

2018-000016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5506 (S.C. Ct. App. August 2, 2017)

STATE OF SOUTH CAROLINA,

Petitioner,

v.

MARVIN BROWN,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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
Attorney for Petitioner

Other Counsel of Record:
Susan B. Hackett, Esquire,
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201
803-734-1330
Attorney for Respondent

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.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant 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

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge abuse her discretion in granting defendant's motion to suppress a bedside photographic identification by the victim of the defendant where there is evidence that at the time the victim had an awareness of his impending death as a result of his wounds from a gunshot and had expressed those thoughts to his grandfather and sister and his demeanor supported that belief. The trial judge erred in finding that there was no evidence that at the time of the statement on April 29, 2011 that he did not have a belief in his impending death. The evidence was admissible under Rule 804(b)(2) SCRE.
- II. Did the trial judge err and abuse her discretion in finding as a basis for 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 no evidence supporting that conclusion was presented at the March 26, 2013 hearing nor in any medical record introduced as an exhibit. Since there is no evidence to support this "finding" or inference from the unsupported finding, 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?

STATEMENT OF THE CASE

This is an appeal by the State of South Carolina to the granting of a motion to suppress hearsay testimony and exclude the victim's identification and rejecting its admissibility as a dying declaration in a written order dated August 18, 2014. The defendant, Marvin Reginald Brown, was indicted by the Court of General Sessions for murder, armed robbery and possession of a weapon during a violent crime. 2012-GS-10-6844, 6845, 6846. On March 25, 2013, the defendant, Marvin Brown, through appointed counsel Cody J. Groeber, Assistant Public Defender, made a motion to suppress hearsay testimony of Detective Jerome Fleming concerning the April 29, 2011 photographic identification of Brown by Davon Goodwin at the Medical University of South Carolina where he had surgery as a result of an April 26, 2011 gunshot wound. The victim died on May 4, 2011.

The victim, Davon Goodwin, was shot on April 26, 2011, around 2 a.m., on America Street in downtown Charleston, South Carolina. R.p. 135, Order, p. 1. He was transported to the Medical University of South Carolina, where he underwent surgery that same day. He was subjected to a second surgery on April 27, 2011. He made it through surgery and regained consciousness sometime on April 27, 2011. The following day, the victim's breathing tube was removed, and he was able to converse with his family and doctors. On April 29, 2011, Detective Fleming of the Charleston Police Department interviewed the victim. Detective Fleming read him a standard admonition form for photographic lineups. The victim identified the Defendant in a six-pack photo lineup. There is a partial audio recording of this identification procedure. On May 4, 2011, the victim died from complications of the gunshot wound.

In his motion to suppress, Brown claimed that the admission of the deceased's identification of Brown from a 6-person photographic line-up was a violation of the Sixth

Amendment Confrontation Clause and alternately inadmissible as hearsay and asserted the evidence failed to qualify as a dying declaration exception under Rule 804(b)(2), SCRE. R.p. 119-129, Memo in Support of Motion to Suppress Hearsay Testimony, p. 2-12.

The State made written opposition to the motion to suppress through Assistant Benjamin Chad Simpson. R.p, 131-34, "Source Citations in Response to Defense Motion to Suppress". p. 1-4.

On March 26, 2013, a suppression hearing was held before the Honorable Stephanie McDonald, then Circuit Court Judge. The defendant was present and represented by Mr. Groeber and Megan Ehrlich of the Ninth Circuit Public Defender's Office. The State was represented by Assistant Solicitor Simpson. At the hearing, testimony was received from former investigator Jerome Fleming (R. 8-44, Tr. 8-44), the victim's grandfather, David Allen Brunson, Jr. (R. 45-48, 67-70, Tr. 45-48, 67-70), the victims' father, David Allen Brunson, III (R.p. 49-57, Tr. 49-57), the victim's sister, Dendria Brunson, (R. 57-79, Tr. 57-59) and the victim's brother, Desmonte Brunson, (R. 59-62, Tr. 59-62).

After testimony, argument was heard from counsel. R.p. 63-67, Tr. 63-67. At that point, the victim's grandfather was recalled concerning the timing of his conversations with the victim. R. 67-70, Tr. 67-70.

At that point, further argument was heard on the Confrontation Clause and "dying declaration" issue. R. 70-90, Tr. 70-90. [Argument was also heard on a Neil v. Biggers issue concerning the identification procedures concerning a separate motion. R. 90-96, 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. R. 96, 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. R. 104, Dec. 10, 2013 Tr. p. 3, 14-15. The trial court did not address the Confrontation Clause issue. R. 104-09, 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.” R. 138, Order, p. 4.

The State filed a notice of appeal on August 26, 2014 pursuant to State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) asserting the suppression of this evidence significantly impaired the prosecution.

This briefing follows.¹

¹ An earlier notice of appeal was served on December 20, 2013 and filed from the December 10, 2013 oral order granting the suppression motion. On January 24, 2014, the South Carolina Court of Appeals entered an order dismissing the December 20, 2013 notice of appeal without prejudice as premature because the trial judge had not issued a written order.

ARGUMENT

- II. The trial judge abused her discretion in granting the motion to suppress the victim's statement where there is evidence that at the time of the photographic identification to Detective Fleming the victim believed his death was imminent reflected in his statements to his grandfather and sister concerning his future without them and his medical condition.**
- a. Contrary to the trial court's finding, there is no evidence in the record of the hearing that the victim was planning on seeking revenge against Brown which the trial court erroneously partially based its rejection.**
 - b. Contrary to the conclusion of the trial, death did not have to actually be imminent at the time of the statement.**
 - c. The statement was admissible under Rule 804(b)(2), SCRE.**

The trial court erred in finding the statement of Davon Goodwin on April 29, 2011 from his hospital bed after surgery from a gunshot wound of April 26, 2011 was not admissible as a "dying declaration" under Rule 804(b)(2), SCRE. The error arises from the court's conclusion that there was "no evidence" "that the victim was aware of his imminent death when identifying the photograph of the defendant from the six-pack line-up." R. 138, Order, p. 4. However, the record reflects 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. In addition, 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. Further, the trial court's conclusion that death had to actually be imminent and was not imminent in this case was a misreading of Rule 804(b)(2), SCRE and State v. McHoney which concluded that the length of time the declarant lives after making a declaration under a belief of imminent death was immaterial, particular under the victim's circumstances in this case and his death on May 4,

2011.

Further, reflecting a strong error in the Order of Suppression, the trial court based its rejection of Davon Goodwin's belief of imminent death:

Furthermore, evidence presented at the pre-trial hearing suggested that the victim 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, 464.

R. 138, Order, p. 4, ¶ 2. However, there was no evidence at the hearing to support this finding of revenge. There is no evidence that Davon was planning his revenge presented by any witness at the hearing. R. 1-101, Tr. p. 1-101. The trial judge's citation to Ex. A p. 464 does not concern anything about a motive or plan to revenge or "seeking revenge", but is only a record reference to chaplain visits which did not include any contact with Davon Goodwin. Ex. A p. 464 (MUSC Records).²

Simply put, the trial judge mistakenly rejected the showing of belief in imminent death on unsupported facts and the unfounded inference from the facts. This was an abuse of discretion.

STANDARDS OF REVIEW

State's Right to Immediately Appeal Pre-Trial Suppression Ruling

An appeal ordinarily may be pursued only after a party has obtained a final judgment." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). However, "[a] pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a)." McKnight, 287 S.C., 168. "Under McKnight, the State has the right to immediately appeal a trial court's

² The State notes that in the pre-trial "memo in Support of Motion to Suppress Hearsay Testimony", Brown's counsel stated: "Furthermore, there is evidence to be presented at the pre-trial hearing that the victim was planning on seeking revenge." R. 129, Memo., p. 12. However, at the hearing, such evidence was not presented.

suppression of evidence which significantly impairs the prosecution of the case.” State v. Belviso, 360 S.C. 112, 115, 600 S.E.2d 68, 70 (Ct. App. 2004).

Admissibility of Evidence

“In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous.” State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). “The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion.” (alteration in original) (internal quotation marks omitted). State v. Williams, 409 S.C. 455, 463, 761 S.E.2d 770, 775 (Ct. App. 2014). “Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion.” *Id.* “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015)(internal quotation marks omitted). The determination by the trial 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 - 850 (1962) citing State v. Franklin, 80 S.C. 332, 60 S.E. 953 (1908); State v. Smalls, 87 S.C. 550, 70 S.E. 300 (1911); State v. Marshall, 111 S.C. 356, 98 S.E. 130 (1919).

“On appeals from a motion to suppress based on Fourth Amendment grounds, [an appellate court] applies a deferential standard of review and will reverse if there is clear error.” State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)(internal quotation marks omitted). “However, [an appellate court] reviews questions of law de novo.” *Id.*

Dying Declaration as an Exception to Hearsay

Hearsay is not admissible unless it fits within an exception to the hearsay rule. Rule 802, SCRE. The State sought to introduce the victim's identification of Marvin Brown as her killer under the dying declaration exception. Rule 804(b)(2), SCRE. The Rule states in pertinent part:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

2) Statement Under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement 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.

A statement made under the belief of impending death is not excluded by the hearsay rule if the declarant is unavailable as a witness in a prosecution for homicide, the statement is made by a declarant while believing the declarant's death is imminent, and the statement concerned the causes or circumstances of what the declarant believed to be impending death. Rule 804(b)(2), SCRE; *see also* 29A Am.Jur.2d, Evidence § 829 (2000) ("In a homicide prosecution, the dying declaration must bear on the fact of the homicide and the person by whom it was committed.

Such statements must be made voluntarily and in good faith. In addition, such statement must be made under a sense of impending death."). ³ Accord, State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001).

The commentators have generally addressed this condition:

It is essential that a dying declaration be made when the declarant has abandoned all hope of recovery from the injury inflicted by the accused and

³ Under the long established common law rule of evidence, which we quote from State v. Johnson, 26 S.C. 152, 1 S.E. 510 (1887), dying declarations are competent evidence, for or against the accused, upon preliminary proof of certain conditions.:

'The rules in regard to such testimony are well settled: 1st. That death must be imminent at the time the declarations in question are made. 2nd. That the declarant must be so fully aware of this as to be without any hope of life. * * * And 3rd. That the 'subject of the charge' must be the death of the declarant, and the circumstances of the death must be the subject of the declarations.'

Bethea, 241 S.C., 21-22, citing Johnson, 26 S.C. 152.

is firmly convinced that death is inevitable and near at hand.

It is not enough that the statement be made when the declarant is in extremis as the statement must be made when the declarant is conscious of impending death.[FN1] The fact that the declarant believes that there is great danger and entertains a fear of dying is not sufficient.[FN2] The declarant must possess the requisite state of mind simultaneously with the statement.[FN3] For a deceased's statement to be admissible as a dying declaration, it need only appear to the court from the circumstances of the case that there was a probability that the deceased was conscious of his condition at the time he made the statement.[FN4] The testimony need not contain any statement by the deceased to the effect that he or she was conscious of impending death at the time the declarations were made since this may be inferred from the nature of the wounds and other circumstances.[FN5]

It is immaterial how or by what means the deceased became conscious of dying.[FN6] For instance, it is no objection to the admissibility of the declarations that the declarant's belief of impending death was induced by the statements of attendants.[FN7] Conversely, the statement is not rendered inadmissible by the fact that no physician or other person had told the declarant that death was impending[FN8] or that witnesses had told the declarant that death was not impending.[FN9]

It has been held that the declarant must believe that there is no hope of recovery.[FN10] Under this view, the declarations are inadmissible if the deceased had the slightest hope of recovery when they were made.[FN11] On the other hand, it has also been held that it is not necessary that all hope of recovery be abandoned.[FN12] In any event, a statement should not be rejected as a dying declaration when only nebulous rays of hope exist.[FN13] For a dying declaration to be admissible, the declarant's belief in impending death must be strong enough that the ordinary worldly motives for misstatement are not operative.[FN14]

There is authority for the view that the person making the declaration must entertain a settled and hopeless expectation of immediate or, in other words, of impending death[FN15] and that the declarant's mere belief that there will be no recovery from the injuries is not sufficient to admit the declarations into evidence.[FN16] However, there is contrary authority.[FN17]

C.JS Homicide, § 389. (footnotes omitted).

