THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Hon. Donald Hocker, Circuit Court Judge

Appellate Case No. 2018-000022

State of South Carolina ..... Respondent,

vs.

Adam Rowell ..... Appellant.

FINAL BRIEF OF APPELLANT

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Statement of Issues Presented

Question I: Did the trial court err in admitting the blood test results from the 8:54 pm blood draw when the hospital records establish that Adam Martyn Rowell did not arrive at the emergency room until 9:00 pm, the records do not establish whether the blood was drawn from his arm or a line, the blood is unaccounted for for a 30 minute period, and a person who allegedly received the blood from the nurse did not testify?

Question II: Did the trial court err in admitting into evidence the 8:54 pm blood draw when the testimony established that Adam M. Rowell had approximately 50% of the blood in his body replaced with either blood products or saline solution, and the State produced no evidence that the blood products transfusion and saline solution did not impact the reliability of the test administered?

Question III: Did the trial court err in admitting the test results from the SLED blood draw when the blood draw was conducted after more than 150% of the blood volume of Adam Martyn Rowell had been replaced and the test results contained a level of Benadryl which was near lethal, and therefore, brought into question the accuracy of the entire test?

Question IV: Did the trial court err in failing to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the Solicitor for the 8th judicial circuit when such a question was asked during jury voir dire?

Statement of the Case

Procedural History

Adam Martyn Rowell was formally arrested on December 16, 2014, upon his release from the hospital and charged with one count of felony driving under the influence resulting in death and one count of felony driving under the influence resulting in great bodily injury. [1] He was indicted on March 27, 2015. He was tried before the Honorable Donald R. Hocker and a jury on February 13 to 27, 2017. The jury convicted him of the two charges. Judge Hocker sentenced him to 13 years in prison and a fine of $10,100 on the felony driving under the influence resulting in death. He was sentenced to 8 years and a fine of $5,100 on the felony driving under the influence resulting in great bodily injury. The two charges are to run concurrent with each other. Rec. on App. at 1343, l 18 to 1344, l 6.

Mr. Rowell filed a Motion for a New Trial on March 7, 2017, and a Supplemental Motion on March 29, 2017. A post-trial hearing on the Motion was held on November 27, 2017. Judge Hocker denied the post-trial motion by an Order dated December 27, 2017. The Notice of Appeal was filed on January 3, 2018.

Factual History

Adam Martyn Rowell was involved in a serious automobile accident on November 15, 2014. The accident resulted in the death of Jeremey Cockrell and serious injuries to Matthew Sanders. Mr. Rowell also received massive injuries resulting in transfusions of blood, blood products and saline solutions. He was airlifted to Greenville Memorial Hospital where he remained until December 16,

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[1] The trial judge made a finding that Mr. Rowell was arrested at the time of the reading of the Miranda right on November 16, 2014. Rec. on App. at 1207, l 21 to 1208, l 3.

2014. Rec. on App. at 1175, ll 15-18.

The exact cause of the crash was in dispute, but the record established the collision occurred in the lane of traffic of Mr. Cockrell. The theory of the State was that Mr. Rowell crossed the center line and collided with the truck being driven by Mr. Cockrell. Rec. on App. at 491, ll 6-17. Mr. Rowell presented the testimony of Justin Pennington, an eye witness, that the truck driven by Mr. Cockrell had crossed the center line toward Mr. Rowell, and Mr. Rowell then veered left to avoid the collision. Rec. on App. at 1014, ll 1-15.

The testimony from Mr. Rowell was that he had spent the day running errands for his family. He had anticipated going to a family dinner that night. He had spent the afternoon making trips between the residence of his parents and Walmart. He was seen at Walmart about 2 pm by a friend who testified he was sober and gave no indications of being under the influence. He was seen again at Walmart at about 7 pm on a store video. He again gave no appearance of being intoxicated. Mr. Rowell stated that at the time of the collision he was heading to dinner to celebrate the birthday of his grandmother.

He further testified that he observed the truck being driven by Mr. Cockrell cross the center line and appear to be coming at him. He then swerved left to avoid the collision, but Mr. Cockrell then turned back to the right. They collided in Mr. Cockrell's lane of traffic.

