from *Crawford* as follows:

> Sixteen of our sister states have considered whether the Dying Declaration is exempted from the coverage of the Confrontation Clause. Sixteen out of sixteen have concluded that it is. In *People v. Monterroso,* 34 Cal.4th 743, 765, 22 Cal.Rptr.3d 1, 101 P.3d 956, 972 (2004), the California Supreme Court addressed the issue squarely:
>
> Thus, if, as *Crawford* teaches, the confrontation clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding," it follows that *the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.*
>
> (Emphasis supplied). *See also Walton v. State,* 278 Ga. 432, 603 S.E.2d 263, 265–66 (2004); *People v. Gilmore,* 356 Ill.App.3d 1023, 293 Ill.Dec. 323, 828 N.E.2d 293, 302 (2005) ("Although the statement just quoted [from *Crawford*] is *dicta,* we view it as a strong indication that the Court does not believe that admitting testimonial dying declarations violates the confrontation clause."); *Wallace v. State,* 836 N.E.2d 985, 996 (Ind.Ct.App.2005) ("[W]e are convinced that *Crawford* neither explicitly, nor implicitly, signaled that the dying declaration exception to hearsay ran afoul of an accused's right of confrontation under the Sixth Amendment.")[, *trans. denied*]; *State v. Jones,* 287 Kan. 559, 197 P.3d 815, 822 (2008) ("Accordingly, we are confident that, when given the opportunity to do so, the Supreme Court would affirm that a dying declaration may be admitted into evidence, even when it is testimonial in nature and is unconfronted."); *Commonwealth v. Nesbitt,* 452 Mass. 236, 892 N.E.2d 299, 310–11 (2008) ("Thus, in the unique instance of dying declarations, we ask only whether the statement is admissible as a common-law dying declaration, and not whether the statement is testimonial."); *People v. Taylor,* 275 Mich.App. 177, 737 N.W.2d 790, 795 (2007) ("For the reasons stated by the Supreme Court of California, we hold that, under *Crawford,* dying declarations are admissible as an historic exception to the Confrontation Clause."); *State v. Martin,* 695 N.W.2d 578, 585–86 (Minn.2005) ("We hold that the admission into evidence of a dying declaration does not violate a defendant's Sixth Amendment right to confrontation within the meaning of *Crawford* because an exception for dying declarations existed at common law and was not repudiated by the Sixth Amendment."); *Grindle v. State,* 134 So.3d 330, 341–44 (Miss.App.2013) ("[W]e are swayed by the United

States Supreme Court's commentary in *Crawford* and *Giles* that, were the matter properly before the Court, the exception would be held to apply."); *Harkins v. State,* 122 Nev. 974, 143 P.3d 706, 711 (2006) ("The Confrontation Clause, like other provisions in the Bill of Rights, is subject to exceptions, 'recognized long before the adoption of the Constitution, and not interfering at all with its spirit.' A dying declaration is one such exception to the Confrontation Clause."); *People v. Clay,* 88 A.D.3d 14, 26–27, 926 N.Y.S.2d 598 (N.Y.App.Div.2011) ("Thus, we read *Crawford* to signify that the substance of the right of confrontation enshrined in the Constitution is informed by the contemporaneous understanding of that right at common law, and is not, instead, an abrogation of it. We therefore conclude that the Supreme Court, having suggested that the common-law right did not encompass dying declarations, would likely determine that the same is true of the Sixth Amendment."); *State v. Calhoun,* 189 N.C.App. 166, 657 S.E.2d 424, 428 (2008) ("We ... follow the majority of the states that have decided this issue and hold that a dying declaration is a 'special exception' under *Crawford* to the Sixth Amendment right to confrontation."); *State v. Kennedy,* 998 N.E.2d 1189, 1202 (Ohio Ct.App.2013) ("In light of this case law, we hold that the Sixth Amendment incorporates an exception for 'the common law pedigree' of dying declarations, even testimonial ones, and that *Crawford* did not alter the rule."); *State v. Lewis,* 235 S.W.3d 136, 148 (Tenn.2007) ("Because the admissibility of the dying declaration is also deeply entrenched in the legal history of this state, it is also our view that the single hearsay exception survives the mandate of *Crawford* regardless of its testimonial nature."); *Satterwhite v. Commonwealth,* 56 Va.App. 557, 695 S.E.2d 555, 560 (2010) ("[W]e hold *Crawford* did not upend the traditional view that dying declarations serve as an exception both to the common law hearsay rule and the constitutional right of a defendant to confront his accusers."); *State v. Beauchamp,* 333 Wis.2d 1, 796 N.W.2d 780, 784–85 (2011) ("Those principles compel the conclusion that allowing this hearsay exception comports with the protections of the Confrontation Clause."). *Contra United States v. Mayhew,* 380 F.Supp.2d 961, 964–65 (S.D.Ohio 2005) (*Mayhew* admitted the dying declaration but rationalized the exemption from the Confrontation Clause as an instance of forfeiture by wrongdoing.).