A mere belief that death was possible, or even probable, is not sufficient; the declarant must be virtually certain that death is imminent. In other words, the declarant must have abandoned all hope of recovery.[FN94] If the declarant believed in his impending death at the time he made the declaration, it does not matter that he later believed that he would recover.[FN95]

A request to a doctor, "Try to get me well," does not render a dying declaration made at that time inadmissible.[FN96] The dying person need not state expressly that he knows he is going to die. The use of any words equivalent to such a statement will suffice.[FN97] However, a statement that indicates the declarant retains some hope of recovery which, in turn, precludes a firm conviction of the imminence of death, will render a dying declaration inadmissible.[FN98]

Wharton's Criminal Evidence, § 6:30. Dying Declarations (Dec. 2014).

The central issue in determining whether a statement is a dying declaration is whether the declarant believed he or she was dying.[FN1] To render a dying declaration admissible, the declarant must have uttered it with a consciousness of impending death.[FN2] Where a death is sudden and unexpected the declaration will be inadmissible under the exception for dying declarations.[FN3] A mere belief that death was possible, or even probable, is not sufficient; the declarant must be virtually certain that death is imminent.[FN4] There must be a settled, hopeless expectation that death is near at hand and no statements indicating a hope for recovery,[FN5] although a declarant's urgent request for an ambulance would not necessarily show that he or she entertained some hope of recovery.[FN6] Similarly, the fact that the declarant requested a doctor does not, in itself, render the declaration inadmissible.[FN7] In addition, if the declarant believed in his or her impending death at the time of the declaration, it does not matter that, after the declaration, hope was revived and the declarant believed that he or she would recover.[FN8]

A declarant's statements are admissible to show a belief in impending death.[FN9] However, although there is some authority to the contrary,[FN10] some courts state that the dying person does not have to state expressly that he or she knows that he or she is going to die; rather, the use of any words which are equivalent to such a statement will suffice.[FN11] Apart from the statements of the declarant, his or her consciousness of impending death can be proved by surrounding circumstances, such as the nature of the injury,[FN12] or by conduct, such as sending for a priest.[FN13] Furthermore, although there is some authority to the contrary,[FN14] there is authority that a statement by a physician or other attendant that the declarant was aware,[FN15] or was not aware,[FN16] of impending death is admissible in evidence. It is not necessary to show a statement by the declarant indicating a belief that death was impending, if it is otherwise clear that the declarant did not expect to survive the injury.[FN17] In any event, the attendant circumstances should be carefully considered, not only to determine whether the declarant believed death was imminent, but also to confirm whether the declarant was sincere in entertaining such a belief.[FN18]

Although it is immaterial that the declarant did not die until a significant period of time had elapsed after making the declaration, provided at the making of the declaration, the declarant believed death was impending,[FN19] the existence

of delay may be a factor in determining whether the declarant did in fact believe that death was impending when he or she made the declaration.[FN20]

Am Jur. Evidence § 844. *Dying declarations; statements made under belief of impending death - Expectation of impending death.*

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. See Louisiana v. Bell, 721 So.2d 38 (La.Ct.App. 5th Cir.1998); Louisiana v. Nicholson, 703 So.2d 173 (La.Ct.App. 4th Cir.1997); Louisiana v. Matthews, 679 So.2d 977 (La.Ct.App. 4th Cir.1996). Repeated 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 are circumstances that indicate the declarant's awareness of approaching death. Charles v. State, 955 S.W.2d 400 (Tex. App. 1997).⁴ In fact, a declarant can be aware of imminent death even when he is assured he will not die and will be fine. See Id. at 404(holding evidence was sufficient for trial court to infer victim believed her death was imminent where victim had severe burns all over her body, she asked if she was going to die, and the officer replied negatively to reassure her and to prevent shock). See Wilks v. State, 983 S.W.2d 863 (Tex. App. 1998)(statement victim made to a witness at the hospital, that she always figured defendant, her husband, would kill her, but she figured he would use a gun, was admissible as a dying declaration in murder and arson case, where victim was severely injured and death was imminent); State v. Brown, 263 N.C. 327, 139 S.E.2d 609 (1965)(although attending physician was hopeful and encouraging, declarant's belief in inevitability of death was

⁴ See, e.g., People v. Georgakopoulos, 303 Ill.App.3d 1001, 237 Ill.Dec. 156, 708 N.E.2d 1196 (1999) (holding the belief in the imminence of death may be demonstrated by the declarant's own statement or from circumstantial evidence, such as the nature of the wounds or statements made in his presence); Louisiana v. Lucas, 762 So.2d 717 (La.Ct.App. 1st Cir.2000) (finding the magnitude of the victim's gunshot wound, the victim's knowledge he was going into surgery, his obvious pain, and his "serious" tone of voice provided enough evidence to infer victim was aware of his imminent death).

sufficient for admission); State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983)(declaration admissible where the victim repeatedly stated to police officers "Oh God, I am dying; somebody please help me"; it is not necessary that declarant personally express his belief that he has no chance of recovery).

Additional examples include; People v. Newell, 135 Ill. App. 3d 417, 481 N.E.2d 1238 (1985)(victim's identification of murderer and additional "I love my mother, tell my mother I love her, better yet, I'll tell her" does not prevent admission of declaration); Bargery v. State, 37 Ark. App. 118, 825 S.W.2d 831 (1992)(declarant's repeated statements that he didn't know why he had been stabbed and that he was scared, coupled with the obvious severity of his wound combined to make statement admissible); .

At common law, the condition was described as "that the declarant must be so fully aware of this as to be without any hope of life." "While it is true that, to make a dying declaration admissible, the deceased must have lost all hope of life, it does not follow necessarily that, because he sends for a physician, or asks that one be sent for, he has any hope of life from the timely aid of a physician. One may be so severely wounded that he may know that death is imminent and certain, and yet he may want a physician to relieve his suffering." Marshall, 98 S.E., 131. Evidence that on the morning after a defendant had fatally stabbed deceased, and while deceased was in a hospital and about two hours before his death, declarant he stated that he wanted to get well so he could apologize to defendant, was not admissible as a "dying declaration." State v. Dawson, 203 S.C. 167, 26 S.E.2d 506 (1943). However, the commentator to the Rule stated that the requirement that the declarant actually died was relaxed and only required the death of the declarant in a homicide death prosecution and only requires unavailability. In State v. Wideman, 110 S.C. 394, 96 S.E. 688 (1918), it was held that, where

declarant made statement that he was shot to death and was not going to get well, this sufficiently showed that he was *in extremis*.

HOW THE ISSUE WAS RAISED BELOW

On March 26, 2013, a hearing on the motion to suppress was held before Judge McDonald. In addressing the admission of the April 29, 2011 bedside identification of Marvin Brown as the assailant by Davon Goodwin to Detective Jerome Fleming, the state presented a series of witnesses to support its admissibility under Rule 804(b)(2), SCRE.

Former Detective Jerome Fleming stated he arrived at the Medical University of South Carolina Hospital around noon (corrected to around 10 am⁵) to attempt to interview Davon Goodwin for any information about the gunshot wound he received on April 26. R. 8-10, Tr.p. 8-10. He went to the Intensive Care Unit and met with the victim's family members and learned that the father had spoken with the son that night and that his son was lucid and able to communicate. At that point, Detective Fleming went into the room and sought to interview Goodwin and convince him to cooperate and told him that he was fortunate to be alive and that no one had come forward and he was the only person who could establish who the perpetrator was and to bring him to justice. R. 11, Tr.p. 11, ll. 11-20. 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. He attempted to initial or sign the photograph he pointed to. The tape of the interview, Court Exhibit 3, was played for the judge (and is supportive of the weakened state and demeanor of the victim at the time. R. 14, Tr.p. 14 (10:24-10:30 am). Detective Fleming had to stop the recording when he was holding the recorder close to the victim's mouth because Fleming lacked

⁵ R. 37, Tr.p. 37, ll. 8-17.

a free hand to hold the photographic lineup and admonition statement. R. 13-14, Tr.p. 13-14.

Detective Fleming stated that he showed the victim the 6-pack which included Marvin Brown based upon an anonymous call that they had received. R. 15, Tr.p. 15. Without hesitancy, he pointed out Number 6 which was Brown to Detective Fleming. R. 15-17, Tr.p. 15-17. The victim attempted to write what appeared to be "D I G" on the photograph. R. 16, Tr.p. 16. Fleming confirmed that the victim stated to him that while he did not know the person's name, that he had known the person's face from the neighborhood for quite some time. R. 17, Tr.p. 17. The remainder of the tape of the interview was played for the next four minutes. R. 18, Tr.p. 18. (10:34-10:37). Detective Fleming conformed again that the victim's weakened state is reflected in the recording. R. 18, Tr.p. 18.

On cross-examination, Detective Fleming confirmed that there was no breathing tube in the victim's throat at the time and the victim was able to speak and appeared lucid. He confirmed that the shooting happened on the morning of the 26th and he interviewed him on the 29th. R. 19-20, Tr.p. 19-20. 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. He allowed that the actual lineup that was shown Goodwin was a colored line-up identified as Court Exhibit 5. R. 30-31, Tr.p. 30-31. Although Fleming was aware of the anonymous tip, he never revealed that information to the victim. R. 22, 34, Tr.p. 22, 34.

Detective Fleming clarified that when he first interviewed the victim, he stated that he did not know the name, but that he knew the person who shot him by sight. R. 36-38, Tr.p. 36-38. He stated that the interview began around 10:12 am. R. 37-38, Tr.p. 37-38. It was pointed out that the victim stated that the perpetrator "he's always doing that when he's drunk" and that the person took money from him. R. 37-39, Tr.p. 37-39. Detective Fleming stated that the victim said

he had \$120 in his pants and his pants were taken in and he did not know where they were and clarified that he was not sure if money was taken. R. 38-39, Tr.p. 38-39. Detective Fleming confirmed that he did not record when the victim made the identification. He stated described how weak the victim's voice was and why he had difficulty holding the recorder and showing the victim the documents. R. 39-40, Tr.p. 39-40. Detective Fleming stated that he though he made his written report on April 29, but was corrected that the report was dated May 4, 2011, the date the victim died. R. 34, Tr.p. 34.

The defendant's grandfather, David Brunson, Jr. testified about his visit with the victim at the hospital. He noted that he had a close relationship with the victim. He described his discussion with the victim about the car rides they took together:

A. I was sitting there holding his hand, and we were talking about the times we had, and the subject came up bout riding around, and – he would always sit on the front, near the door on the passenger side. **And he said he wouldn't be able to ride with me, and that my other grandson Kaleem would have his seat.** Because he and Kaleen would always fight.

Q. And did you take that to mean that he was fearful he may not ever have the opportunity to take these rides with you again?

A. Yes.

Q. Did he also apologize to you for some of the decisions that he made in his life?

A. Yes, he did

R. 47-48, Tr.p. 47, l. 12- p. 48, l. 5.

The grandfather was recalled concerning the timing of these conversations. R. 68-70, Tr.p. 68-70. He stated that conversations occurred on more than one occasion, although he could not state the exact dates. R. 68, Tr.p. 68, l. 3. He stated that conversation about no longer being able to ride in the car with him occurred "a little bit after he was sewn back up after that."

[According to hospital records, the victim had two separate surgeries. R. 208-211, Court Exhibit

p. 56-59. (MUSC Records). He stated the car conversation preceded when he was putting cream on the victim's stomach. R. 69, Tr.p. 69.

