STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

THE STATE,

PETITIONER,

V.

MARVIN BROWN,

RESPONDENT

APPELLATE CASE NO 2018-000016

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

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II. Did the Court of Appeals err finding harmless error in the trial judge's findings when the Court of Appeals found no record support for its basis in concluding that the victim did not have an awareness or belief in his impending death that "evidence was presented at the pre-trial hearing suggested that the victim was planning on seeking revenge against the assailant" when it is an abuse of discretion where the record supports a conclusion the Davon Goodwin had a belief in his impending death on April 29, 2011 after his extensive surgeries for the effect of gunshot wounds reflected in his grave demeanor and morbid discussions with family members.

III. When the victim died on May 4 from the gunshot wounds he received on April 26 and the victim had been subjected to two surgeries and evidence was that at the time of the statement the victim had just been transferred to the Intensive Care Unit, was in great pain and weakened from the surgeries, and in the bed, did the trial court err in concluding that the medical records showed no imminence of death at the time of the statement on April 29 because there was asserted improvement in the medical records and physical therapy and concluded this prevented his statement from qualifying under Rule 804(b)(2) because he did not die when his condition on May 4 caused his death from the same injuries and the Court has held the length of time the declarant lives after making the declaration is immaterial?

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

I. Did the Court of Appeals correctly determine the circuit court judge did not abuse her discretion when she concluded that a statement was not admissible as a "dying declaration"?

   a. Did the Court of Appeals correctly determine the judge did not abuse her discretion when she concluded that (1) when the statement was made, death was not imminent and (2) the statement was not made while the deceased had an awareness of imminent death?

   b. Did the Court of Appeals correctly determine that any error made by the judge in finding the deceased intended to seek revenge against his assailant was harmless in light of the judge's reliance upon other un-contradicted evidence in the record?

II. As an alternate sustaining ground, was the statement made by the deceased to the police inadmissible as a violation of the Confrontation Clause of the United States Constitution and the South Carolina Constitution?

STATEMENT OF THE CASE

On the morning of April 26, 2011, Davon Goodwin was shot in the abdomen while standing on the street. Court's Exhibit #3; R. 140; R. 208; R. 571. When he arrived at the Medical University of South Carolina (MUSC), he was "awake, alert, oriented." R. 208; R. 568. Goodwin underwent surgery, repairing the injuries. R. 140-141; R. 202; R. 208; R. R. 239. Additionally, he was intubated. R. 208; R. 239. The following day, April 27, 2011, he underwent surgery again for "an abdominal washout and drain/tube placements," and he "tolerated this procedure well." R. 140; R. 202; R. 208; R. 516-521. On April 28, 2011, at approximately 11:00 a.m., he was extubated. R. 339; R. 555. Thereafter, he "improved and had begun ambulation and physical therapy." R. 140; R. 208.

On April 29, 2011, he was "adequate on the floor and transferred accordingly." R. 208; R. 210.[1] On that date, he was started on oxycodone and tube feeds, which he tolerated well. R. 210. At 8:00 a.m., he was calm and "stable." R. 351; R. 355. At 12:45 p.m., he was sitting "up in [a] chair." R. 356. At 2:15 p.m., he returned to his bed from his chair. R. 357. At 2:17 p.m., the doctor ordered a physical therapy evaluation and treatment. R. 617. At 8:00 p.m., he denied feeling any tingling or numbness. R. 367. Also at 8:00 p.m., the doctor ordered Goodwin could be out of bed at his liberty. R. 369. Although the nurses' notes indicated he was emotional on April 26 and April 27, the notes ceased to list "emotional" on April 28 or April 29. R. 543-544.

On April 29, 2011, Jerome Fleming, then a detective for the City of Charleston Police Department, went to MUSC at "[a]pproximately noontime." R. 8, ll. 9-18; R. 9, ll. 15-19. Goodwin's parents informed Fleming that Goodwin "was lucid" and "able to communicate." R. 10, ll. 1-9; R. 19, ll. 23-24; Court's Exhibit #3. Fleming described Goodwin as "alert," "conscious,"

[1] Goodwin was transferred to a regular room around 8:00 p.m. on April 29, 2011. R. 372; R. 471.

and "recuperating from his injury." Court's Exhibit #3. Goodwin did not have a breathing tube and was able to communicate with Fleming by speaking. R. 19, ll. 16-19.

First, Fleming tried "to convince the [Goodwin] to cooperate" with the investigation. R. 10, ll. 16-22. Goodwin expressed hesitancy because individuals "living in a community [] don't want to be identified as being an individual [who] assisted the police." R. 10, l. 23 – R. 11, l. 5. Goodwin was emphatic that "he didn't want to get involved" and did not know who had shot him. R. 11, ll. 11-12; R. 36, ll. 1-11. Nevertheless, Fleming continued to press Goodwin. R. 11, ll. 12-19. Eventually, Goodwin provided Fleming with a statement. R. 11, ll. 20-22; R. 12, ll. 22-25; R. 26, ll. 8-12; R. 39, ll. 3-7. Fleming read the admonition form to Goodwin and showed a lineup to him. R. 13, ll. 7-22; R. 15, ll. 17-23. Goodwin signed the admonition form and circled a photograph among those in the lineup. R. 14, ll. 7-10; R. 15, ll. 1-4; R. 16, ll. 1-22; R. 672; R. 688.[2]

Despite Goodwin's continued improvement, he was found unresponsive on May 4, 2011, five days after his meeting with Fleming and eight days after the shooting. R. 141; R. 208. The attending physician described his death as "[s]udden, unexpected, [and] unexplained." R. 200.