The injuries to Mr. Rowell were so severe that he had to be airlifted to Greenville Memorial Hospital. Rec. on App. at 525, ll 13-24. The hospital records show that blood was taken from Mr. Rowell at 8:54 pm. Rec. on App. at 662, ll 20-24. The records also show that Mr. Rowell's Life Flight helicopter arrived at the hospital at 8:59 pm. Rec. on App. at 1454 (State's Exhibit 70). At a post-trial hearing, the State produced an exhibit that showed Mr. Rowell arrived at the hospital at

8:44 pm, some 15 minutes before the flight records show he arrived. Rec. On App. at 1399 at 23, ll 6-23. Angela Waites, the flight nurse, testified the helicopter departed the accident scene at 8:31 pm and the flight took 24 minutes. This would have put him at Greenville Memorial Hospital some 11 minutes after the State's exhibit showed he arrived. Before arriving at Greenville Memorial Hospital, Mr. Rowell had received 2,540 milliliters of fluids and blood products. This would have been approximately half of the amount of blood in Mr. Rowell. Rec. on App. at 353, ll 7-22.

Angela Waites, the flight nurse, testified she observed Amanda Baker, an emergency room nurse, draw the blood from Mr. Rowell. Rec. on App . at 579, ll 21-24. She testified it was taken from the right arm. Rec. on App. at 583, ll 10-12. Ms. Baker did not remember taking blood from Mr. Rowell. Rec. on App. at 588, ll 21-23. Ms. Baker stated the hospital documents stated the blood was taken from a central line and not the arm. Rec. on App. at 591, ll 16-24. The central line was put in by Dr. Bradley Snow after Mr. Rowell arrived at the emergency room. Rec. on App. at 592, ll 14-15; 593, ll 15-19.

The blood sample taken in the emergency room was sent to the lab, but, according to the hospital records, did not arrive there for approximately 30 minutes from the time it was taken. Rec. on App. at 597, ll 14-20. The lab technician listed as receiving the blood was Bill Evans. Rec. on App. at 671, l 18 to 672, l 9. The tubes for the blood drawn in the emergency room with their labels were destroyed after about a week. Rec. on App. at 558, ll 10-17. The analysis from the Greenville Memorial Hospital showed a plasma blood alcohol level of .219. Rec. on App. at 549, ll 14-19.

After Mr. Rowell had his surgery, during which many more liters of blood were given to him, the State obtained a search warrant for a blood sample and urine sample. Rec. on App. at 155, ll 13-25. Trooper Brunson Smith, who served the search warrant, also read the implied consent forms to

Mr. Rowell. Rec. on App. at 154, ll 9-24. Mr. Rowell was unconscious at the time of the reading of the implied consent forms and the search warrant. A blood and urine sample were taken at 1:05 a.m. on November 16, 2014. This was approximately five and a half hours after the wreck. The urine was never tested. Rec. on App. at 796, ll 2-8. The result of this test showed a blood alcohol level of .096. Rec. on App. at 902, ll 11- 12. Also found in the blood was diphenhydramine, commonly known as Benadryl, at a level of 4.9 micrograms per milliliter. Rec. on App. at1112, ll 20-25. This was on the high end of a toxic dose and .1 away from a lethal dose. Rec. on App. at 1114, ll 18-25; 1115, ll 10-25. The SLED lab report also contained a level of acetone which would indicate the person was a diabetic. Rec. on App. at 1107, ll 3-25. The record does not contain any evidence that Mr. Rowell was diabetic. Mr. Rowell testified he was not diabetic nor does he take Benadryl. Rec. on App. at 1159, ll 6-13.