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. 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.

The victim's sister, Dendria Brunson testified that she spent time with the victim at the hospital. Before the incident, she stated that he was not an emotional person and never saw him cry. R. 58, Tr.p. 58, ll. 2-13. However, she stated she saw him cry at the hospital when she would wipe his face. She testified: "I don't think he wanted us to see him crying. But he used to always—seemed tired, and he was ready to go home." R. 58, Tr.p. 58, ll. 19-22. [According to a note passed from the family to the prosecutor, the comment "ready to go home" meant ready to

pass on in death. R. 99, Tr.p. 99, ll. 8-18.

The brother, Desmonte Goodwin testified that the victim was his big brother. He stated that his brother kept telling him that everything will be all right.⁶

WHAT THE TRIAL JUDGE RULED

In the initial oral ruling on December 10, 2013, Judge McDonald orally rule that the statement identifying Brown was not admissible within Rule 804(b)(2), SCRE after reviewing the medical records, the information about the extubation of the victim and his health status at the time of his viewing the six-pack. R. 104, December 10, 2013 Tr.p. 3, ll. 7-13. She opined that the victim had been extubated and had told his sister he just seemed tired and ready to go home and that he was ambulatory the next day and screened for physical therapy and that everyone thought he was getting better. R. 104, December 10, 2013 Tr.p. 3, ll. 13-19.

She distinguished McHoney, 344 S.C., 93("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."), by noting that there the victim never regained consciousness after the declaration although she lived for two more weeks. R. 104-05, December 10, 2013, Tr.p. 3-4.

In the written order dated August 18, 2014, Judge McDonald set forth her reasons for suppressing the statement:

1. Imminent Death at the Time the Declaration is Made

The Court concludes that while there is no doubt that the victim in this case was in serious condition at the time of his identification of Defendant Brown, his medical records demonstrate that he was improving and was not in imminent danger of death at the time the statements were made. The victim was admitted into the hospital on April 26, 2011, and underwent surgery the same day. See Exhibit A, page 56 of 519. He was

⁶ Desmonte also said that his brother told him who the person who shot him was, but did not use a name and that he knew who he was. R. 60, Tr.p. 60, ll. 11-22. However, there is a dispute on whether Desmonte told law enforcement about that statement by his brother. R. 61, Tr.p. 61.

intubated on April 26th and extubated on the 28th. Ex. A at 186. Furthermore, on the day that the challenged statements were made, the Defendant, the victim was "adequate on the floor, transferred out of STICU, was making strides with physical therapy, and ambulating in the hall." Ex. A at 56. He received a physical therapy consult on April 29th, and began physical therapy on April 30th. Ex. A at 404, 406 and 465. On that day, he tolerated 5-15 minutes of uninterrupted exercise. Ex. A at 429. Moreover, the victim's May 4th death was listed as sudden and unexpected. Ex. A at 48.

2. Declarant must be Fully Aware of Imminent Death to be without any Hope of Life

The Court further finds that 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 of the defendant from the six-pack lineup. In fact, the evidence suggests the contrary; on April 29th, the victim's medical condition was improving. Furthermore, evidence presented at the pre-trial hearing suggested that the victim 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.

3. The Circumstances of the Death Must be the Subject of the Statement

The Court concludes, and all parties agree, that the circumstances of the shooting – which resulted in the victim's subsequent death - were the subject of the hearsay statement. However, this alone does not satisfy the requirements of either Rule 804(b)(2), SCRE or the common law rule.

R. 137-38, Order, p. 3-4.

ANALYSIS

The State submits that the trial court erred in its conclusions that the April 29, 2011 declaration by Davon Goodwin was inadmissible under Rule 804(b)(2), SCRE. First, contrary to the mistaken conclusion of Judge McDonald, 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 order, although during the hearing, she considered the testimony as "pretty persuasive"

evidence of his belief of impending death. Similarly, these statements cannot be taken in a vacuum. The medical records before the trial judge revealed that on April 29 at 10 am, the victim had been subjected to a gunshot wound which would cause his death on May 4, just 5 days later. Exhibit 1 (A), p. 56. He had been intubated and subject to two surgeries to seek to close the damage. R. 208, 516-24, *Id.* p. 56, 364-372. He spoke with a weakened voice and was weak and unable to write. He was confined to his bed at the time of the interview in the Intensive Care Unit where he had been within that day. *Id.* He was on oxycodone for pain. R. 210, *Id.*, 58. At some point (apparently subsequent to the interview) during that day, he was placed in a chair bed. The day after the interview on April 30, he was given some physical therapy. R. 581, *Id.* at 429. However, it also revealed that he did not want to do PT and they required encouragement for his participation. R. 581, *Id.*, 429.

On April 29 at 8 PM, the social work report indicated that the victim “lacked motivation and was unreceptive” to discussions about discharge planning, pain management, patient safety and plan of care.” R. 544, *Id.* at 392. He was found that same day to have a “flat affect. *Id.* .

Here, the circumstances support only a conclusion that on April 29 at around 10 am. Davon Goodwin had a belief that his death was imminent. Under Rule 804(b)(2), SCRE, this is the crux of a showing for admissibility, not whether the hospital was continuing to treat the wound or whether the social workers were taking a course of conduct to prepare for the possibility of survival. The fact that death resulted on May 4, 2011 speaks volumes about whether death was imminent on April 29 and whether the victim after two days of surgeries had a belief that death was imminent.

The trial court also based its decision on a factor that did not exist in the record as suggesting that he did not believe that death was imminent. There is no evidence in the record to

show that Davon Goodwin was planning revenge against Brown. To the contrary, Detective Fleming had to encourage Goodwin to assist law enforcement at the time of the meeting. For this unsound basis in the decision it must be reversed.

The trial court, although death occurred on May 4, questioned whether there was evidence on April 29 to suggest that death was imminent. The trial judge surveyed the medical records and asserted that they reflected that his condition was reported improving until his death. However, in McHoney, under Rule 804(b)(2), SCRE, the court determined that even though the declarant survived for another two weeks after her statement, the statement was admissible as a dying declaration. As was clear under McHoney and its interpretation of Rule 804(b)(2), SCRE, the focus is on the declarant's state of mind, not on the eventual outcome of the declarant's injuries. Here, his state of mind was morbid and represented a belief that he would not return to the life he knew as represented to his grandfather.

The Court in McHoney recognized that the declarant's state of mind can be inferred from the facts and circumstances surrounding the declaration where it found repeated questioning by the declarant about whether he was going to live, a less than reassuring answer, the nature of the wound and the declarant's critical condition⁷ are circumstances that indicate the awareness of his approaching death. Here, those factors on April 29, 2011 point conclusively that awareness of his impending death. The trial court's conclusion to the contrary is not supported and was an abuse of discretion.

⁷ A declarant's serious injuries can support an inference that he believed death was imminent, see United States v. Peppers, 302 F.3d 120, 137 (3d Cir. 2002), but the nature and extent of the injuries must be so severe that "obviously ... [the declarant] must have felt or known that he could not survive." Mattox v. U. S., 146 U.S. 140, 151, 13 S. Ct. 50, 36 L. Ed. 917 (1892)

THE ACTUAL IMMINENCE OF DEATH IS NOT THE DETERMINING FACTOR UNDER Rule 804(b)(2), SCRE WHERE THE LENGTH OF TIME TO DEATH IS IMMATERIAL.

The trial court also erred in assessing whether death was actually imminent on April 29 as an issue on admissibility under Rule 804(b)(2), SCRE. First, death did occur on May 4, 2011. Second, the victim was just placed in the Intensive Care Unit on that date after two surgeries had been completed to seek to repair the effects of the gunshot wound. The trial court misread Rule 804(b)(2), SCRE and the precedent of McHoney. It is the declarant's belief that death is impending under Rule 804(b)(2) and McHoney that makes the statement admissible, not that death is actually imminent. In fact, the commentators to our rule recognized the difference between the common law and Rule 804(b)(2) in noting that "subsection (2)" and stated the "rigid requirement that the declarant must actually have died, Dawson, 203 S.C. 167, is relaxed under the Rule which only requires the death of the declarant in a homicide prosecution." Since the declarant need not die from the wounds or injuries, the length of time between a statement and death could not be dispositive of the statement's admissibility under the modern exception. McCormick on Evidence, § 310.

As in McHoney, the swiftness of the death was not the issue underlying admissibility, but the declarant's state of mind. Under the trial court's mistaken theory, any indication of improvement in medical status could make a statement made under a belief of impending death inadmissible. As the Rule notes, even if the declarant survives the particular wounds, but later dies, the statement would be admissible as long as the declarant is unavailable by death at the time it was proffered. While his medical condition may be a circumstance supporting or rejecting a belief in his impending death, it is his actual state of mind that controls the admissibility.

Here, it is evident that the declarant was in danger of death, even if death was not actually

imminent on April 29. Like the Court held in McHoney, the length of time the declarant lives after making the dying declaration is immaterial. McHoney, supra. (victim died two weeks after statement). 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. See State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926).⁸ In Hall, 134 S.C. 361, the Supreme Court held a dying declaration was properly admitted when the declaration was made shortly after the injury, and the declarant died 33 days later. The Supreme Court held it was the jury's duty to pass upon the credibility of the dying declaration, and the length of time between the declaration and death is just one factor to be considered. Id. at 361, 133 S.E. at 26. In McHoney, supra, the victim died two weeks after the injury. The medical personnel who attended the victim assured her she would be "fine." However, the victim shook her head no in response to the assurances, indicating she was aware of her impending death. The Court found the two week time frame after her injury did not indicate the victim did not believe her death was imminent, where she shook her head when told she would be fine, and where she never regained consciousness after she made the declaration and the court admitted the statement.

The trial court abused its discretion and erred in concluding otherwise. The order to suppress the statement must be reversed.

⁸ See also State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981)(holding the fact victim lingered for several days after his communication to police officer that defendant was the man who shot him did not render statement inadmissible as a dying declaration); State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978)(the fact victim survived one week longer than doctors told him he might live did not render victim's dying declaration inadmissible); Thomas v. State, 62 Ark. App. 168, 973 S.W.2d 1 (1998)(holding under the dying declaration exception, it is declarant's belief in nearness of death when he makes the statement, not the swiftness with which death actually ensues, that is most important); Charles, 955 S.W.2d 400(holding length of time declarant lives after making dying declaration is immaterial in determining if statement is dying declaration for purposes of hearsay exception); Herrera v. State, 682 S.W.2d 313 (Tex. Crim. App. 1984)(length of time declarant lives after making dying declaration is immaterial to dying declaration exception).

CONCLUSION

It 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.

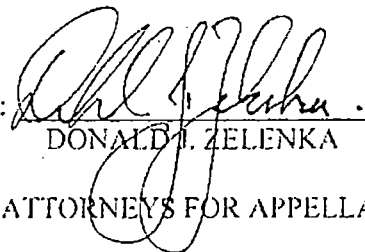
Respectfully submitted.

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BY:



DONALD J. ZELENKA

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
January 15, 2016

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.

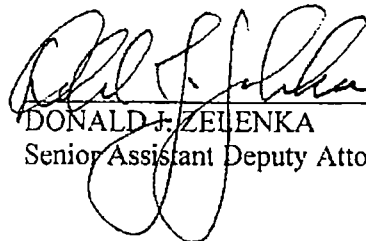
v.

MARVIN BROWN.

Respondent.

CERTIFICATE OF COMPLIANCE

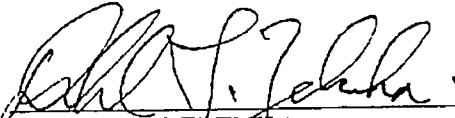
The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled “ Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”


DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

January 15, 2016

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Final Brief of Appellant in the foregoing action by depositing copy in the InterAgency Mail to Susan B. Hackett, Esquire, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 15th of January 2016.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

APPELLANT,

v.