In 2012, Respondent was indicted for the murder of Goodwin, along with charges of armed robbery and possession of a weapon during a violent crime. R. 690-695. Respondent moved to suppress hearsay testimony of Goodwin to Fleming as the statement did not fall within the hearsay exception of a dying declaration. R. 117-130.[3] The Honorable Stephanie P. McDonald presided over a hearing on the motion on March 26, 2013. R. 1. Cody Groeber and Megan Ehrlich represented Respondent, and Chad Simpson represented the state. R. 1.

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[2] Fleming explained the purpose of conducting a photographic line-up is to get information to make an arrest with the ultimate goal of prosecuting the case. R. 24, l. 23 – R. 26, l. 2.

[3] Additionally, Respondent moved to exclude the statements as violating his rights under the Sixth Amendment's Confrontation Clause and the South Carolina Constitution. R. 119-130.

At the hearing, Goodwin's grandfather, David Brunson, Jr., recalled his close relationship with Goodwin and the car rides he would take with all of his grandkids, including Goodwin. R. 45, ll. 19-20; R. 46, ll. 1-11. On an unknown date while Goodwin was in the hospital, Goodwin and his grandfather talked about the rides they used to take. R. 46, ll. 12-22. In fact, the two discussed the rides more than once. R. 46, ll. 23-25. Goodwin "would always sit on the front, near the door on the passenger side." R. 47, ll. 18-19. Goodwin "said he wouldn't be able to ride" with the grandfather, and another grandson "would have his seat." R. 47, ll. 20-22. The grandfather took "that to mean that he was fearful he may not ever have the opportunity to take [those] rides with [him] again." R. 47, l. 24 – R. 48, l. 2. Additionally, Goodwin apologized to the grandfather "for some of the decisions that he had made in his life." R. 48, ll. 3-5. The grandfather was unable to recall an exact date when "these types of conversations" happened. R. 68, ll. 1-3. However, he stated those "types of conversations happened on more than one occasion while he was in the hospital." R. 68, ll. 4-7.

Additionally, the grandfather noted that he believed Goodwin "was leaking inside because he started to swell." R. 68, ll. 11-12. Goodwin "was rubbing his belly" and stated he was "burning inside." R. 68, ll. 13-14. The grandfather asked the nurse "for something" to assist Goodwin. R. 68, ll. 14-15. After speaking with a doctor, the nurse told the grandfather was told "to go to the drugstore and get some itch cream and put [it] on his belly." R. 68, ll. 15-17. The grandfather walked to a drug store, returned with "itch cream," and rubbed it on Goodwin. While doing so, Goodwin "point-blank asked" his grandfather, "he wasn't going to make it." R. 68, ll. 17-20. Later, the grandfather said Goodwin "pretty much pointblank said he wasn't going to make it - - he didn't

think he was going to make it." R. 70, ll. 2-4. This incident occurred "a little bit after he was sewn back up" when Goodwin's "eyes were yellow like a banana." R. 69, ll. 4-8.[4]

On the morning of the shooting, David Brunson, III, Goodwin's father, arrived at the hospital where Goodwin was in surgery. R. 49, ll. 8-9; R. 49, ll. 16-17. Immediately after the surgery, the doctor advised, "we did what we can do, but you know, I'm - - I'm just telling you, it don't look like he may make it, but you know - - and it's because the small intestines got damaged real bad." R. 50, ll. 1-5. However, according to the doctor, Goodwin "was stable" immediately after the surgery. R. 50, l. 6. In fact, the doctor told the family that the surgery went as well as could be expected. R. 50, ll. 13-15. Nevertheless, the doctor warned, "any moment, it can be bad for him." R. 50, l. 7.[5]

After the surgery, Goodwin was "[a]lmost like a - - a child just happy to see his parents." R. 51, ll. 2-3. Goodwin's father compared his son's demeanor to that of a "child [who] got in a fight at school or beat up with a gang" and was "happy to see [his] parents" because the child was "scared or whatever." R. 51, ll. 4-7. Further, he described Goodwin as "pretty much scared" and "in a deep stare." R. 51, ll. 8-9. While in the hospital, Goodwin wanted to hold hands with his family members, but prior to being in the hospital, the nineteen-year old was not inclined to hold hands with others. R. 51, ll. 15-20. Nevertheless, Goodwin was "real playful" and enjoyed playing with "his little sisters and nephews and everybody." R. 51, ll. 20-25. Goodwin's father interpreted Goodwin's desire to hold hands while in the hospital to mean he was afraid. R. 52, ll. 7-9. Later, Goodwin's father explained Goodwin feared his assailant would finish the job because the person

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[4] The medical records first mention "sclera yellow" on May 1, 2011, at 7:20 p.m. R. 399.