Argument

Question I

Did the trial court err in admitting the blood test results from the 8:54 pm blood draw when the hospital records establish that Adam Martyn Rowell did not arrive at the emergency room until 9:00 pm, the records do not establish whether the blood was drawn from his arm or a line, the blood is unaccounted for for a 30 minute period, and a person who allegedly received the blood from the nurse did not testify?[2]

The trial court erred in admitting the blood alcohol test result. This case should be controlled by *Benton v. Pellum,* 232 S.C. 26, 100 S.E.2d 26 (1957). The first glaring error in this case is the fact that the hospital records show that the blood was allegedly taken from Mr. Rowell before he arrived at the emergency room. The records show he arrived at the emergency room at 9:00 pm. Rec. at 1454 (State's Exhibit 70). The blood was taken at 8:54 pm. Rec. on App. at 662, ll 20-24. There is disagreement as to who drew the blood. The Life Flight nurse testified the blood was drawn from the right arm of Mr. Rowell by emergency room nurse Amanda Baker. Rec. on App. at 583, ll 10-12. Ms. Baker did not recall drawing the blood. She testified the blood was drawn from a central line and was drawn by Dr. Snow. Rec. on App. at 665, l 18 to 666, l 11. [3]

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[2] The record refers to blood being drawn at three separate times. The trial judge stated he was admitting the 8:54 pm blood draw. The hospital records refer to a 9:08 pm blood draw. It is not known what happened to the 9:08 pm blood draw. The last blood draw was drawn at 1:05 am. Rec. on App. at 157, l 11-13. This is referred to as the "SLED" blood draw as it was analyzed by SLED.

[3] The time required to install a central line is not set forth in the record. Obviously, it would take a few minutes. Thus, if Mr. Rowell arrived at the emergency room at 9 pm, the blood could not have been drawn until several minutes after 9 pm. Obviously, he did not have a central line placed in him on the flight to Greenville Memorial Hospital.

The reliability of this blood draw is further brought into question when the State produced a document that showed Mr. Rowell arrived at Greenville Memorial Hospital at 8:44 pm. This was some 15 minutes before the evidence the State produced, State's exhibit 70, showed he arrived. Angela Waite, the flight nurse and a State's witness, testified she left the accident scene at 20:31 and the flight took 24 minutes. Rec. on App. at 525, ll 22 - 24. Whether Mr. Rowell arrived at the hospital at 8:44 pm or 8:59 pm might not matter in making decision to save his life. However, the time matters a great deal when the State is attempting to show the blood sent to the lab to be analyzed was actually taken from Mr. Rowell. Obviously, if the blood was taken from a patient that arrived at 8:44 pm, the blood was not taken from Mr. Rowell, regardless of whose name is on the tube of blood.

Emergency room nurse Amanda Baker testified that according to the documents, she did not draw the blood but received it from Dr. Snow. Rec. on App. at 593, ll 15-19. Dr. Snow, however, while describing the general procedure as to drawing of blood in the emergency room, never testified he drew the blood or even how the blood was drawn. Rec. on App. at 341, l 14 to 342, l 12. Angela Waites, the flight nurse, testified she observed Baker draw the blood from Mr. Rowell. Rec. on App . at 579, ll 21-24. She testified it was taken from the right arm. Rec. on App. at 583, ll 10-12. Ms. Baker did not remember taking blood from Mr. Rowell. Rec. on App. at 588, ll 21-23.

To further complicate this chain of custody, the testimony says it was given to a technician named Bill Evans. Emergency room nurse Baker testified on direct as follows:

> Q. (By Mr. Garrett) But it sat down there – once you take it where does it go?
> A. (Ms. Baker) It goes into the tube, into the – into the bag, and then the tech takes it up there. And then they have to hand it to a person at the lab window.

Q. And you do not recall doing that in this case?
A. No.
Q. Or giving it to a tech?
A. No, sir.
Q. Do you know what the name of the tech would be?
A. The only one listed is Bill Evans. He's the only tech present, according to this documentation, the day that –
Q. So there was a person named Bill Evans who had possession of the blood?
A. Un-huh
Q. Affirmative. That was yes?
A. Yes
Rec. on App. at 671, l 13 to 672, l 7.

Mr. Evans did not testify. The State never attempted to explain his absence or his unavailability. The blood took over 30 minutes to go up one floor. The State never attempted to explain why this blood drawn in an emergency room was not immediately sent to the lab one floor up.