MARVIN BROWN,

RESPONDENT.

APPELLATE CASE NO. 2014-002129

FINAL BRIEF OF RESPONDENT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge correctly find that a statement made by the deceased to the police was not admissible as a "dying declaration"?
- II. As an alternate sustaining ground, is 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

In 2012, Respondent was indicted for murder (2012-GS-10-6846), armed robbery (2012-GS-10-6845), and possession of a weapon during a violent crime (2012-GS-10-6844). R. 690 - 695. On March 13, 2013, Respondent filed a motion to suppress hearsay testimony of Goodwin, Davon Goodwin. R. 117. On March 25, 2013, Respondent filed a memo in support of his motion to suppress hearsay testimony. R. 118. Respondent argued the burden was on the state to demonstrate the proffered evidence fulfilled the requirements of the law to be introduced as a dying declaration. R. 128. Although Respondent conceded the subject of the proffered statement concerned the circumstances of the death, Respondent argued Goodwin was not in imminent danger of death and the statement was not given while Goodwin was so fully aware of his imminent death as to be without any hope. R. 128-129.

The state responded by way of a document titled "Source Citations in Response to Defense Motion to Suppress Statement." R. 131 - 134. The state argued that Respondent's "line of cases dating from 1914-1943 & 1962" stood for the "general proposition that a victim must literally be at death's door" for the dying declaration exception to apply. R. 131 - 134. The state continued by explaining that defense counsel "kindly taught" the prosecuting attorney the phrase "*in extremis*" to explain the first requirement of a dying declaration. R. 131- 134. Additionally, the state argued the cases cited by Respondent, which the state called "World War I era authority," had been implicitly overruled by State v. McHoney, 344 S.C. 85, 554 S.E.2d 30 (2001). R. 131 - 134. According to the state "the modern approach to the reasonable fear of 'imminent death' relaxe[d] somewhat the rigid requirements of a century ago." R. 131 - 134.

The matter proceeded to a hearing before the Honorable Stephanie P. McDonald on March 26, 2013. R. 1. Cody Groeber and Megan Ehrlich represented Respondent, and Chad Simpson represented the state. R. 1. Judge McDonald took the matter under advisement. R. 101, lines 3-4.

On December 10, 2013, the parties reconvened. R. 102 Judge McDonald found the statements made by Goodwin were not dying declarations falling within the hearsay exception found in Rule 804(b)(2) of the South Carolina Rules of Evidence. R. 104, lines 7-12. On August 18, 2014, Judge McDonald issued a written order granting Respondent's motion to suppress the statements made by Goodwin. R. 135.

The state filed a notice of appeal on August 26, 2014, which was perfected. Respondent now files this brief.

ARGUMENT

- I. The trial judge correctly found that a statement made by Goodwin to the police was not admissible as a “dying declaration.”

Relevant Facts

During the early morning hours of April 26, 2011, Davon Goodwin, Goodwin was shot in the abdomen in downtown Charleston. Court’s Exhibit #3; R. 140; R. R. 208; R. 571. He was transported to the Medical University of South Carolina (MUSC) by EMS. 140; R. 208; R. 571. He informed the emergency medical personnel that he “heard one shot” and “felt pain in [his] stomach.” R. 571.

When he arrived, he was “awake, alert, [and] oriented.” R. 208; R. 568. Immediately, Goodwin “underwent an exploratory laparotomy and repair of duodenum, inferior vena cava, and superior mesenteric vein and artery.” R. 140 - 141; R. 202; R. 208; R. R. 239. According to the physician, the injuries were repaired. R. 208. 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.” R. 140; R. 202; R. 208; R. 516 - 521. The decedent “tolerated this procedure well.” R. 208. Discussions of extubation began on April 27, 2011 due to Goodwin’s improving condition. R. 273. On April 28, 2011, at 10:15 a.m., the medical team arrived at the his bedside awaiting extubation. 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. Furthermore, he was “up and out of bed-to-chair.” 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 in his upper or lower extremities. R. 367. Also at 8:00 p.m., the doctor ordered the patient 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. However, the notes indicated Goodwin lacked motivation and was unreceptive to instruction. R. 544.

On April 29, 2011, Jerome Fleming, then a detective for the City of Charleston Police Department, went to MUSC to meet with Goodwin. R. 8, lines 9-18; R. 9, lines 15-17. Fleming went to the hospital at “[a]pproximately noontime.” R. 9, lines 18-19.² Fleming first spoke with Goodwin’s parents, who informed him that Goodwin “was lucid” and “able to communicate at the time.” R. 10, lines 1-9; Court’s Exhibit #3. During the audio recording, while Fleming was in Goodwin’s presence, Fleming described him as “alert and conscious” and “recuperating from his injury.” Court’s Exhibit #3. At the time of the meeting, Goodwin did not have a breathing tube and was able to communicate with Fleming by speaking. R. 19, lines 16-19. Goodwin was lucid and alert. R. 19, lines 23-24.

¹ It appears he was transferred from the ICU to a regular room around 8:00 p.m. on April 29, 2011. R. 372; R. 471.

² In his report, he stated he saw Goodwin “around 12:10.” R. 37, lines 4-7. On the recording, he said he interviewed Goodwin at 10:12 a.m. R. 37, lines 8-17; Court’s Exhibit #3.

After entering Goodwin's hospital room, he first engaged in conversation "to convince the [deceased] to cooperate ... as far as the investigation [was] concerned." R. 10, lines 16-22. Goodwin expressed hesitancy in speaking to Fleming because individuals "living in a community [] don't want to be identified as being an individual [who] assisted the police." R. 10, line 23 – R. 11, line 5. Goodwin told Fleming "he didn't want to get involved." R. 11, lines 11-12. In fact, Goodwin said he did not know who shot him. R. 36, lines 1-11. Fleming encouraged Goodwin to cooperate because he was "very fortunate" to be alive" and "no matter ... the opinion of the people" there were no other witnesses to assist the police in determining the identity of the perpetrator. R. 11, lines 12-19. Thereafter, Goodwin provided Fleming with a statement, which was partially recorded. R. 11, lines 20-22; R. 12, lines 22-25; R. 26, lines 8-12; R. 39, lines 3-7.

Fleming described Goodwin as "very weak" while lying in a bed in the Intensive Care Unit (ICU). R. 12, lines 2-3. There were "tubes ... attached to his body" and he was "unable to really raise his hands or arms, *per se*, and speak loudly." R. 12, lines 3-6. When Fleming asked Goodwin to circle a photograph, Goodwin stated he "was too weak to accomplish that task." R. 12, lines 7-15. Nevertheless, Goodwin "attempted to write his initials -- or sign by the picture that he pointed to." R. 14, lines 7-10; R. 672; R. 688.

While the digital recording device was turned off, Fleming "read an admonition statement from the lineup to show" Goodwin and showed the simultaneous photographic lineup to Goodwin. R. 13, lines 7-22; R. 15, lines 17-23. Also, while the digital recording device was turned off, Goodwin signed the admonition form indicating he understood the admonition and circled a photograph among those in the lineup. R. 14, lines 7-10; R. 15, lines 1-4; R. 16, lines 1-22; R. 672; R. 688. According to Fleming, Goodwin indicated

“while he didn’t know the person’s name, he had known this person’s face from the neighborhood for quite some time,” despite Goodwin’s earlier statements that he did not know the shooter at all. R. 17, lines 3-6; R. 36, lines 9-15. Fleming claimed Goodwin expressed no hesitation, reluctance, or doubt concerning the identification. R. 17, lines 7-12. During the recorded conversation, Goodwin indicated he got a good look at the person who shot him. R. 17, line 22 – R. 18, line 1; Court’s Exhibit #3. Also, during the recorded and unrecorded conversation, Fleming referred to the suspect by the name of Marvin and told Goodwin “he had made a positive identification.” R. 33, lines 2-8; R. 36, line 16 – R. 37, line 3; R. 40, lines 23 -25.

On April 30, 2011, a physical therapist consulted with Goodwin. R. 556. He was able to tolerate five to fifteen minutes of uninterrupted exercise. R. 557. He could roll, scoot, move from supine to sitting, and move from sitting to standing with moderate assistance. R. 557. Also, Goodwin’s family was instructed on physical therapy exercises and the importance of getting out of bed. R. 557. The physical therapist determined Goodwin’s prognosis was “good” and established short term goals for Goodwin to achieve by May 14, 2011 and long term goals to be achieved within two months. R. 557 - 558.³

Despite the decedent’s improvement over the course of his hospital stay, he was found unresponsive on May 4, 2011. R. 141; R. 208. The hospital suspected he died from a pulmonary embolism. R. 199. He was pronounced dead at 8:45 a.m. R. 199; R. 141; R. 207; R. 658. The attending physician described his death as “[s]udden, unexpected, [and] unexplained.” R. 200.

³ On May 2, 2011, the physical therapist met with the deceased who indicated, “I’m ok.” R. 563.

An autopsy was performed on May 5, 2011 at MUSC at 9 a.m. R. 140. The pathologist opined the “decedent died as the result of complications of a single penetrating gunshot wound to the abdomen.” R. 146.

At the hearing, Goodwin’s grandfather, David Brunson, Jr. recalled his close relationship with Goodwin. R. 45, lines 19-20. He mentioned that he would ride around in the car with all of his grandkids, including Goodwin. R. 46, lines 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, lines 12-22. In fact, the two discussed the rides more than once. R. 46, lines 23-25. While the grandfather was holding Goodwin’s hands, the subject came up. R. 47, lines 16-18. Goodwin “would always sit on the front, near the door on the passenger side.” R. 47, lines 18-19. Goodwin “said he wouldn’t be able to ride” with the grandfather, and another grandson “would have his seat.” R. 47, lines 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, line 24 – R. 48, line 2. Additionally, Goodwin apologized to the grandfather “for some of the decisions that he had made in his life.” R. 48, lines 3-5.

After the judge indicated she found the grandfather’s testimony persuasive, the state recalled the grandfather to the stand. R. 66, lines 7-11; R. 66, lines 24-25. The grandfather was unable to recall an exact date when “these types of conversations” happened. R. 68, lines 1-3. However, he stated those “types of conversations happened on more than one occasion while he was in the hospital.” R. 68, lines 4-7.

Additionally, the grandfather noted that he believed Goodwin “was leaking inside because he started to swell.” R. 68, lines 11-12. Goodwin “was rubbing and his belly” and

stated he was "burning inside." R. 68, lines 13-14. The grandfather asked the nurse "for something" to assist Goodwin with this complaint. R. 68, lines 14-15. The nurse went to the doctor. R. 68, line 15. The grandfather was told "to go to the drugstore and get some itch cream and put [it] on his belly." R. 68, lines 15-17. The grandfather and his grandson 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, lines 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, lines 2-4. This incident occurred "a little bit after he was sewn back up." The grandfather recalled "his eyes were yellow like a banana." R. 69, lines 4-8.

The conversation between Goodwin and his grandfather about the car rides the two would take occurred *prior* to the conversation in which the grandfather rubbed cream on Goodwin's belly. R. 68, line 21 - R. 69, line 3; R. 69, line 12-15.

On the morning of the shooting, David Brunson, III, Goodwin's father, arrived at the hospital where Goodwin was in surgery. R. 49, lines 8-9; R. 49, lines 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, lines 1-5. However, the doctor explained Goodwin "was stable" immediately after the surgery. R. 50, line 6. In fact, the doctor told the family that the surgery went as well as could be expected and they had done "the [b]est they [could] do." R. 50, lines 13-15. Nevertheless, the doctor warned, "any moment, it can be bad for him." R. 50, line 7.

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, lines 15-19. However, the medical records clearly showed Goodwin underwent two surgeries.