[5] Oddly, Goodwin's father claimed the doctor said "they couldn't do surgery again because that was it, because of the damage and stuff and he wouldn't be strong enough for them after this if anything happened, that was just it, they couldn't do anything else for him." R. 50, ll. 15-19. However, the medical records clearly showed Goodwin underwent two surgeries.

who allegedly shot Goodwin was someone who "do[es] so much in the community, and always get[s] in a lot of trouble." R. 54, ll. 10-22. Goodwin agreed to cooperate with the detective because "you don't have to worry about nobody coming back to do nothing to you when you do the right thing." R. 54, ll. 10-22.

Goodwin's father recalled that when Fleming arrived to talk to Goodwin, he was asleep. R. 53, ll. 3-7. However, the doctors explained that if someone needed to talk to Goodwin, "they can pinch it where the medicine would stop going in, and he can wake up." R. 53, ll. 11-14. However, the doctors would not allow Goodwin to stay awake for longer than "an hour or so." R. 53, l. 15. Goodwin's father permitted the doctors to wake up Goodwin and talk to Fleming. R. 54, ll. 1-2.[6]

Goodwin's sister, Dendria Brunson, explained she had never seen Goodwin cry until he was in the hospital following his surgeries. R. 58, ll. 7-17. According to her, he did not cry frequently in the hospital, but she would see tears fall when she would wipe his face. R. 58, ll. 18-20. Goodwin "seemed tired, and he was ready to go home." R. 58, l. 22.[7]

Goodwin's brother, Desmonte Goodwin, visited with Goodwin in the hospital. R. 59, ll. 24-25; R. 60, ll. 4-6. Goodwin repeatedly told him "everything will be all right." R. 60, ll. 11-12. In conjunction with explaining everything would be "all right," Goodwin told his brother that he *knew* who shot him. R. 60, ll. 20-22. According to Desmonte, Goodwin told him "Marvin" had shot him and Desmonte conveyed this to the police. R. 62, ll. 1-4.

At the conclusion of the hearing, the judge took the matter under advisement. R. 101, ll. 3-4. When the parties re-convened on December 10, 2013, the judge found "after reviewing the

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[6] The medical records contained no indication the deceased's medications were altered in order to permit the deceased to communicate with the detective. R. 85, l. 18 – R. 86, l. 1.

[7] During argument on the motion, the prosecutor explained he had "received a note from the family" and "their interpretation of his statement, I'm ready to go home was, I'm ready to pass. I'm ready to pass on to Heaven." R. 99, ll. 13-18.

medical records, the information about the extubation of the victim and his health status at the time of him looking at the six-pack," the statement was not a dying declaration within Rule 804(b)(2), SCRE. R. 102; R. 104, ll. 7-12. The judge noted Goodwin expressed to his sister that he was tired and ready to go home. R. 104, ll. 14-15. He was ambulatory later that day or the next day. R. 104, ll. 17-18. He was "screened for a physical therapy session and everyone thought he was getting better." R. 104, ll. 18-19.

The judge distinguished the instant facts from State v. McHoney, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001), where the "victim ... never regained consciousness after she made her declaration. Her throat was cut. ... [She] shook her head and thought she was going to die at the time." R. 104, l. 20 – R. 105, l. 3. Thus, the judge held the hearsay exception of 804(b)(2), SCRE did not apply. R. 105, ll. 4-5; R. 106, ll. 15-16.

According to the judge, it was not the intent of the exception to deal with someone in the health condition that Goodwin was in. Along those lines, she noted it was a not a "spontaneous declaration," but occurred when an officer went into his hospital room with a simultaneous photographic line-up. R. 106, ll. 17-22.

On August 18, 2014, Judge McDonald issued her formal written order resolving the issue in the case. R. 135-139.[8] She concluded there was "no doubt" Goodwin "was in serious condition" at the time of his statements, but the medical records showed he was improving and not in imminent danger of death at the time the statements were made. R. 137-138. Per the medical records, on the day of the statements, Goodwin was "'adequate on the floor, transferred out of STICU, was making strides with physical therapy, and ambulating in the hall.'" R. 138. Goodwin received a physical

[8] The lower court entertained argument on the federal and state constitutional claims, but ultimately did not reach the issues. R. 71, ll. 2-21; R. 72, ll. 1-20; R. 120; R. 124; R. 105, ll. 5-6. Based upon the Court of Appeals' conclusion that the statements were not dying declarations, the Court of Appeals did not address the federal and state constitutional claims either. App. 104.

therapy consult on April 29 and began therapy on April 30 tolerating between five and fifteen minutes of uninterrupted exercise. R. 138. Further, Goodwin's death on May 4 "was listed as sudden and unexpected." R. 138.