Our Supreme Court has said, " [T]he party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed." *Id.* at 33, 100 S.E.2d at 537. The chain in this case is fatal from the very beginning. The blood was taken from a person before Mr. Rowell was admitted to the emergency room. The blood was even taken before the helicopter carrying Mr. Rowell touched down at Greenville Memorial Hospital according to the flight records. The hospital records have Mr. Rowell being admitted over 10 minutes before he arrived at the hospital. This is a factual impossibility. The only attempt to explain this impossibility was the testimony of Dr. John Reddic, who referred to it as "clock slop." Rec. on App. at 744, ll 11-16. The problem with the theory of the State is no one involved in drawing the blood testified it is their standard practice to look at their watch for a time when drawing blood. The

testimony was Amanda Westhart was the nurse recording the events, including the times. Rec. on App. at 580, l 24 to 581, l 3; 654, l 18. Even though she was named as a possible witness, Ms. Westhart never testified. Rec. on App. 37, l 8. As a result, the record does not show what source she used to record the times. Nothing in this record suggests that Ms. Westhart used a watch or that any source of time she used was not in keeping with the clock in the laboratory. To conclude there was "clock slop" in this case is complete speculation. "Clock slop" can never be a basis for admitting a blood sample when the medical record times make it factually impossible for the blood that was analyzed to be the blood of the person it purports to be.

In addition, the tech who received the blood was supposed to immediately walk the blood to the lab on the second floor. Rec. on App. at 668, ll 5-12. The blood was handed to a tech named Bill Evans who never testified nor was there any attempt to explain why it took 30 minutes to walk up one floor. Ms. Baker testified she normally labels the blood. Rec. on App. at 590, ll 12-14. But the testimony also shows that at times the blood is not labeled and the lab has to call the emergency room to get the information. As Mr. Robert Smith testified, "In some cases there are times when they don't put collection information, and in that instance I would call to the ER to get the collection information." Rec. on App. at 698, ll 4-8. As no one from Greenville Memorial Hospital had a recollection about the collection process in this case, whether the blood was labeled or the lab had to call the ER to get the information is unknown. And if the sample sent to the lab was the sample of the person admitted at 8:44 pm and drawn at 8:54 pm, then that person was not Mr. Rowell. The State is required to prove the proper labeling and handling of the blood drawn. As the labels were destroyed, the State is unable to disprove the lab technician called and obtained information from the ER and that the information obtained was incorrect. Under the times established in this case,

this fact is more than a mere possibility. In fact, it is the only explanation that explains the very serious time differences.

While the testimony was that the tubes the blood is placed in are self-sealing, Mr. Smith testified he would not be able to tell if the tubes had been tampered with. As he stated, "There would be no way I would know if it was tampered with before it got to me." Rec. on App. at 688, ll 23-24. He later stated the obvious and said if the cap was missing off the tube and it had spilled, he would not test it.

Mr. Smith further testified that he did not know from whom he received the blood. Rec. on App. at 602, ll 3-9. He admitted he has no knowledge as to how he received the blood. Rec. on App. at 597, l 21 to 598, l 3. This information may have been available to the State had they checked the scanning records of when a person entered the laboratory. Rec. on App. at 602, ll 5-9. When a person has control of an item that is not sealed, that person must testify to preserve the chain of custody. This Court has acknowledged that an incorrect date may not be a basis for holding a chain of custody is not valid. In doing so the Court said, " Although a discrepancy existed as to the dates Dailey received the evidence, no evidence was presented to indicate the drugs were not within the control of identifiable people during the entire time." *State v. Johnson*, 318 S.C. 194, 196, 456 S.E.2d 442, 444 (Ct. App. 1995). Here, the record establishes that the blood vial, apparently not sealed, was in the control of an unidentified person who brought it to the lab.