After the surgery, Goodwin was "[a]lmost like a -- a child just happy to see his parents." R. 51, lines 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, lines 4-7. Further, he described Goodwin as "pretty much scared" and "in a deep stare." R. 51, lines 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, lines 15-20. Nevertheless, Goodwin was "real playful" and enjoyed playing with "his little sisters and nephews and everybody." R. 51, lines 20-25. Goodwin's father interpreted Goodwin's desire to hold hands while in the hospital to mean he was afraid. R. 52, lines 7-9. Later, Goodwin's father explained Goodwin feared his assailant would finish the job police because the person who allegedly shot Goodwin was someone who "do[es] so much in the community, and always get[s] in a lot of trouble." 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, lines 10-22.

Goodwin's father recalled when the detective arrived to talk to Goodwin. Initially, the father told the detective that Goodwin was asleep. R. 53, lines 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, lines 11-14. However, the doctors would not allow Goodwin to stay awake for longer than “an hour or so.” R. 53, line 15. Thereafter, Goodwin’s father permitted the doctors to wake up Goodwin and talk to the detective. R. 54, lines 1-2.⁴

Goodwin’s sister, Dendria Brunson, explained she had never seen Goodwin cry until he was in the hospital following his surgeries. R. 58, lines 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. Tr. 58, lines 18-20. Goodwin “seemed tired, and he was ready to go home.” R. 58, line 22.

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

During the argument on the motion, the state noted Goodwin had “majorly, invasive surgery, emergency surgery” and was “in critical condition” when he arrived on April 26, 2011. R. 73, lines 21-24. Goodwin underwent “further exploratory surgery” on April 27, 2011. R. 74, lines 5-6. Goodwin gave a statement to the police at 10:12 a.m. on April 29, 2011. R. 74, lines 15-17. The state noted Goodwin “had a breathing tube ... was intubated” and the “breathing tube was removed ... on the morning of the 29th - - or late the

⁴ As noted by defense counsel, 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, line 18 – R. 86, line 1.

28th.” R. 74, lines 19-22. Nonetheless, Goodwin gave his statement after the tube was removed. R. 74, line 24 – R. 75, line 1.

The state’s summary of the medical records was that “the doctors believed that surgery was successful, that they were hopeful of a favorable prognosis.” R. 75, lines 2-7. Further, the state contended the “doctors conveyed to the family, hey you know, surgery went as well as can be expected and we’re hopeful.” R. 75, lines 8-10. Nevertheless, the state argued the “prognosis” was “in a context of a gunshot wound to the abdomen and majorly invasive surgery.” R. 75, lines 11-14. Further, the state argued that Goodwin’s dying days after the surgery and his statement to police was “immaterial” and that his “actual medical condition” was “not the end of the discussion.” R. 76, lines 1-7. According to the state, the issue was whether the “person subjectively [was] in fear of death” and “was that fear of death, of imminent death, a reasonable fear to have at that time.” R. 76, lines 9-12. Acknowledging “things [] cut both ways,” the state argued Goodwin “was actually in fear of imminent death and that fear was reasonable.” R. 76, lines 14-19.

The state argued the evidence “suggesting this fear of imminent death” was “the medical records themselves,” the fact that the statement was made approximately forty-eight hours after “major invasive surgery,” the surgery was to repair a gunshot wound, and that the medical records “echoe[d] the severity of the situation that he was under and how he was in fact still in the woods, so to speak, and in fact, possibly going to die.” R. 77, lines 3-21. Next, the state pointed to the testimony of the officer that Goodwin could not use his hands and the statement showing “how weak and scrawled his initials” were. R. 77, lines 22-25. According to the state, Goodwin’s “weakness and pain” could be heard in his voice on the recording of his statement. R. 78, lines 3-4. Finally, the state argued the substantial

evidence of Goodwin's subjective fear of imminent death was the testimony by the grandfather of his conversations with Goodwin. R. 78, lines 9-12. The state claimed Goodwin was "very upset that that could very well be his last ride with his granddad that he was going to have." R. 78, lines 22-24. The state argued that was "a direct statement ... suggesting he was fearful of death." R. 78, lines 24-25. Further, the state argued Goodwin's apologies to his grandfather "for some of the decisions and some of the mistakes he had made in his life" were "suggestive of a fear of imminent death." R. 79, lines 1-4.

The state claimed the father's testimony that Goodwin would "stare off into space" was attributable to medication, but was "some circumstantial evidence toward a fear." R. 79, lines 12-16. Further, the testimony that previously, Goodwin was not "the kind of touchy-feely guy [who] would walk around holding people's hand" but when he was "in the hospital, he almost constantly wanted someone's hand to hold" was "circumstantial evidence of the degree of fear that he was under." R. 79, lines 17-21. Further, the state pointed to the testimony of Goodwin's sister that Goodwin cried and attempted to hide his crying from his family. R. 79, lines 22-25. The state conceded there were "some signs of hope." R. 80, line 8. However, the state argued that "being hopeful of recovery and fearful of imminent death are not mutually exclusive propositions for someone in this kind of situation." R. 80, lines 10-13. The state argued it would be "very natural for someone in this kind of situation [to] have ebbs and flows and fear death - - you know, have a persistent fear of death while remaining somewhat hopeful of recovery." R. 80, lines 13-16. According to the state, the evidence was "mixed" on this issue, but what went "to the heart of it" was the conversation between Goodwin and his grandfather. R. 80, lines 17-25.

According to defense counsel, dying declarations are exceptions to the rule against hearsay “because a person who believes that they’re about to meet their maker wouldn’t lie” and would desire a clear conscience. R. 81, lines 11-18. Defense counsel explained the first condition that must be met in order to find a statement is a dying declaration is that the declarant “actually be in imminent danger of death.” R. 82, lines 1-21. Second, the declarant must be aware of imminent death and be without any hope at life. R. 83, lines 8-10. Defense counsel noted the state’s concession “there was a mixture of hope and fear,” and argued that “if hope exists, then the statement does not come in.” R. 83, lines 10-13.

Defense counsel noted the absence of repeated questioning by Goodwin of his health status. R. 84, lines 7-13. Importantly, defense counsel explained that while the condition of Goodwin was relevant, the most relevant aspect of this factor was his condition when he made the statement. R. 84, lines 14-22.

According to defense counsel, there was no “sacrosanct moment” when Goodwin gave his statement to the detective. R. 84, line 23 – R. 85, line 4. Instead, Goodwin was “lucid and alert,” was “recuperating from his injury,” had the ability to correct mistakes in his conversation with the detective. R. 85, lines 10-17.

Defense counsel noted the sister’s testimony Goodwin was tired and wanted to go home, and argued this “clearly” indicated “he had hope that he was going to go home.” R. 86, lines 2-5. Similarly, the younger brother testified Goodwin told him everything would be all right, which evidenced his hope that he would get better and go home. R. 86, lines 5-7.

Defense counsel countered the state’s argument that the doctors telling the family that “things could go bad” by explaining that such a prognosis was not a suggestion

Goodwin as in imminent danger of death at the time he gave the statement – it was a mere possibility. R. 86, lines 9-17.

Regarding the grandfather's testimony, defense counsel noted the record was unclear *when* those statements were made and that an apology for past conduct showed "hope to change in the future." R. 86, lines 18-24.

In response to defense counsel's argument, 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, lines 13-18.

When the parties re-convened on December 10, 2013, the judge found "after reviewing the 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. 104, lines 7-12. The judge noted Goodwin expressed to his sister that he was tired and ready to go home. R. 104, lines 14-15. He was ambulatory later that day or the next day. Ruling Tr. 3, lines 17-18. He was "screened for a physical therapy session and everyone thought he was getting better." R. 104, lines 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, line 20 – Ruling Tr. 4, line 3. Thus, the judge held the hearsay exception of 804(b)(2), SCRE did not apply. R. 105, lines 4-5; R. 106, lines 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, lines 17-22.

On August 18, 2014, Judge McDonald issued her formal written order resolving the issue in the case. R. 135. Judge McDonald concluded there was “no doubt” Goodwin “was in serious condition” at the time of his statements, 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 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, Judge McDonald 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.

Discussion

Standard of Review

“The circuit court primarily decides whether these conditions 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).

"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.

Dying Declarations – Common Law through the Rules of Evidence

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)(explaining the rules for dying declarations are "well settled" requiring (1) the death be imminent at the time the declarations are made, (2) that the declarant "be so fully aware of imminent death as to be without any hope of life," and (3) the subject of the declaration must be the imminent death and circumstances of the death); State v. Long, 93 S.C. 502, 77 S.E. 61 (1912); State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926)(explaining that the death of the deceased must be imminent at the time of the declarations).

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, the 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.” The 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 the 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. The Court held “this question and answer were quite sufficient to show that the deceased had no hope of recovery at the time.” Id. Additionally, the 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.

The 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. However, the defendant called a witness who testified that on the third day after he was shot, the deceased said he was better and thought he would get well. Id. Other witnesses also testified to not hearing the deceased “express any apprehensions of dying.” 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.

The Supreme Court affirmed the trial judge’s finding that the statements were admissible as dying declarations. Id. The 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, the Supreme 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. The 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. Jagers, 58 S.C. 41, 41, 36 S.E. 434, 435 (1900), the deceased was shot on the morning of October 3, 1899 between 9:00 a.m. and 10:00 a.m. A witness found the deceased between ten and fifteen minutes after the shooting. Id. The deceased said he was "shot bad" and "did not expect to live." Id. Around 3:00 p.m. and 4:00 p.m., the sheriff and the magistrate met with the deceased, who was "sleeping under the influence of opiates." Id. The magistrate shook the deceased awake and took a statement regarding the circumstances of the shooting. Id. Although the magistrate told the deceased he might die, the deceased made no indication of his belief regarding his death. Id. According to the magistrate, the deceased was under the influence of morphine at the time, did not manifest any concern about himself, and "seemed to be perfectly easy." Id. Another witness claimed that between 9:00 p.m. and 10:00 p.m. on the day of the shooting, the deceased expressed "no hope of himself." Id. The deceased died the following day at noon. Id.

The Court found no evidence "to show that the deceased, at the time he made the declarations in question, was so fully aware that his death was imminent as to have lost all hope of recovery." Id. In fact, the Court held "the testimony rather tends to show the contrary." Id. The Court pointed to the fact that the deceased was sleeping quietly, and when awakened, sat up in bed and drank a glass of milk. Id. According to the Court, the deceased "certainly said nothing and did nothing tending to show that he was conscious of impending death." Id. Even when the magistrate told the deceased that he might die, "the

deceased expressed no apprehension, and in no way indicated that he was uneasy about his condition.” Id. The Court explained that “while it may be true that, under the excitement of the moment” of being shot, the deceased may have thought he was going to die, it did “not at all follow that he still entertained those same apprehensions” several hours later when he was resting “perfectly easy.” Id.

In Franklin, 80 S.C. at 332, 60 S.E. at 955, the Court found the deceased’s dying declarations admissible where two witnesses testified the deceased indicated “he was fatally shot,” “was in a bad fix,” and “was in a dying condition.” Not only did the deceased refer to his wound as a “death shot,” but he removed his watch and handed it to someone nothing he would “have no further use for it.” Id.

In State v. Hall, 127 S.C. 256, 256, 120 S.E. 849, 850 (1924), the 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. The 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. The 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.

The Supreme 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. The Court was not persuaded that the "length of time intervening between the assault and the death render[ed] the declaration inadmissible." Id. The 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), the 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 the 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).