Additionally, the judge found neither the medical records nor the other evidence in the case demonstrated Goodwin was aware of imminent death when he gave the statements to the police. R. 138. In fact, the evidence showed Goodwin's condition was improving. R. 138. The judge found evidence Goodwin "was planning on seeking revenge against his assailant" and such evidence was "inconsistent with both an awareness of imminent death as well as one who has given up all hope of survival." R. 138.

The state filed a notice of appeal on August 26, 2014, which was perfected by Donald Zelenka. App. 1-30. Respondent subsequently responded. App. 31-75. The state filed a reply. App. 76-94. On April 18, 2017, the Court of Appeals heard oral argument, and on August 2, 2017, the Court of Appeals affirmed the trial court's decision. App. 95-104; State v. Brown, 421 S.C. 337, 806 S.E.2d 724 (2017). Thereafter, the state filed a petition for rehearing. App. 105-111. On December 5, 2017, the Court of Appeals denied the petition. App. 112. On January 11, 2018, the state filed a petition for writ of certiorari. This return follows.

ARGUMENT

This Court should deny certiorari in this matter. The issues on appeal are not novel questions of law. See Rule 242(b)(1), SCACR. In fact, what constitutes a dying declaration and its admissibility as an exception to the rule against hearsay are matters governed by almost two hundred years of jurisprudence in this state. The appellate decision is a straight-forward application of the standard of review and the case law to the evidence presented. A unanimous panel of the Court of Appeals rendered the decision. See Rule 242(b)(2), SCACR. No conflict exists between the decision of the Court of Appeals and a prior decision of this Court. See Rule 242(b)(3), SCACR. The circuit court and the Court of Appeals resolved the question based on state evidentiary rules; therefore, there are no substantial constitutional issues directly involved or federal questions. See Rules 242(b)(4)&(5), SCACR.

As will be discussed in greater detail, the matter before the circuit court was an uncomplicated application of clearly defined legal precedents to the facts presented. The judge allowed both sides to fully present evidence, including witnesses and records. The judge allowed both sides to argue fully, both in writing and orally. The judge took the matter under advisement, then issued an oral ruling followed by a written ruling, demonstrating the great care and consideration the judge gave the matter. There exists simply no reason for this Court to exercise its extraordinary power to review the decision by the Court of Appeals.

I. The Court of Appeals correctly determined the circuit court judge did not abuse her discretion when she concluded that a statement was not admissible as a "dying declaration."

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "The circuit court primarily decides whether these conditions [for a dying declaration] exist and its ruling will not be disturbed unless clearly incorrect and prejudicial." State v. Smalls, 87 S.C. 550, 70 S.E. 300 (1911); see also State v. Bethea, 241

S.C. 16, 23, 126 S.E.2d 846, 849 (1962)(explaining "[t]he determination by the trial court of the preliminary facts, on which the competency of the dying declaration depends, will not be disturbed on appeal 'unless clearly incorrect and prejudicial'"). "Primarily the circuit judge decides whether these conditions [for a dying declaration] have been met, and [the appellate court] will not interfere with his ruling except when clearly convinced that he reached an incorrect conclusion prejudicial to the accused." State v. Franklin, 80 S.C. 332, 332, 60 S.E. 953, 954 (1908). "Affirmance is required when ... the conclusion of the trial judge is a reasonable inference from the evidence." Bethea, 241 S.C. at 24, 126 S.E.2d at 850.

Under the common law, the conditions authorizing the admission of dying declarations were (1) the imminence of death of the deceased; (2) that deceased was without hope of recovery; (3) that the circumstances of the death were the subject of the declaration. State v. Smalls, 87 S.C. 550, 550, 70 S.E. 300, 301 (1911); see also State v. Johnson, 26 S.C. 152, 152, 1 S.E. 510, 510 (1887); State v. Long, 93 S.C. 502, 77 S.E. 61 (1912); State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926). All parties agreed that Goodwin's statement to Fleming, including the photographic line-up procedure, concerned the circumstances of his eventual death. Therefore, the only disputed elements of a dying declaration were there first two. R. 128-129.

a. The Court of Appeals correctly determined the circuit court judge did not abuse her discretion when she concluded that (1) when the statement was made, death was not imminent and (2) the statement was not made while the deceased had an awareness of imminent death.

The common law permitted the introduction of dying declarations due to their inherent reliability in light of the declarant being so fully aware of his imminent death as to be without any hope of life. State v. Quick, 49 S.C.L. (15 Rich.) 342 (Ct. App. 1868). "This condition of the person is considered as constituting as strong a guarantee for the truth of the declaration, as an oath is of ordinary testimony. There must be few that would be willing to pass immediately into the

presence of that Almighty Judge, whose eye penetrates all disguise, with a lie upon his lips." Id. A dying declaration is admissible because it occurs "when a party is at the point of death, and is conscious of it – when every hope of this world is gone, and every motive to falsehood is silenced by the most powerful considerations to speak the truth." State v. Belcher, 13 S.C. 459, 463 (1880).