Many of these unanswered questions as to whether Mr. Rowell's blood was actually tested could have been answered if the original vial and labels had been retained. They were destroyed a week or so after the blood was tested. Rec. on App. at 558, ll 10-17. Had the label been preserved, then the lower court would have known if the tube had been labeled or if the lab had to call to obtain

the information. The Court would have known if the lab copied the information correctly when they put it in their computer. Some of the unanswered questions in this chain could have been answered. But if the blood tested is that of the person who arrived at 8:44 pm, then the unanswered question is - whose blood was it?

To further add to the confusion in this matter, the record also reflects that a blood sample was taken at 9:08 pm. Rec. on App. at 683, ll 20-23. The laboratory personnel never reported they received two blood samples from Mr. Rowell. The trial judge admitted to the confusion when he stated, "If there was another blood draw – I mean, I can't control that." Rec. on App. at 686, l 13-14. He concluded that the 8:54 pm blood draw was the one being admitted. But as noted, this blood draw was even before Mr. Rowell had arrived at the emergency room and had the central line installed.

As to the obligation to establish a valid chain of custody, the South Carolina Supreme Court has said, "DSS has the burden to establish a chain of custody for the blood samples 'as far as practicable.'" *S.C. Dep't of Soc. Servs. v. Cochran,* 356 S.C. 413, 418, 589 S.E.2d 753, 755 (2003). This includes the obligation to establish the item tested is in fact the blood of the person it is being introduced against. The State has failed in their burden in this case. What is left to speculation, among other things, is not only whether the blood tested is the 8:54 pm blood draw or the 9:08 pm blood draw, but whose blood is it? Was the 8:54 pm blood draw related to the patient who arrived at 8:44? The trial judge found it was the 8:54 pm blood draw being introduced but acknowledged that there was apparently a 9:08 pm blood draw for which there is no record.

The State attempted to explain the lack of clear evidence as to the chain of custody by saying the emergency room was "controlled chaos." Rec. on App. at 685, l 8. But because there is

"controlled chaos" is not a reason to sustain a bad chain of custody. As a practical matter, the emergency room is not concerned with a chain of custody. If a problem arose because of the "controlled chaos" then the labeling on the tube would be available to double check in case of a question. Once the emergency is over, the hospital has no interest in keeping the tubes and labels and they are discarded. While discarding the tube and label a week or so later would seldom, if ever, have an impact on the medical treatment rendered, it is of great importance to verify the blood tested is the blood of Mr. Rowell. This is true when the criminal case arises and memories have faded to the extent they have in this case.

Suppose in a case involving a SLED blood draw the SLED officers and technicians testified to the following:

1. The SLED agent testified that blood was drawn at a time that was before the defendant arrived at the hospital with no explanation as to why that time was used.

2. Another SLED agent testified that a document shows the blood was actually drawn some 14 minutes later again with no explanation as to why that time was used.

3. The SLED agent did not testify that the blood was placed in a sealed tamper proof container.

4. The blood sample when taken to SLED headquarters was given to a named individual.

5. The SLED technician who tested the blood did not know from whom they received the blood nor was there any document saying that the named individual at SLED headquarters actually received the blood and gave it to the technician for testing. The named individual did not testify.

6. SLED could not account for the whereabouts of the blood tube for 30 minutes.

7. The SLED technician testified they could not say the blood had not been tampered with.

The technician did not testify they received the blood in a tamper proof container.

8. SLED destroyed the package in which the blood was received destroying the name on the label on the blood tube and all other vital information.

Under those circumstances a Court would not admit the SLED blood draw because too many questions remain unanswered and the State had failed to prove the blood tested was actually the blood of the defendant. This Court would not accept "clock slop" or "controlled chaos" as reason to excuse a proper chain of custody. The process would simply not be reliable enough to permit the introduction of the blood alcohol test evidence in court. The fact that these problems exist with a non-SLED blood draw should not be a basis for admitting the blood evidence in this case. The Court should look at the reliability of the entire process and not the entity making the blood draw. We do not have one standard for the admissibility of the evidence for SLED and another for all others. If it is unreliable for SLED, it is unreliable for all others.