The 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. The 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, the 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.*

Although many of the concepts contained within the Rules had been adopted by the Supreme Court through case law, 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.⁵

The only published case in South Carolina examining “dying declarations” since the adoption of the Rules of Evidence is State v. McHoney, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001). Contrary to the state’s assertion at trial, which was not argued on appeal, the Court

⁵ In Sligh v. Newberry Elec. Co-Op., 216 S.C. 401, 419, 58 S.E.2d 675, 683 (1950), the Supreme Court explained that under the common law a dying declaration was only admitted in cases of criminal homicide.

did *not* alter the requirements for a dying declaration. Rather, the Court affirmed its reliance on the common law to interpret the Rule. This is not surprising in light of the note to the Rule explaining the Rule had not changed the common law except in two very narrow respects. In fact, the Court cited to State v. Hall, 134 S.C. 361, 133 S.E. 24 (1926) to support its conclusion that the focus of the analysis is on the declarant's state of mind when the statement is made, not on the eventual outcome of the declarant's injuries. McHoney, 344 S.C. at 93, 544 S.E.2d at 34. Thus, it is clear, the adoption of the Rules of Evidence as it concerned dying declarations, did not alter the landscape created by centuries of common law.

In McHoney, 344 S.C. at 93, 544 S.E.2d at 33, the 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, the 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.

Imminent Death at the Time the Declaration is Made

The state argues that “actual imminence of death is not the determining factor” under the Rule “where the length of time to death is immaterial.” IBOA at 21. This proposition runs directly counter to centuries of case law concerning dying declarations. In fact, our Courts maintain the length of time between the statement and death remains a “factor to be considered.” McHoney, 344 S.C. at 94, 544 S.E.2d at 34. Although the victim died two weeks after her injury, the victim, whose throat was slashed, expressed her concern that she would die by shaking her head when told she would die and never regained consciousness after making the declaration. Id. The evidence was clear that death was imminent. Id.

In the instant matter, death was not imminent at the time of the police interview. The shooting occurred during the early morning hours of April 26, 2011. The police interview occurred on April 29, 2011, after Goodwin underwent two successful surgeries on April 26, 2011 and April 27, and one day after, the breathing tube was removed. R. 339; R. 555. Goodwin’s medical condition significantly improved during April 28 and on April 29 as shown by the medical records explaining he was ambulatory, starting physical therapy, able to get out of bed and sit in a chair, and allowed to get out of bed whenever he wanted.

Fully Aware of Imminent Death & Without Hope of Life

On appeal, the state argued Goodwin expressed his belief in his impending death through his contact with his grandfather and expressions to him of regret that he would no longer be taking rides with him. IBOA at 18. The grandfather interpreted the statements of regret to mean Goodwin was not going to make it. IBOA at 18-19. The state also argued the multiple facts in the medical records supported the grandfather’s interpretation, including Goodwin dying five days after the statement, being intubated, undergoing two

surgeries, having a generalized weakened condition, and using pain medicine. IBOA at 19. Although the state admitted Goodwin was “placed in a chair bed” on the date of his statement and engaged in physical therapy, the state discounted this evidence as indicative of Goodwin’s improving condition. IBOA at 19. A careful examination of the record reveals the judge’s ruling on this point is not clearly incorrect or prejudicial.

The grandfather could provide no date for his conversation with Goodwin regarding his regret concerning no longer being able to take rides with him. In fact, the grandfather’s best guess was the conversation took place close in time to the surgery, which would have been two or three days prior to the police interview. The meaning of the conversation was open to multiple interpretations. First, Goodwin may have worried that his grandfather would not have wanted to ride with him if the shooting incident revealed negative character traits, as suggested by Goodwin’s apologies for his past decisions and conduct. Second, Goodwin may have feared retribution from his assailant and would have to leave the area in fear. Goodwin’s fear of his assailant was expressed clearly and unequivocally by his father, who testified Goodwin was afraid of the assailant. Third, Goodwin may have feared that his physical condition would not allow him to ride in a regular car or he would require assistance to ride in a car. The lack of evidence in the record regarding when the conversation between the grandfather and Goodwin occurred coupled with the equivocal nature of the conversation failed to carry the state’s burden.

According to Goodwin’s sister, Goodwin “seemed tired, and he was ready to go home.” R. 58, line 22. Goodwin repeatedly told his younger brother that “everything will be all right.” R. 60, lines 11-12. These two indicate Goodwin expected to recover from his injuries. During the arguments on the state argued, pursuant to a note from the family, that

“ready to go home” meant ready to die. However, this was not evidence before the court as it was received solely during arguments. Further, the statement was open to interpretation, and the most obvious interpretation was that Goodwin was ready to go to his physical home, not his heavenly home.

Additionally, the medical records support the trial judge’s finding that Goodwin was not so fully aware of his impending death to be without hope of life. When Goodwin was transported by EMS, he was alert and oriented. R. 208; R. 568. He underwent a successful surgery on April 26, 2011, followed by a second successful surgery on April 27, 2011. By all accounts, he was tolerating all treatment well and his condition was improving significantly. R. 140 - 141; R. 202; R. 208; R. 239; R. 516 - 521. Two days before the police interview, the medical team discussed extubation due to the decedent’s improving condition. R. 273. A full twenty-four hours before the police interview, the medical team arrived at Goodwin’s bedside for his extubation that day, a clear sign that his medical condition had improved significantly. R. 339; R. 555.

Thereafter, he “improved and had begun ambulation and physical therapy.” R. 141; R. 208. On the very day of the police interview, he was transferred from the ICU to a room. R. 208; R. 210. He was clearly in a much improved condition on the date of the police interview because he was “up and out of bed-to-chair.” R. 210. According to the records, he was calm and stable just two hours before the police interview. R. 351; R. 355. A short time after the officer left, Goodwin was sitting “up in [a] chair” and did not return to bed for several hours. R. 356 - 357. Goodwin reported no numbness or tingling that day and the doctor ordered for him to receive physical therapy. In fact, his condition had improved so much, the doctor allowed him to get out of bed at his liberty. R. 617; R. 367; R. 369.

Concerning Appellant's emotional state, the nurses' notes demonstrate a change in his demeanor. The notes indicated Goodwin was emotional on April 26 and April 27. However, the notes did not list "emotional" on April 28 or April 29, the date of the police interview. R. 543 - 544. Even the detective who conducted the interview described Goodwin as "recuperating from his injury" at the time of the statement. Court's Exhibit #3. He described Goodwin as lucid and alert, and did not describe him as emotional or without hope. R. 19, lines 23-24.

Very telling of Goodwin's mental state was his initial unwillingness to cooperate with the police. As explained by the detective, Goodwin expressed his hesitancy in cooperating because individuals who lived in the community did not want to be identified as individuals who cooperated with the police - snitches. R. 10, line 16 - R. 11, line 5. A fear of retribution or concern about one's reputation in the community as a snitch or rat would hardly be the concerns of a man lying on what he perceived to be his deathbed. The very purpose supporting the introduction of dying declarations is that a person believing death to be imminent would not die with a lie upon his lips. It was not Goodwin's fear of death that convinced him to cooperate with the police; rather, it was the detective's statements that he was lucky to be alive and the police needed his assistance in apprehending the culprit.

After the hearing, the state admitted Goodwin had a "favorable prognosis" and the doctors were "hopeful." R. 2-10. Further, the state admitted the evidence "cut both ways." The state conceded the evidence showed there were "some signs of hope." R. 80, line 8. However, the state's argument was that "being hopeful of recovery and fearful of imminent death are not mutually exclusive propositions for someone in this kind of situation." R. 80, lines 10-13. The state argued it would be "very natural for someone in this kind of situation

[to] have ebbs and flows and fear death - - you know, have a persistent fear of death while remaining somewhat hopeful of recovery.” R. 80, lines 13-16. According to the state, the evidence was “mixed” on this issue. R. 80, lines 17-25.

The state faults the trial judge for explaining that “evidence presented at the pre-trial hearing suggested that the victim 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, 464.” IBOA at 5. According to the state, there was no evidence at the hearing to support this finding of revenge, and that the judge’s citation did not concern a revenge plan. IBOA at 5. While the state is correct that the judge cited to the chaplain records, the state is incorrect that the record contained no evidence to support a finding of revenge.

Goodwin’s brother testified Goodwin told him everything would be “all right” and that he *knew* who shot him. R. 60, lines 11-22. Further, Goodwin’s father testified Goodwin feared his assailant because he had a bad reputation in the community. R. 54, lines 10-22. Finally, Goodwin was not inclined to cooperate with the police initially. R. 10, line 16 – R. 11, line 12. Although the chaplain’s records do not directly support the judge’s inference that Goodwin sought revenge, the chaplain’s records do show Goodwin never sought the services of the chaplain. R. 616. Although Goodwin’s family met with the chaplain on the day of his arrival to the hospital and expressed they were “hopeful,” Goodwin never sought the services of the chaplain. R. 616. Someone in fear of imminent death, particularly someone who was religious as Goodwin appeared to be in light of his family’s initial contact with the chaplain, would likely seek out the chaplain to seek

absolution and comfort before passing. These facts would permit the judge to infer that Goodwin planned to seek revenge against his assailant.

II. As an alternate sustaining ground, 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.

Relevant facts

Respondent incorporates by reference the discussion of relevant facts presented in Issue I, supra. In addition to moving to exclude the deceased's statement to police as not falling within the hearsay exception of a dying declaration, Respondent moved to exclude the statements as violating his right to confront his accusers under the Sixth Amendment's Confrontation Clause. R. 119. Further, Respondent moved to exclude the statements as violating the South Carolina Constitution. R. 119(citing State v. Green, 269 S.C. 657, 239 S.E.2d 485 (1977); S.C. Const. art. I, § 14).

During the pre-trial hearing, Fleming testified that his documentation in a case, which was part of the investigation, would be used by the prosecutor to prosecute the case. R. 23, lines 22-25. Fleming testified that 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, line 23 – R. 25, line 3; R. 25, line 17 – R. 26, line 2. Fleming also explained, on re-direct examination, that he wanted a statement from Goodwin because he wanted to take a dangerous person off the street and catch the person who committed the crime. R. 43, lines 2-8. Fleming was motivated by a public safety component inherent in investigating crimes and apprehending criminals. R. 43, lines 13-16.

Respondent argued Goodwin's statements to police were testimonial and Respondent had not had a prior opportunity to cross-examine Goodwin. R. 120. Further, Respondent argued the primary purpose for the police eliciting the statements from

Goodwin, including the photographic line-up, was not to enable police assistance to meet an ongoing emergency. R. 124. Finally, Respondent argued that if the trial court determined Goodwin's statements were dying declarations, the statements should still be excluded because dying declarations were not an exception to the Confrontation Clause. R. 126.

According to the state, he had an "uphill battle" to show Goodwin's statements did not violate the Confrontation Clause. R. 71, lines 18-19. The state conceded this was "a fairly formal statement," but stated, "there is an argument to be made that this is nontestimonial" pursuant to Michigan v. Bryant, despite the fact that some factors worked against his position. R. 72, lines 1-3. The state argued the Supreme Court's standard regarding what is testimonial and what is not was "wishy-washy" and left "open the possibility that a gunman on the loose" was not an emergency. R. 71, lines 7-12. The state noted that Fleming "acknowledged" he was gathering evidence "to later prosecute and get a conviction," but he also had a public safety motivation. R. 71, lines 12-15. Additionally, the state argued that if Goodwin's statements were dying declarations, then the statements were admissible because "Crawford v. Washington does not impact on dying declarations." R. 71, lines 2-5; R. 72, lines 5-20.

The trial judge explained that she did not "need to reach the Confrontation Clause issue" in light of her decision that the statements were not dying declarations. R. 105, lines 5-6. However, she noted that the statements were "certainly testimonial." R. 105, lines 10-11. Further, the judge explained the statements did not occur under circumstances in which the police were in "emergent situation where you have the first person dying in a back alley." R. 105, lines 12-15. At this point, the state interjected: "And I believe we conceded that at the hearing, Your Honor." R. 105, lines 16-17. Finally, the judge noted the split in

authority regarding whether dying declarations were excepted from the Confrontation Clause. However, the judge made no ruling in this regard. R. 105, line 23 – R. 106, line 16. Additionally, the judge’s written order did not address the Confrontation Clause. R. 135 - 139

Discussion

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth 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). 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.