"The principle on which death bed declarations are admitted is that of necessity." State v. Ferguson, 20 S.C.L. (2 Hill) 619, 624 (1835). "No one who has a proper sense of religion or who believes in a future state of rewards and punishments, would willingly incur the guilt of falsehood, who had before him the immediate prospect of a final account for the deeds done in the body, when every word, thought and deed of evil, must rise up for his condemnation." Id. In order to introduce statements by the deceased as dying declarations, the proponent must present evidence "that the deceased was in *extremis*, and that he himself was conscious of his approaching death." Id. This evidence may be produced from the conversation of the deceased "or from other circumstances indicating such a state of mind." Id.

In Belcher, 13 S.C. at 463, this Court held statements of a wife to her doctor that her husband, the defendant, caused her injuries did "not come within the definition of dying declarations." This Court explained the wife "was afflicted with a lingering disease" and did not die until nearly three months after her statement to the doctor. Id. According to this Court, the wife's statement was not made knowing her death was imminent where wife stated "she thought at the time the violence was inflicted that 'she would then die,' but she did not say that, at the time she made the statement, she considered herself in the very presence of death – soon to occur." Id.

In Johnson, 26 S.C. at 152, 1 S.E. at 510, the deceased was shot on September 20, 1886. The following day, the deceased gave a statement concerning the circumstances of his injury to a witness, who later testified the deceased was "'lying on a bed in his house in a weak condition,'"

was "'in a very low condition,'" and "did not sign the declaration because he was unable to do so." Id. at 152, 1 S.E. at 510-511. The witness asked the deceased if he thought he would get well or die and the witness responded that he did not know, but he did not think he would ever get well. Id. at 152, 1 S.E. at 511. Thereafter, the deceased gave the witness an account of how he received the fatal wound. Id. This Court held "this question and answer were quite sufficient to show that the deceased had no hope of recovery at the time." Id. Additionally, this Court noted the circumstances surrounding the declaration demonstrated the deceased was full conscious of his impending death:

> Here was a man lying on his bed "in a very low condition," suffering from a wound inflicted with a deadly weapon, in close conflict, which very speedily proved to be mortal, with the film of death then probably spreading over his eyes, as shown by his inability to see ... and with the numbness of death then probably creeping up his extremities. ... When it is remembered that not a word was said, either by the deceased or by the doctor, or any one else, indicating that there was any hope for the recovery of deceased, and considering the very low condition in which the deceased was, of which he was manifestly conscious.

Id.

This Court explained that to show a dying declaration is made under a belief of a speedily impending death, it is not necessary to show "any set form of words." Id. at 152, 1 S.E. at 511-512. Rather, "the court must draw a rational conclusion from all that was said, taken in connection with such surrounding circumstances as must have been known to the declarant, as to whether or not the declarant was in such a condition of mind as would render his declarations competent." Id. at 152, 1 S.E. at 512.

In State v. Banister, 35 S.C. 290, 290, 14 S.E. 678, 680 (1892), the deceased was shot on a Thursday afternoon and died the following Monday morning. Id. On the evening he was shot, the deceased told a witness that his brother, the defendant, had shot him. Id. at 290, 14 S.E. at 681. Additionally, the witness claimed the deceased said "'he would be obliged to die; that he was going to die, and was obliged to die'" and "'he could not get well.'" Id. The doctor who examined

deceased told him that "the ball ha[d] entered [his] brain" and could not be located. Id. The doctor advised him that some people recovered from head wounds, but there were none on record "where a foreign body was imbedded in the brain." Id. The deceased never shared with the doctor whether he thought he was going to die or recover. Id. However, the doctor stated the deceased understood his death "would probably result from the wound." Id.

This Court affirmed the trial judge's finding that the statements were admissible as dying declarations. Id. This Court was persuaded "the expression of the deceased, that he was 'obliged to die,' made after the examination of the physician, which informed him of the fact that the bullet was lodged in his brain, was abundantly sufficient to show that deceased had lost all hope of recovery." Id.

However, this Court also affirmed the trial judge's ruling that other statements by the deceased were not admissible as dying declarations. A witness claimed that on the Sunday before the deceased died, he told her someone other than the defendant had shot him. Id. However, the deceased thought he was getting better on the day of this statement. Id. This Court held the deceased's statements were not a dying declaration because "the deceased was not then in the condition of mind required by the rule as he then thought he was getting better." Id.

In State v. Hall, 127 S.C. 256, 256, 120 S.E. 849, 850 (1924), this Court held "[t]he evidence that the deceased had given up all hope of life was not clear enough to allow the introduction" of a statement as a dying declaration. The deceased lived about a month after sustaining a fatal injury. Id. He made a statement to a witness "about three days before he died." Id. The witness testified the deceased said he "had to die" and "he could not live." Id. "The deceased had been very ill and thought that he would die nearly a month before." Id. However, he recovered, but had a relapse. Id. This Court found "no intimation that the deceased expected

immediate death. The death he expected was death from disease, and not the immediate death from a mortal wound." Id. This Court held the deceased's statement to the witness did "not indicate that the deceased had abandoned all hope of recovery, but simply that at the time he thought that he would die." Id. "There [was] no evidence that at the time the dying declaration was written down the deceased had abandoned hope." Id.