The Supreme Court of Alabama has held that a chain of custody similar to the above would not be sufficient to establish a proper chain of custody. The case involved the chain of custody for a drug sale which had been handled by experienced law enforcement officers. The Court said:

> In the instant case, there were clearly missing links in the State's chain of custody. There is no evidence, either direct or circumstantial, reflecting what Larimer did with the substance he purchased from Lee or reflecting how Larimer handled and safeguarded the substance while it was in his possession before it was delivered to Gulledge. There was no evidence reflecting that the substance was ever sealed in an evidence envelope or safeguarded in any way by Larimer. There is no evidence, either direct or circumstantial, reflecting what Gulledge did with the substance while it was in his possession or how Gulledge handled or safeguarded the substance while it was in his possession. There is no evidence reflecting that the substance was ever sealed in an evidence envelope or safeguarded in any way by Gulledge. Moreover, Cannon did not state that the substance was in

> a sealed condition when she received it. Her testimony reflected only that she sealed the envelope the evidence was in after she completed her testing. To reiterate, there is no testimony reflecting where the substance was kept or how it was kept before it was presented to Cannon. Nor was there any evidence that when the substance was received at the lab it was packaged so as to be tamper-resistant.
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> *Lee v. State,* 748 So. 2d 904, 912 (Ala. Crim. App. 1999), overruled on other grounds by *Pruitt v. State*, 954 So. 2d 611 (Ala. Crim. App. 2006)

Birge v. State, 973 So. 2d 1085, 1092 (Ala. Crim. App. 2007)("In order to establish a proper chain, the State must show to a 'reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain.' Because the proponent of the item of demonstrative evidence has the burden of showing this reasonable probability, we require that the proof be shown on the record with regard to the various elements discussed below.")(internal citations omitted).

Our Supreme Court has said, "The party offering evidence is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final analysis." *State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) Similarly, the Illinois Supreme Court has said, "There is no dispute that the State has a burden of showing a continuous chain of possession over the contraband in order to establish the proper foundation for admitting it into evidence." *People v. Witanowski*, 104 Ill. App. 3d 918, 925, 433 N.E.2d 334, 340 (1982). Here the state has not shown a continuous chain of custody of the blood allegedly drawn at 8:54 pm. As noted earlier, the blood is unaccounted for for a 30 minute period. The individual who initially received the blood, Bill Evans, did not testify. We do not know if the blood was sealed to prevent tampering when received by Mr. Evans or if Mr. Evans took the

blood out of any package before it arrived at the lab. We do not even know if Mr. Evans delivered the blood to the lab. The State simply failed to establish a continuous chain of custody. *People v. Gibson*, 287 Ill. App. 3d 878, 882, 679 N.E.2d 419, 422 (1997) held, "A chain of custody requires proof of delivery, presence and safekeeping." Such facts are not established in this case.

This case should be also controlled by *Cribb*. In *Cribb* the case involved a non-legal blood draw at a hospital just as this case. In holding the proper chain of custody had not been established, the Court noted the following facts:

> Two nurses attended Cribb upon his admission to the emergency room. One of the nurses testified that the other nurse administered an intravenous solution (IV) to Cribb and that it was customary for blood to be drawn by the person administering the IV. The nurse who administered the IV did not recall drawing blood from Cribb, but assumed that she drew his blood when she started the IV because that was her standard procedure. The lab technician did not know who drew Cribb's blood or how it was transferred to the lab. Neither Cribb's medical records nor the label on the blood sample discloses the person(s) who drew the sample and transported it to the lab. *Id.* at 518, 522, 426 S.E.2d at 309.

Many of the facts found to be flawed in *Cribb* exist here. There is confusion as to who drew the blood. There is confusion as to when the blood was drawn. There is confusion as to whether the blood could even belong to Mr. Rowell. The lab technician who tested the blood did not know from whom he received the blood. He could not even testify the blood had not been tampered with. He could not testify with assurance that the blood was labeled or if he had to call the ER to get the information. All these factors make the alcohol blood test result in this case unreliable.

This Court should hold that a proper chain of custody has not been established and the trial court erred in admitting the blood alcohol test result from the 8:54 pm blood draw.