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 unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Important to this case, the Court has held that statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006); see also State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009). “[I]nterrogations by law enforcement officers fall squarely within [the] class” of testimonial hearsay the Confrontation Clause forbade. 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).

In Davis, the United States Supreme Court sought to “determine more precisely which police interrogations produce testimony” that is barred by the Confrontation Clause. 547 U.S. at 813. During the call, the victim identified the defendant as her attacker. Id. The victim did not testify at trial. Id. at 819. The Davis Court ruled the 911 call was admissible. Id. at 826-30. The Court stated, “A 911 call . . . and at least the initial connection with a 911 call is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance.” Id. The Court noted an important distinction between calls for emergency assistance and interrogations by the operator about the facts of the incident. Id. at 828-29. The Court stated, “This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot... evolve into testimonial statements once that purpose has been achieved.” Id. at 828 (internal quotations and citations omitted). The Court noted that after the operator told the victim to be quiet and “proceeded to pose a battery of questions,” those statements could be construed as testimonial. Id. at 828-29. The Court noted that trial courts “should redact or exclude the portions of any statement that have become testimonial.” Id. at 829.

As explained by the Court, “[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.” Davis, 547 U.S. at 822. Conversely, 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 prosecution.” Id. However, in Bryant, 562 U.S. at 358, the

Supreme Court explained “there may be *other circumstances*, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.” (emphasis in original). When a court makes “the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” Id. at 358-359. According to the Court, “[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.” Id. at 359.

In Bryant, the Court provided “additional clarification with regard to what Davis meant by ‘the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.’” Id. (quoting Davis, 547 U.S. at 822). To make the determination about the primary purpose, the reviewing court must “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” Id. Two factors to consider are the location of the police encounter (at or near the scene of the crime versus at a police station) and the time of the police encounter (during an ongoing emergency or afterwards). Id. at 360. Another relevant inquiry is what purpose would reasonable participants have had as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred. Id.

“The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution.” Id. at 361 (internal citations omitted). This is because “the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished,” and “the Confrontation Clause does not require such statements to be

Nevertheless, the existence of an “ongoing emergency” is but one factor of determining the primary purpose of the police encounter, which in turn, relates to the testimonial inquiry. Id. at 366. Formality must be considered as well as it “suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.” Id. at 366 (internal quotation omitted).

“[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.” Id. at 367. The Court explained that if the police tell a victim to tell who committed the crime so that person could be arrested and prosecuted, the victim’s identification of the culprit “appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.” Id. at 368.

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. Although the interrogation did not occur in the police station, it occurred in the hospital only because of Goodwin’s injuries. Further, it occurred three days after the assault, not immediately following the assault at the scene. Fleming’s encounter with Goodwin was very formal, as conceded by the state at the hearing, 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 Davis, 547 U.S. at 829 (holding a witness's statements to law enforcement regarding who assaulted her were testimonial where there was no ongoing emergency, the officer questioned the witness in a separate room from her husband, the alleged culprit, about past events, and the witness's statements were memorialized in an affidavit).

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 (declining to address whether the statements should have been admitted pursuant to the hearsay rules where the issue was not before the Court); Giles v. California, 554 U.S. 353, 358 (2008)(holding that "forfeiture by wrongdoing" was not an exception to the Confrontation Clause because it was not established at the time of founding of the Bill of Rights or in American jurisprudence since that time, but noting "declarations made by a speaker who was both on the brink of death and aware that he was dying" were admitted at common law even though they were unconfronted) Crawford, 541 U.S. at 56, n. 6 (explaining the Court need not decide whether the Sixth Amendment incorporates an exception for testimonial dying declarations where the issue was unpreserved).

Further, Respondent acknowledges the courts that have addressed the question have found an exception for dying declarations implicit within the Sixth Amendment. See People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004)(finding the Sixth Amendment incorporates an exception for testimonial dying declarations); Wallace v. State, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005)(holding 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”); State v. Martin, 695 N.W.2d 578, 585-586 (Minn. 2005)(declaring “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”); People v. Gilmore, 828 N.E.2d 293, 303 (Ill. Ct. App. 2005)(holding dying declarations did not violate the Sixth Amendment).

One argument that the exception exists is historical – that at the time of the adoption of the Sixth Amendment, the Framers intended to include any exceptions at common law existing at the time. Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 Mo. L. Rev. 285 at 289 (2006).⁶ Another argument for the exception is one of necessity. *Id.* at 305-306. Despite the number of courts finding the exception and permitting dying declarations, all admit the incongruence with the admission of a dying declaration and the core of Crawford and the Sixth Amendment. Admitting a dying declaration into evidence violates the basic concepts of the Sixth Amendment’s right of confrontation and Crawford’s interpretation of that right. 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 violate the Sixth Amendment in light of their testimonial nature and the

⁶ 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. If the state’s argument on this point is true, then dying declarations that satisfy the Rules of Evidence, but do not satisfy the common law, should not be admitted as an exception incorporated into the Sixth Amendment at the time of its drafting.

incongruity of permitting the dying declaration exception with the Confrontation Clause jurisprudence.

Finally, if this Court were to determine the statements were dying declarations and that the Sixth Amendment permitted the exception, then this Court should analyze the South Carolina Constitution's bestowment of the right to confrontation. While Respondent is unaware of any case interpreting the 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)(explaining the state constitution affords greater protections than the federal constitution).

CONCLUSION

Respondent respectfully requests this Court affirm the trial judge's order excluding the deceased's statements.

Respectfully submitted,

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 26th day of January, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 26, 2016

Susan B. Hackett
Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

APPELLANT,

V.

MARVIN BROWN,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Donald J. Zelenka, Esquire, at P.O. Box 11549, Columbia, S.C. 29211, this 26th day of January, 2016.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 26th day of January, 2016.

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

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.

FINAL REPLY BRIEF OF APPELLANT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant 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

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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. *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 Amendment's Confrontation Clause. *(R. 119, Memo at 2). Further, Brown moved to exclude

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.

the statements as violating the South Carolina Constitution. *(R. 119-130, 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). 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. R. 131-34.

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 (R. 8-44, Tr. 8-44), the victim's grandfather, David Allen Brunson, Jr. (R. 45-48, 67-70, Tr. 45-48, 67-70), the victims' father, David Allen Brunson, III (R. 49-57, Tr. 49-57), the victim's sister, Dendria Brunson, (R. 57-59, Tr. 57-59) and the victim's brother, Desmonte Brunson, (R. 59-62, Tr. 59-62). After testimony, argument was heard from counsel. R. 63-67, Tr. 63-67. At that point, the victim's grandfather was recalled concerning the timing of his conversations with the victim. R. 67-70, Tr. 67-70.

At that point, further argument was heard on the Confrontation Clause and "dying declaration" issue. R. 70-90, Tr. 70-90. [Argument was also heard on a Neil v. Biggers issue concerning the identification procedures concerning a separate motion. R. 90-96, 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*. R. 96, 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. R. 104, 115-16, Dec. 10, 2013 Tr. p. 3, 14-15. The trial court did not address the Confrontation Clause issue. R. 104-08, 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 declaration 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 unfronted” 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”).

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 unconfuted.”); *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 unopposed ... 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

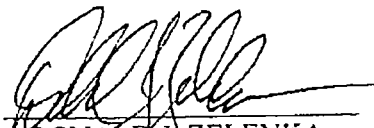
The State of South Carolina, for the reasons set forth in the Brief of Appellant and Reply Brief respectfully requests that the trial judge's ruling granting the suppression of the April 29 statement of Davon Goodwin be reversed and vacated and the trial court be directed to allow its admission under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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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

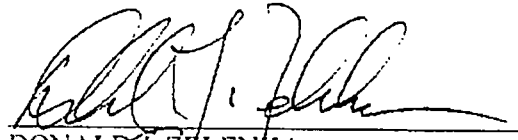
Office of the Attorney General
Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

January 15, 2016
Columbia, South Carolina.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Final 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 15th day of January, 2016.



DONALD J. ZELENA
Senior Assistant Deputy Attorney General

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Marvin Reginald Brown, Respondent.

Appellate Case No. 2014-002129

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

Opinion No. 5506
 Heard April 18, 2017 – Filed August 2, 2017

AFFIRMED

Attorney General Alan McCrory Wilson and Deputy
 Attorney General Donald J. Zelenka, both of Columbia;
 and Solicitor Scarlett Anne Wilson, of Charleston, for
 Appellant.

Appellate Defender Susan Barber Hackett, of Columbia,
 for Respondent.

KONDUROS, J.: In this criminal case, the State appeals the circuit court's decision finding the statement of the victim inadmissible as a dying declaration exception to hearsay. The State argues the circuit court erred in (1) finding the statement inadmissible as hearsay, (2) making conclusions regarding the medical records, and (3) finding the victim was planning to seek revenge. We affirm.

FACTS

Davon Goodwin, a nineteen-year-old man, sustained a gunshot wound to his abdomen on April 26, 2011. Emergency medical services transported Goodwin to the hospital, and the medical records indicate he arrived at the hospital "alert" and "spitting up or coughing up bright red blood" with a severe abdominal wound requiring immediate surgery. Goodwin was intubated and doctors performed emergency surgery to repair his abdominal wounds. Doctors performed another surgery the next day, April 27, which included the placement of drains and tubes. The medical records indicate Goodwin was extubated on the morning of April 28.

On April 29, Detective Jerome Fleming with the City of Charleston Police Department, went to the hospital to interview Goodwin in the intensive care unit. Goodwin identified Marvin Reginald Brown from a six-pack photographic line-up as the person who shot him. On the same day Goodwin made the identification to Detective Fleming, Goodwin was moved out of the intensive care unit "to the floor." Medical records reveal "the decision was made that he was ready for transfer to the floor;" "[h]e is up and out of bed-to-chair and [physical therapy] has been consulted to work with ambulation;" "[h]is abdominal incision is closed and the skin is closed with staples and is clean, dry, and intact;" and "[h]e has been tolerating tube feeds through [the tube] without any difficulty."

The medical records also indicate Goodwin continued to have pain and was not interested in physical therapy. For example, the "[Physical] Therapy Charting Report" of April 30—the day after Goodwin gave the identifying statement to Fleming—indicates his "[a]verage pain over the last 24 hours" was "8/10," his goal was "not [to] do [physical therapy]," and his response to the treatment was noted as "fatigued" with impairments of "decreased endurance, pain, limited mobility." On the other hand, the same physical therapy record that day states: "Patient is alert and oriented to name, place[,] and date;" he "[t]olerates 5 to 15 minutes of an uninterrupted exercise bout;" his physical therapy prognosis is "good;" and the long term outcome "as discussed with patient and/or family" includes a notation that Goodwin "will be able to return to work/school full time" and "will be independent with all self care including driving."

While still in the hospital, on the morning of May 4, Goodwin was found to be unresponsive. Efforts to revive Goodwin failed, and he was pronounced dead. The medical records include notations that a pulmonary embolism was the suspected cause of Goodwin's death and his death was a "[s]udden, unexpected,

unexplained death." However, the Forensic Autopsy Final Report established the cause of death as "[c]omplications of a single penetrating gunshot wound to abdomen." Brown was indicted for murder, armed robbery, and possession of a firearm during the commission of a violent crime. Before trial, Brown moved to exclude Goodwin's identifying statement to Detective Fleming as hearsay and a violation of the Confrontation Clause.

At the suppression hearing, Detective Fleming described Goodwin as "very weak" and "unable to really raise his hands or arms . . . and speak loudly." Detective Fleming answered affirmatively when asked whether Goodwin "was able to communicate," "was lucid and alert," and "was able to correct you if you misheard something he said." Detective Fleming also testified he had to encourage Goodwin to identify the person who shot him, explaining "[i]t is common knowledge, as far as a lot of victims . . . they don't want to be identified as being an individual that assisted police." Detective Fleming noted:

My comments to him [were] that he's the victim here of this shooting, and very fortunate at that time to say that -- to be alive. And . . . there was no one out there really to come forward to say that they witnessed this shooting, and he was the only guy that could say -- we could say establish who the perpetrator of the crime was and bring him to justice.