In State v. Hall, 134 S.C. 361, 361, 133 S.E. 24, 25 (1926), the defendant and the deceased fought between 8 and 9 o'clock at night. The deceased was found early the next morning "helpless, badly beaten up, and bleeding from a wound in his head." Id. He was carried to his home and put to bed. Id. That morning, he told his wife and daughter that the defendant had beaten and robbed him. Id. Although he developed pneumonia, he "recovered sufficiently to sit up around the house." Id. However, he suffered a relapse, and died thirty-three days after the fight with the defendant. Id.

At the defendant's trial, the prosecution sought to admit the deceased's statement to his wife and daughter as a "dying declaration." Id. The wife and daughter claimed the deceased told them he was dying and had no hope at the time of the declaration. Id. Further, the two claimed the deceased was in agony every day until he died. Id. A doctor examined the deceased five or six days after the fight. Id. He claimed the deceased was in "very critical condition" and was "suffering from pneumonia." Id. According to the doctor, the deceased was "in imminent peril of death at that time." Id. Additionally, the doctor testified the deceased's "condition was extremely critical from the moment, from the time of the trauma, the time of the assault, up until the time of his actual death; he was at all times in extreme danger." Id.

This Court held the testimony by mother, daughter, and doctor established the necessary foundation for finding the deceased's statements to be dying declarations. Id. at 361, 133 S.E. at 26. This Court was not persuaded that the "length of time intervening between the assault and the death

render[ed] the declaration inadmissible." Id. This Court explained that it is "not the rapid succession of death ... that renders the testimony admissible"; instead, "[i]t is the impression of almost immediate dissolution" that must be present. Id.

In State v. Davis, 138 S.C. 532, 532, 137 S.E. 139, 140 (1927), this Court emphasized the importance of a declarant making the statement, subsequently offered as a dying declaration, in *extremis*, and fully conscious of his impending dissolution. According to this Court, "it is not alone sufficient that the declarant believe that he is about to die; to be admissible under the dying declarations rule, his dying declarations must have been made while he was in *extremis*. And even though the declarant was in *extremis*, his declarations are not admissible unless they were made by him while he was under a sense of impending death." Id. (internal quotation omitted). In other words, "[t]o render his declarations admissible, the declarant must not only believe that he is about to die, but must be without hope or expectation of recovery." Id. (internal quotation omitted). "[I]f the deceased had the slightest hope of recovery, when the declarations were made, they were inadmissible." Id. (internal quotation omitted).

This Court held that statements by the deceased to a doctor while being taken from his home to a hospital in Columbia after the shooting were not dying declarations because there was no evidence the declarant had abandoned all hope of recovery. Id. The deceased told the doctor he did not believe he was going to make it. Id. This Court noted that what the deceased meant by those words was unknown, but the doctor interpreted them to mean the deceased did not believe he would get well. Id. As a result, the doctor encouraged him to think he would recover, but the success of the encouragement was unknown. Id. Nevertheless, this Court held it did "not appear from the language used that he had abandoned all hope of recovery." Id. "While he was uneasy and anxious

about his condition, he had not given up all hope of life." Id. Therefore, the declarant's statements to the doctor should not have been admitted. Id.

South Carolina formally adopted the South Carolina Rules of Evidence effective September 3, 1995. Just as the common law did, the Rules of Evidence prohibited the introduction of hearsay: "Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE.

Additionally, the Rules of Evidence "codified" the common law exception to hearsay for dying declarations. When the declarant is unavailable as a witness, hearsay may be admissible "[i]n a prosecution for homicide" when the proffered statement was "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Rule 804(b)(2), SCRE. As explained by the drafter's note, the Rule altered the common law regarding "dying declarations" by "broaden[ing] the admissibility of dying declarations by making them admissible in civil cases" and "relax[ing]" the "rigid requirement that the declarant must actually have died" except in homicide prosecutions. Rule 804 note, SCRE.

At the time of the pre-trial hearing in the instant matter, the only published case in South Carolina examining "dying declarations" since the adoption of the Rules of Evidence was State v. McHoney, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001). In McHoney, 344 S.C. at 93, 544 S.E.2d at 33, this Court explained that "[a] declarant does not have to express, in direct terms, his awareness of his condition for his statement to be admissible as a dying declaration." "The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration." Id. Circumstances considered by a court include "[r]epeated questioning by the declarant concerning

whether he is going to live, a less than reassuring answer, the nature of the wound, and the declarant's critical condition." Id. "The focus is on the declarant's state of mind when the statement is made, not on the eventual outcome of the declarant's injuries." Id. at 93, 544 S.E.2d at 34. Ultimately, this Court held a victim's statement regarding her attacker were a dying declaration despite the victim dying two weeks after her injury because she shook her head when told she would be fine and never regained consciousness after she made the declaration. Id. at 94, 544 S.E.2d at 34.