Question II

Did the trial court err in admitting into evidence the 8:54 pm blood draw when the testimony established that Adam Martyn Rowell had approximately 50% of the blood in his body replaced with either blood products or saline solution and the State produced no evidence that the blood products transfusion and saline solution did not impact the reliability of the test administered?

In addition to the chain of custody problems discussed above, and as will be discussed again as to the SLED blood draw, at the time of the 8:54 pm alleged blood draw, Mr. Rowell had received fluids from either saline solution and blood products equal to 2540 milliliters. Rec. on App. at 522, l 23 to 523, l 1. What effect this had on Mr. Rowell's blood alcohol level is not known as the State produced no testimony as to how it would affect the reading. There was no testimony it would have no effect. Would the saline solution drive alcohol out of the body tissues and raise the level? Or would it dilute the blood and lower the level? Was there any alcohol in the blood products given Mr. Rowell and if so, how would it have impacted the reading? Would his reduced metabolism because of the drugs he was given impact the rate at which alcohol is removed from his system? Rec. on App. at 519, l 8 to 520, l 5. The State, who has the burden of proving the reliability of the test they elected to introduce, answered none of these questions. The State had to have been aware of all these problems before the trial. They elected to leave these questions unanswered.

Courts have taken judicial notice of the reliability of certain tests when that reliability is clearly established. In taking judicial notice of the HGN test one court noted; "We do so considering the great weight of scientific support in the literature and in light of its adoption in most other jurisdictions that have addressed the issue." *Schultz v. State*, 106 Md. App. 145, 173, 664 A.2d 60,

74 (1995). *See also State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977)("The proponent of a chemical or scientific test must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.") Here there is no great weight of scientific support that establishes the reliability of blood tests when approximately 50% of a person's blood was replaced with blood products and saline solution. The State had the burden of establishing the reliability of the test under the circumstances of the facts of this case. The State has failed to do this and the results of the 8:54 pm blood draw should have been suppressed.

Question III

Did the trial court err in admitting the test results from the SLED blood draw when the blood draw was conducted after more than 150% of the blood volume of Adam Martyn Rowell had been replaced and the test results contained a level of Benadryl which was near lethal and therefore brought into question the accuracy of the entire test?

After Mr. Rowell had had more than 150% of his blood volume replaced by blood products and saline solutions, the State obtained a search warrant to obtain a blood sample from Mr. Rowell. This was done at 1:05 am. Rec. on App. at 157, l 12-13. This sample does not present the chain of custody issues presented above. The sample does, however, present two different problems that call into question the admissibility of the test result.

"When a clock strikes 13 it calls into question all that has gone before."[4] This old saying has great application to the facts of this case. The result of the second blood test lists a level of Benadryl at 4.9. The testimony at trial was this is a near lethal level of Benadryl. A level of 5.0 is

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[4] This is an old folk saying. See https://en.wikipedia.org/wiki/Thirteenth_stroke_of_the_clock (Visited August 19, 2018)

considered lethal. Rec. on App. at 809, l 20 to 810, ll 23- 24. Other published literature supports this fact. *See*, Steven B. Karch, KARCH'S PATHOLOGY OF DRUG ABUSE, 4th ed. CRC Press at 669 (reporting a lethal dose of Benadryl at 5.1 mg.L). Dr. Jimmie Valentine, testifying for the defense and uncontradicted by an expert for the state, stated such a level combined with the alleged alcohol level would make a person comatose. He stated:

> Q. (Mr. Garrett) As a medical chemist, Doctor, any way possible that a person could have 18-100th of one percent alcohol and a 4.9 Benadryl in his system and be able to do anything other than be in a comatose state?
> A. (Dr. Valentine) No, sir. There's not.
> Q. He'd be comatose, wouldn't he?
> A. I'm sorry I didn't hear you.
> Q. So, its not possible?
> A. It's not possible. Yes sir.
> Rec. on App. at 1115, l 21 to 1116, l 6.

