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.**

STATE'S PETITION FOR REHEARING

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar No. 5758
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, S. C. 29401

The Appellant State of South Carolina hereby makes a Petition for Rehearing in the above-captioned case pursuant to SCACR Rule 221. The Respondent submits the Court of Appeals panel overlooked or misapprehended the following points in its opinion in State v. Marvin Reginald Brown, Appellate Case No. 2014-002129, OP. No. 5506 (S.C.Ct. App. August 2, 2017). The State would show the Court the following:

1. The standard of review portion set forth the following in its opinion:

> Thus, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." *Id.* "**The determination by the [circuit] court of the preliminary facts**, on which the competency of a dying declaration depends, will not be disturbed on appeal '**unless clearly incorrect and prejudicial.**' " *State v. Bethea*, 241 S.C. 16, 23, 126 S.E.2d 846, 849-50 (1962) (quoting *State v. Smalls*, 87 S.C. 550, 551, 70 S.E. 300, 301 (1911)).

State v. Brown, No. 2014-002129, 2017 WL 3272134, at *3 (S.C. Ct. App. Aug. 2, 2017).

2. However, the Court of Appeals recognized that the hearing judge made a significant and unsupported finding of fact that there was evidence that the victim was seeking revenge against Brown in support of its conclusion of conflicting with "both an awareness of imminent death as well as one who has given up all hope of survival." As stated by this Court, it found:

> No evidence was presented at the suppression hearing that Goodwin planned to seek revenge against Brown, and the evidence Brown identified in his brief is not evidence Goodwin was planning to seek revenge. **Therefore, we find the conclusion of the circuit court as to revenge was erroneous.**

State v. Brown, No. 2014-002129, 2017 WL 3272134, at *5 (S.C. Ct. App. Aug. 2, 2017).

3. The Court of Appeals panel however, concluded that "this error did not prejudice the State." This finding and conclusion overlooked the significance of the finding and its impact.

A. First, it cannot be questioned that if there was evidence that the victim after being shot by Brown was in fact planning on seeking revenge on Brown at the time he made the statement that it would have defeated any assertion that he had a belief in his imminent death. This mistaken fact of intended revenge by him in the future would override any medical evidence or other comments that he may have had with family members. The prejudicial impact of this unsupported conclusion by the hearing judge cannot be understated.

B. Second, the reliance by the Court of the fact that the hearing judge did not rely solely in its written order on the unsupported or at all in its verbal order is confusing at best and simply does not support the emphasis given on it by the Court of Appeals. The State submits that the Court in appellate review would be leading the standard of review down a slippery slope if it forgives mistaken and critical findings of fact in later written orders merely because in an earlier oral order the Court did not make reference to it. It is difficult to see how this mistake does not only enhance the prejudice to the mistake, but secures it in this case. The hearing judge found it important enough to support her decision to add it to the analysis.

This is not one-sided. Davon Goodwin did express a belief the his death was impending due through his contact with his grandfather in his expression to him of regret that he would no longer be taking rides with him. R. 47-48, Tr.p. 47-48. Any question about the intent of such an expression was resolved by the recipient of that statement who unequivocally stated "he just pretty much point blank said he wasn't going to make it –he didn't think he was going to make it." R. 70, Tr.p. 70, ll. 2-4. Judge McDonald did not address this strong statement in her written order, although during the hearing, she considered the testimony as "pretty persuasive" evidence of his belief of impending death. The Court of Appeals overlooked this fact in its conclusions.

C. Similarly, the court recognized that : "[T]he circuit court found "neither the medical records **nor the other evidence** in the case demonstrates that the victim was aware of his imminent death when identifying the photograph...." State v. Brown, No. 2014-002129, 2017 WL 3272134, at *5 (S.C. Ct. App. Aug. 2, 2017). The so-called "other evidence" was the non-existent evidence of revenge planning. The probative power the hearing judge placed on it impacted the clear prejudice in the findings.

D. The Court of Appeals may have overlooked **the impact of the other evidence**, *in light of the absence of revenge*, that supports the showing that the victim did have a belief in his imminent death at the time of the statement. The issue was not whether medical records revealed the doctor's opinion that he was improving at the time of the statement and after, but whether at the time of the statement the victim had a belief in his imminent death.

These included:

1. On the April 29, 2011 bedside statement, the victim had just become lucid and able to communicate in the Intensive Care Unit when Detective Jerome Fleming stated he arrived at the Medical University of South Carolina. R. 8-10, Tr.p. 8-10.
    a. He stated that he had attempted to interview the victim earlier when he was intubated but was not allowed to see him. R. 21-22, Tr.p. 21-22.
2. Detective Fleming described the victim as very weak, lying in bed with tubes attached to his body, and unable to raise his arms or legs or speak loudly. R. 12, Tr.p. 12. When asked to circle the photograph that the victim pointed to as being the perpetrator, the victim advised Fleming that he was too weak to do so. R. 12-13, Tr.p. 12-13.

3. There was evidence from his sister that he "seemed tired and ready to go home", which the family interpreted as ready to die. R. 58, 99, Tr. p. 58, ll. 19-22, p. 99, ll. 13-19.

4. The victim's father, David Brunson, III, testified that about the victim's demeanor at the hospital. R. 48-56, Tr.p. 48-56. The father stated he got there while his son was still in surgery. When they brought his son out he noted the overall swollenness of his son and the large cut in his stomach. R. 48-49, Tr.p. 48-49. The father learned from the doctor that "we did what we can do...I'm just telling you it don't look like he may make it . . . because the small intestines have been damaged real bad." R. 50, Tr.p. 50. The father said that his son was scared and afraid. R. 51, Tr.p. 51. He described his son as wanting to hold his hand which he had never done before. R. 51-52, Tr.p. 51-52. He also described the victim's demeanor as reflected in his having a "deep stare while holding his hand." R. 52, Tr.p. 52, ll. 13-22. He stated that they had to wake his son up to talk with the detective because he was in such pain. The father stated the swollen condition of his son lasted awhile and did not go down in one day. R. 55, Tr.p. 55, ll. 17-21.

5. There was evidence presented through his grandfather that Davon Goodwin was aware of his imminent death. R. 46-48, 68, 70, Tr. p. 46-48, p. 68, ll. 16-20, p. 70, ll. 2-4.

    a. On cross-examination, the grandfather unequivocally stated: "he just pretty much point blank said he wasn't going to make it –he didn't think he was going to make it." R. 70, Tr.p. 70, ll. 2-4. He said that they talked about the incident with the car a couple of times. R. 70, Tr.p. 70, ll. 2-12.

E. The effect of this evidence may have been misinterpreted because of the fact that the victim eventually survived until May 4. However, the fact that he lived until May 4, should not eliminate that fact that under the circumstances Goodwin had a belief in his imminent death on April 27 to support the admission as a dying declaration.

CONCLUSION

The State of South Carolina, for the reasons set forth in the Petition respectfully requests that rehearing be granted and 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,

ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

BY: _____
DONALD J. ZELENKA
S.C. Bar No. 5758

Office of the Attorney General
Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

August 17, 2017
Columbia, South Carolina.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Petition for Rehearing 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 17th day of August, 2017.

DONALD J. ZELENKA
Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

August 17, 2017

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

Enclosed please find the original six (6) copies of the State's Petition for Rehearing in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Deputy Attorney General

DJZ/lbb
cc: Susan Hackett, Esquire
Scarlett A. Wilson, Solicitor
Trisha Allen, Director, Victim Advocacy Division