The Court of Appeals correctly determined that "evidence supports the circuit court's finding Goodwin's statement was not made while he believed his death was imminent." App. 101. Critically, the trial judge noted "specific facts in the medical record 'that he was improving and was not in imminent danger of death at the time the statements were made.'" App. 101. Upon reviewing the medical records, the Court of Appeals determined "[t]he medical records support the circuit court's finding Goodwin was improving on the date Goodwin gave the identifying statement to Detective Fleming." App. 101. That evidence included that Goodwin was out of his bed and sitting in a chair, had consulted with physical therapy, had started walking, and had undergone two successful surgeries prior to speaking to Fleming. App. 101. Finally, the Court of Appeals noted that on the day after Goodwin's conversation with Fleming, he had been advised by the medical professionals that it was expected he would be able to return to work or school full time and to be independent with all self-care including driving. App. 96. Thus, the Court of Appeals, applying the standard of review appropriate for this matter, concluded the record contained evidence to support the circuit court's finding Goodwin's statement to Detective Fleming was inadmissible as it did not meet the dying declaration exception. App. 102.

b. The Court of Appeals correctly determined that any error made by the circuit court judge in finding the deceased intended to seek revenge against his assailant was harmless in light of the judge's reliance upon other un-contradicted evidence in the record.

The circuit court's order addressing the second element of a dying declaration – that the declarant must be fully aware of imminent death to be without any hope of life – provided as follows:

> The Court further finds that neither the medical records nor the other evidence in the case demonstrates that [Goodwin] was aware of his imminent death when identifying the photograph of the defendant from the six-pack lineup. In fact, the evidence suggest the contrary; on April 29th, [Goodwin]'s medical condition was improving. Furthermore, evidence presented at the pre-trial hearing suggested that [Goodwin] was planning on seeking revenge against his assailant. This is inconsistent with both an awareness of imminent death as well as one who has given up all hope of survival. Ex. A. at 464.

R. 138. At the Court of Appeals, the state challenged this factual finding. App. 11. Ultimately, the Court of Appeals agreed. App. 102-103.[9] However, the Court of Appeals concluded the erroneous factual finding "did not prejudice the state." App. 103.

In finding the no prejudice to the state, the Court of Appeals explained the "circuit court did not rely solely on evidence of revenge to support a finding of hearsay but relied on other evidence, including medical records." App. 103. The Court of Appeals noted the revenge finding appeared in the written order, but was absent from her verbal ruling on the matter. App. 103. Quoting the circuit court's order, the Court of Appeals explained "the finding of revenge in the written order

[9] The Court of Appeals rejected Respondent's argument that evidence in the record supported the trial judge's factual finding regarding revenge. App. 103. Respondent argued the following supported the judge's factual finding that Goodwin intended to seek revenge against his assailant: (1) Goodwin's statement to his brother that everything would be "all right" and that he *knew* who shot him; (2) Goodwin's fear that his assailant would finish the job; (3) Goodwin's reluctance to cooperate with the police due to fear of the assailant; and (4) the absence of evidence in the chaplain's records that Goodwin sought the chaplain's services to seek absolution or comfort before death. App. 64-65.

[was] an additional reason given by the circuit court for finding Goodwin was not aware of his imminent death when he made the statement." App. 103-104.

Petitioner urged this Court to review the Court of Appeals' decision in this case by arguing "the reliance by the Court of Appeals on the fact that the hearing judge did not solely rely in its written order on the unsupported fact or at all in its earlier verbal order is confusing at best and simply does not support the emphasis given on it by the Court of Appeals." Pet. at 12. Nevertheless, Petitioner never denied that evidence existed in the record to support the circuit court judge's findings of fact and conclusions of law. Rather, Petitioner argued simply that because a finding that Goodwin intended to seek revenge was antithetical to an awareness of imminent death, this Court must overrule the Court of Appeals and the circuit court judge despite other evidence supporting the factual findings and conclusions of law. Pet. at 12.

The Court of Appeals looked specifically at the circuit court judge's order explaining that "'neither the medical records nor the other evidence in the case demonstrates that [Goodwin] was aware of his imminent death when identifying the photograph.'" App. 104. Petitioner interpreted "the so-called 'other evidence'" as "'the non-existent evidence of revenge planning and misinterpreted of other evidence set forth herein.'" Pet. 13. While the "other evidence" may have included the "revenge" evidence, by Petitioner's admission, it included "other evidence" presented to the circuit court. Petitioner's only complaint about that evidence is that the circuit court judge "misinterpreted" it. It would be improper for this Court to interpret the evidence before the circuit court judge. "The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity." State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009). By asking this Court to re-interpret the

evidence, Petitioner is asking this Court to depart of the standard of review and substitute its judgment from that of the circuit court judge.

Contrary to Petitioner's assertion, the Court of Appeals' reliance upon the circuit court's oral ruling not mentioning revenge as a strong indicator that the circuit court did not rely on the revenge finding or placed very little emphasis on such a finding in arriving at her ultimate conclusion was entirely proper and logical.