Goodwin's family members also testified at the hearing. Goodwin's grandfather testified Goodwin told him he would not be able to ride with him in the car, an activity they had enjoyed together: "I was sitting there holding his hand, and we were talking about the times we had, and the subject came up about us riding around. . . . And he said he wouldn't be able to ride with me, and that my other grandson . . . would have his seat." Goodwin's grandfather also testified Goodwin told him "he wasn't going to make it." However, Goodwin's grandfather could not remember with specificity at what point during Goodwin's hospitalization these conversations occurred. Of Goodwin's demeanor after surgery, Goodwin's father testified Goodwin was

[a]lmost like a -- a child just happy to see his parents, because . . . he know[s] I'm dad, I'm going take care of him, you know. You know, more like, for example, like if your child got in a fight at school or beat up with a

gang and be happy to see their parents when they see them, because they [are] scared.

Goodwin's father also testified his son "was in a deep stare, and always want[ed] you to hold his hand."

Goodwin's sister testified Goodwin cried while in the hospital, although she had never seen him cry before, and Goodwin "seemed tired, and he was ready to go home."¹ Goodwin's brother testified Goodwin told him "everything will be all right," and "the boy shot him." Regarding the person who shot Goodwin, Goodwin's brother said: "I know who he is."

At a subsequent hearing, the circuit court verbally ruled Goodwin's statement was not a statement made under the belief of impending death, noting Goodwin had been extubated at the time of the statement; his sister testified "he just seemed tired and ready to go home;" and Goodwin was "ambulatory," "screened for a physical therapy session," and "everyone thought he was getting better." The trial court further stated this case "was different than the situation in [McHoney²], which was the case that was most helpful."

The circuit court thereafter issued a written order finding Goodwin's statement was inadmissible as hearsay. Specifically, the circuit court found the medical records indicated Goodwin "was improving and was not in imminent danger of death" at the time he gave the identifying statement. The order referenced several points in the medical record, including Goodwin was "extubated on the 28th," "adequate on the floor, transferred out of [the intensive care unit], was making strides with physical therapy, and ambulating in the hall"; "[h]e received a physical therapy

¹ At the suppression hearing, the State advised the circuit court that Goodwin's family sent a note interpreting this statement as follows:

I received a note from the family. Take this how you will, your Honor. But 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. And they wanted to make sure I conveyed that to you. That was their interpretation of him saying that.

² *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001).

consult on April 29th, and began physical therapy on April 30th"; "[o]n that day, he tolerated 5-15 minutes of uninterrupted exercise"; and his "May 4th death was listed as sudden and unexpected." The court also 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 of the defendant from the six-pack lineup." Additionally, the order stated: "[E]vidence presented at the pre[trial] hearing suggested that the victim 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." This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). 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)). "Affirmance is required when . . . the conclusion of the [circuit court] is a reasonable inference from the evidence." *Id.* at 24, 126 S.E.2d at 850.

"The admission or exclusion of evidence is left to the sound discretion of the [circuit court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010) (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). "An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *Id.* (quoting *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)).

LAW/ANALYSIS

I. Belief of Imminent Death

The State argues the circuit court erred in finding Goodwin's statement identifying Brown is inadmissible hearsay, asserting the record contains evidence Goodwin

believed his death was imminent, citing his grandfather's and sister's testimonies. Goodwin's demeanor, and his medical condition. The State also argues the circuit court erred in relying on Goodwin's improvement when he later died from his injuries and the amount of time a declarant lives after giving the statement is immaterial. We disagree.

"In a prosecution for homicide . . . , a statement 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" is not excluded by the hearsay rule when the declarant is unavailable as a witness. Rule 804(b)(2), SCRE. Imminent is defined as "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." *Imminent*, Black's Law Dictionary (5th ed. 1979). "[D]ying declarations are competent evidence, for or against the accused, upon preliminary proof of certain conditions." *Bethea*, 241 S.C. at 21, 126 S.E.2d at 848.

The rules in regard to such testimony are well settled:

1st. That death must be imminent at the time the declarations in question are made. 2nd. That the declarant must be so fully aware of this as to be without any hope of life. * * * And 3rd. That the 'subject of the charge' must be the death of the declarant, and the circumstances of the death must be the subject of the declarations.

Id. at 21, 126 S.E.2d at 848-849 (quoting *State v. Johnson*, 26 S.C. 152, 153, 1 S.E. 510, 510 (1887)).

"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." *McHoney*, 344 S.C. at 93, 544 S.E.2d at 33. "Furthermore, the length of time the declarant lives after making the dying declaration is immaterial. 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.

A belief in imminent death is an extreme and powerful belief, as noted in *State v. Davis*, 138 S.C. 532, 137 S.E. 139 (1927). In *Davis*, the victim told his doctor: "I

don't believe I am going to make it.'" *Id.* at 538, 137 S.E. at 140. However, the doctor "encouraged him to think that he would recover—with what success is not shown." *Id.* The supreme court found the victim's statement should not have been admitted, finding that while the victim "was uneasy and anxious about his condition, [the victim] had not given up all hope of life, and in this respect the test was not met." *Id.*

Here, evidence supports the circuit court's finding Goodwin's statement was not made while he believed his death was imminent. The circuit court's order 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." The order referenced portions of the medical record that provide Goodwin underwent surgery, was extubated, was transferred out of intensive care on the day of the statement, was able to begin physical therapy, and that his death was not expected. The court indicated recognition of Goodwin's "serious condition" at the time he identified Brown but relied on evidence in the medical record he was improving. The circuit court also found "neither the medical records nor the other evidence in the case demonstrates that the victim was aware of his imminent death" when he made the identifying statement.

The medical records support the circuit court's finding Goodwin was improving on the date Goodwin gave the identifying statement to Detective Fleming. Physician notes from that evening state "[h]e is up and out of bed-to-chair and PT has been consulted to work with ambulation." The medical records establish Goodwin successfully underwent two surgeries and was extubated prior to the statement. The "Case History" set forth in the autopsy report indicates "[t]he patient improved and had begun ambulation and physical therapy," after the second surgery, although an exact date is not given.

In *Bethea*, the victim identified the person who shot her to the responding sheriff and told the sheriff she was going to die. 241 S.C. at 22, 126 S.E.2d at 849. The victim also identified the person who shot her to a nurse at the hospital and told the nurse she was going to die. *Id.* at 22-23, 126 S.E.2d at 849. Later, the victim told the nurse "that *if she died*," she did not want the person who shot her to come to the funeral. *Id.* at 23, 126 S.E.2d at 849. The victim's doctor testified "her course was progressively downward." *Id.* at 22, 126 S.E.2d at 849. The supreme court affirmed the circuit court's decision admitting the statements made by the sheriff and the nurse. *Id.* at 24, 126 S.E.2d at 850.

In the present case, however, Goodwin gave the statement identifying Brown after he had undergone two surgeries, been extubated, and was able to breathe on his own. On the same day Goodwin identified Brown, he was moved out of the intensive care unit and began to ambulate. Goodwin did not identify the assailant spontaneously but in response to questioning when Detective Fleming encouraged Goodwin to identify the person who shot him. Additionally, Goodwin was reluctant to name the perpetrator, which suggests a fear of reprisal, something inconsistent with a belief of impending death.

The case at bar is also in contrast to the facts in *McHoney* wherein the victim sustained a severe cut across her neck and seven stab wounds to her abdomen. 344 S.C. at 89-90, 544 S.E.2d at 32. After the attack, the victim was conscious but could not speak, and identified her attacker by nodding to indicate letters of her attacker's name as a nurse recited the alphabet. *Id.* at 90, 544 S.E.2d at 32. Even though the nurse sought to reassure the victim she would be alright, the victim "shook her head no." *Id.* The victim lost consciousness before being transported to another trauma center and never regained consciousness before dying two weeks later. *Id.* The supreme court found the circuit court "properly admitted the victim's identification of 'SP' as her killer under Rule 804(b)(2), SCRE." *Id.* at 94, 544 S.E.2d at 34.

Recognizing the challenge of discerning the state of mind of the declarant, we find the record contains evidence to support the circuit court's finding Goodwin's statement to Detective Fleming was inadmissible hearsay as it did not meet the dying declaration exception.

II. Findings as to Goodwin's Revenge

The State also argues the circuit court erred in finding Goodwin was planning to seek revenge against his attacker, asserting no evidence was offered at the pretrial hearing to establish such intent. We agree.

The circuit court's written order stated:

Furthermore, evidence presented at the pre[]trial hearing suggested that the victim 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.

"Ex. A at 464" appears to be a flowsheet of chaplain services indicating that a chaplain visited with the family of the victim on the day he was admitted to the hospital and again after Goodwin died. Brown's argument that Goodwin's lack of chaplain visits supports a finding of intended revenge is strained at best. Additionally, testimony Goodwin knew who shot him and feared his assailant does not support such a conclusion.

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. However, this error did not prejudice the State.

"The determination by the trial 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.'" *Bethea*, 241 S.C. at 23, 126 S.E.2d at 849-50 (quoting *Smalls*, 87 S.C. at 551, 70 S.E. at 301). "To warrant reversal, an error must result in prejudice to the appealing party." *State v. Black*, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012).

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial."

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)).

We find the circuit court did not rely solely on evidence of revenge to support a finding of hearsay but relied on other evidence, including the medical records. Notably, the finding of revenge appears in the written order, but the court did not rely on the finding of revenge in its verbal ruling. Moreover, the finding of revenge in the written order is an additional reason given by the circuit court for finding Goodwin was not aware of his imminent death when he made the statement. The 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" The court supported its ruling by first stating: "on April 29th, the victim's medical condition was improving." The court next stated: "Furthermore, evidence presented at the pre[]trial hearing suggested that the victim was planning on seeking revenge against his assailant." Thus, the finding of revenge is in addition to a finding of an improved medical condition as set forth in the medical records. As such, we do not find this error prejudiced the State and affirm the admission of the identifying statement.³

CONCLUSION

For the aforementioned reasons, the decision of the circuit court excluding the identifying statement as hearsay is

AFFIRMED.

WILLIAMS, J., and LEE, A.J., concur.

³ Based on our findings regarding hearsay, we decline to address Brown's assertion the identifying statement was inadmissible as a violation of the Confrontation Clause of the United States Constitution and the South Carolina Constitution as an additional sustaining ground. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the appellate court need not address remaining issues when the previous issue is dispositive).

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.

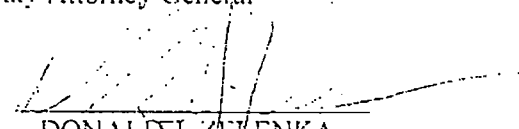
CONCLUSION

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

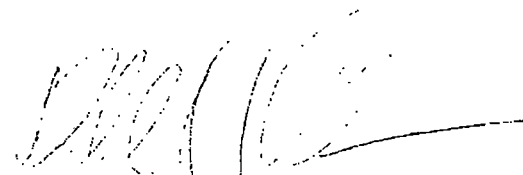
Office of the Attorney General
Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

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

The South Carolina Court of Appeals

The State, Appellant,

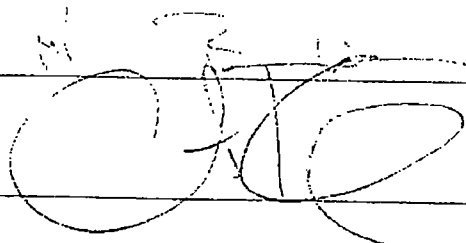
v.

Marvin Reginald Brown, Respondent.

Appellate Case No. 2014-002129

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



A.J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Scarlett Anne Wilson, Esquire
Susan Barber Hackett, Esquire
The Honorable Stephanie P. McDonald

2014-002129
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