The academic authorities are in solid accord. [2] McCormick on Evidence, [§ 309, at 507–508 (7th ed. 2013)], stated:

The fact that dying declarations were received at the time the Constitution and the Bill of Rights were formed when the hearsay rule was not yet settled led the Supreme Court in *Crawford v. Washington* to suggest that *even if such a statement is testimonial it would be admissible as an exception to the Confrontation Clause objection.*

(Emphasis supplied).

[6A Lynn] Mclain, Maryland Evidence: State and Federal, § 804(3): 1b, at 771 [(3d ed. 2013)], observed ...:

In *Crawford v. Washington* the U.S. Supreme Court opined that *although some dying declarations might be "testimonial"* for purposes of the confrontation clause, *they would nonetheless be admissible against a criminal accused.*

(Emphasis supplied).

Professor [Peter Nicholas, *"I'm Dying to Tell You What Happened": The Admissibility of Testimonial Dying Declarations Post–*Crawford, 37 Hastings Const. L.Q. 487, 491–492 (2010)], observed in that regard:

In footnote six, the Court took pains to point out that *Crawford* did not technically decide the issue of the admissibility of dying declarations vis-à-vis the Confrontation Clause. But if the post-*Crawford* era to date is any guide, *this dictum will, like other dicta in Crawford, soon become the Law of the Land....* In any event, the Court's holding in *Giles v. California four years later effectively assumes that a dying declaration exception to the Confrontation Clause exists.* Moreover, lower federal courts and state courts that have addressed the issue have, with near unanimity, read footnote six of *Crawford* as creating a dying declaration exception to the Confrontation Clause.

(Emphasis supplied).

Professors [Tim Donaldson and J. Preston Frederickson, *Dying to Testify? Confrontation v. Declaration In Extremis,* 22 Regent U.L. Rev. 35, 77 (2010)], have also noted:

Crawford acknowledged the existence of authority for admitting testimonial dying declarations. *The Supreme Court left no doubt in Giles about its understanding of the status of the dying declaration exception* at the time of founding when it confirmed: "We have previously acknowledged that *two forms of testimonial statements were admitted at common law even though they were unconfronted ... The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying.*" There is no foundation for the assertion that the dying declaration exception was nonexistent at the time that the Bill of Rights was designed.

... Whatever construction a court places on the Confrontation Clause, it is irrefutable that dying declarations were admitted at common law before and after ratification of the Bill of Rights. *If something must yield when reconciling theory and history in this area, the permanence of history should withstand the winds of changing thought.*

(Emphasis supplied).

State v. Hailes, 217 Md.App. 212, 92 A.3d 544, 565–567 (2014), *aff'd,* 442 Md. 488, 113 A.3d 608 (2015).

The Court of Special Appeals opinion in *Hailes* cited the Indiana court's decision in *Wallace v. State,* which observed that defendant Wallace cited *Crawford* without further argument and inferred that Wallace was challenging the admissibility of statements made by the decedent as dying declarations as a violation of his right of confrontation. 836 N.E.2d at 996. The court disagreed and noted "that Crawford neither explicitly, nor impliedly, signaled that the dying declaration exception to hearsay ran afoul of an accused right of confrontation under the Sixth Amendment." *Id.* Then, in *Wright,* defendant Wright conceded, as the court noted approvingly, "that the rule in *Crawford* has a well-recognized exception for dying declarations." 916 N.E.2d at 275.

The State of South Carolina asserts that, contrary to the argument of the Respondent Brown in this setting, that "dying declarations" as provided by South Carolina Evidence Rule 804(b)(2) are excepted from the right of confrontation provided by the Sixth Amendment of the United States Constitution and the South Carolina Constitution. Therefore, it fails as an additional sustaining ground.

CONCLUSION

The State of South Carolina, for the reasons set forth in the Brief of Appellant and Reply Brief respectfully requests that the trial judge's ruling granting the suppression of the April 29 statement of Davon Goodwin be reversed and vacated and the trial court be directed to allow its admission under Rule 804(b)(2), SCRE.

Respectfully submitted,

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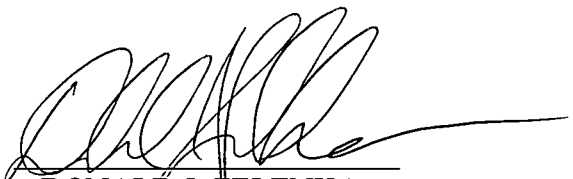
BY: 

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December 7, 2015
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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Initial Reply Brief of Appellant*** in the foregoing action by depositing copies in the United States mail to Susan B. Hackett, Appellate Defender, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 7th day of December, 2015.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

December 7, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Marvin Brown
Appellate Case No. 2014-002129

Dear Ms. Kitchings:

Enclosed please find the Initial Reply Brief of Appellant in the above-referenced matter for the Court's review and consideration. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosure

cc: Susan Hackett, Esquire
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Trisha Allen, Victims Assistance