As determined by the Court of Appeals, despite the erroneous factual finding by the circuit court judge concerning "revenge," ample evidence in the record supported the circuit court judge's decision; thus, an error in finding a "revenge" motive was not prejudicial to the state. The judge's oral ruling, as well as the written order, listed the evidence the judge found most convincing and most reliable in order to arrive at her decision. Based on judge's ruling, she found the medical records most persuasive and believable. Indeed, the medical records were undisputed and were the product of medical professionals who had no stake in the outcome of the proceeding regarding the admissibility of the identification statement by Goodwin.

Respondent respectfully requests this Court deny certiorari in this matter. The testimony by Goodwin's father and Fleming that Goodwin feared retaliation if he were to cooperate with police was evidence enough to support the circuit court judge's decision that Goodwin's statement was not made while he was so aware of his death as to be without hope of recovery. The medical records, particularly coupled with the testimony of Goodwin's father and Fleming, were enough to support the circuit court judge's decision that Goodwin's death was not imminent. The case presents none of the character of reasons listed by this Court when deciding whether to exercise its discretion and review a matter. See Rule 242(b), SCACR. As discussed, the matter before the circuit court was not complicated and required the circuit court judge to do

what she did many times a day, every day – apply clearly defined legal precedent to the facts presented. The Court of Appeals found ample evidence in the record to support the circuit court judge's thoughtful and thorough ruling. There exists simply no reason for this Court to exercise its extraordinary power to review the decision by the Court of Appeals.

II. As an alternate sustaining ground, the statement made by the deceased to the police was inadmissible as a violation of the Confrontation Clause of the United States Constitution and the South Carolina Constitution.

In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause[10] unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. "[I]nterrogations by law enforcement officers fall squarely within [the] class" of verboten testimonial hearsay. Crawford, 541 U.S. at 53. "[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." Michigan v. Bryant, 562 U.S. 344, 358 (2011).

Conducting the analysis required by the Supreme Court's jurisprudence leads to but one conclusion – Goodwin's statements to Fleming were testimonial. The primary purpose of the interrogation was to develop evidence to be used in the prosecution of the suspect. See Davis v. Washington, 547 U.S. 813,822 (2006)(explaining "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"). The photographic line-up procedure occurred three days after the assault, not immediately following the assault at the scene. See id. (explaining statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal

[10] The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987); Pointer v. Texas, 380 U.S. 400 (1967).

prosecution"). Fleming's encounter with Goodwin was very formal because Fleming went to the hospital with a photographic line-up and posed the specific question of who committed the offense. In fact, Fleming spent a considerable amount of time with Goodwin to convince him to cooperate with the investigation so that the police could arrest, prosecute, convict, and imprison the culprit. The primary purpose of the encounter was to obtain testimonial evidence regarding past events to be used later for trial, not to enable police assistance to meet an ongoing emergency. See id. at 829.

Respondent acknowledges the lingering question of whether a dying declaration is an exception to the Confrontation Clause. See Bryant, 562, U.S. 351, n. 1; Giles v. California, 554 U.S. 353, 358 (2008); Crawford, 541 U.S. at 56, n. 6.[11] Nevertheless, the courts that have found the exception still all admit the incongruence with the admission of a dying declaration and the core of Crawford and the Sixth Amendment because allowing a dying declaration into evidence violates the basic concepts of the right of confrontation. Therefore, if this Court were to find Goodwin's statements to be dying declarations, which Respondent submits they were *not*, then this Court should hold admission of the statements violates the Sixth Amendment in light of their testimonial nature and the incongruity of permitting the dying declaration exception with the Confrontation Clause jurisprudence.[12]

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[11] Further, Respondent acknowledges the courts that have addressed the question have found an exception for dying declarations implicit within the Sixth Amendment. See e.g., People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004).

[12] If the basis for admitting a dying declaration is the existence of the exception at the time of the writing of the Sixth Amendment, then the state's argument that the Rules of Evidence have altered the common law requirements for a dying declaration must be analyzed because a dying declaration not satisfying the common law should not be admitted as an exception incorporated into the Sixth Amendment at the time of its drafting. See R. 131-134.

Finally, if this Court were to determine the statements were dying declarations and the Sixth Amendment permitted the exception, then this Court should analyze the South Carolina Constitution's bestowment of the right to confrontation.[13] While Respondent is unaware of any case interpreting this state constitutional right differently than the federal constitution, there is no barrier to the state constitution affording greater rights. See State v. Counts, 413 S.C. 153, 167, 776 S.E.2d 59, 67 (2015)(finding greater privacy protections within the state constitution); State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001)(same).

[13] The South Carolina Constitution also provides that "[a]ny person charged with an offense shall enjoy the right ... to be confronted with the witnesses against him." S.C. Const. art. I, § 14.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 5th day of March, 2018.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

THE STATE,

PETITIONER,

V.

MARVIN BROWN,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marvin Brown, at 5138 Potomac Street, North Charleston, SC 29405, this 5th day of March, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.