Dr. Valentine further opined that as Mr. Rowell had received no Benadryl in the Greenville Memorial Hospital, his Benadryl level some five and a half hours earlier would have been approximately 6, a lethal dose. Rec. on App. at 1117, ll 1-12; 1115, ll 3 - 9. In addition to Benadryl, Mr. Rowell also had acetone, which would indicate a person is diabetic, and "not very well controlled." Rec. on App. at 1107, ll 13 - 25. The record contains no information Mr. Rowell is diabetic. Mr. Rowell denied being a diabetic. Rec. on App. at 1159, ll 6 - 9.

As the record establishes the impossibility of Mr. Rowell having both a 4.9 level of Benadryl and a .18 level of alcohol, the lower court erred in admitting the blood into evidence. The two numbers cannot exist in a person together. The test from SLED was completed on March 5, 2015. Rec on App. at 1463 (State's exhibit 73). The State had known, or should have known, since that date of the high Benadryl level. They knew, or should have known, of the acetone level. The State took no steps to explain or contradict the opinion of Dr. Valentine as to the near lethal dose of

Benadryl.

During an in camera hearing before either of the SLED toxicologists testified, Mr. Rowell, through his expert Dr. Valentine, brought to the attention of the State and the Court the fact that Mr. Rowell had a near lethal level of Benadryl in his system. Rec. on App. at 809, ll 11-24; 810, ll 15-24. The State, while in camera, did discuss this issue with forensic toxicologist Jennifer Brown. She admitted the level was 4.9. Rec. on App. at 847, ll 9-15. The State never attempted to discuss this issue further with Ms. Brown or the other toxicologist. They never attempted to explain how Mr. Rowell could have a near lethal level of Benadryl in his system. The State was hardly caught by surprise when Dr. Valentine testified before the jury as to the near lethal level of Benadryl found in Mr. Rowell. The failure of the State to even attempt to explain this impossibility calls into question the entire test. This is not a credibility issue for the jury. Witnesses for the State and the defendant agreed the level was 4.9. There is no dispute this is a near lethal amount of Benadryl.

After knowing that Dr. Valentine had testified as to 4.9 being a near lethal dose of Benadryl, the State elected to only cross examine Dr. Valentine very briefly as to the Benadryl. Rec. on App. at 1142, ll 1-9. Even then there was no cross-examination about the near lethal level of Benadryl. The cross-examination was limited to the fact that some people use Benadryl to help them sleep. Again, the State did not contest the conclusion of Dr. Valentine that the Benadryl level was near lethal. The reported level was after Mr. Rowell had been under medical care for over 5 hours after the accident. The medical records do not show he was administered any Benadryl while under medical care. Rec. on App. at 1115, ll 3-9.

In addition to the above problem, the record in this case establishes that Mr. Rowell had been given blood products and saline solutions equal to approximately 160% of the blood in his body.

Rec. on App. at 1093, ll 1-25. The State presented no expert that said a blood test taken after such a massive transfusion has any reliability. In fact, when the issue was discussed in camera, the following exchange between the judge and the state occurred concerning the testimony of the toxicologist, the State's expert:

> THE COURT: Now, I mean, if she hasn't reviewed any of the records and if she doesn't have any medical training, I don't think that she's going to be able to testify on this issue of, you know, are the results good or bad based upon transfused blood.
> MR. BLACK: No, sir.
> Rec. on App. at 798, ll 4-9.

Dr. Valentine, testifying for the Defense, opined it would not be reliable. Rec. on App. at 1096, ll 1-9.1096, l 15 to1098, l 13. "The proponent of a scientific test has the burden of demonstrating its reliability." *State v. Moore*, 458 N.W.2d 90, 97 (Minn. 1990). The State in this case never attempted to establish that a blood alcohol test from such a person has any reliability. Mr. Henderson pointed this out to the trial court when he said, "[I]t's burden-shifting that the Court's making us prove that it's not reliable instead of the State proving that it is reliable." Rec. on App. at 828, ll 7-10.

There is a dearth of cases involving the testing of blood after such massive transfusions. The reason is, as Dr. Valentine testified:

> A. (By Dr. Valentine) Well, you can take anything and analyze it. We talked about that earlier. The machine doesn't care where the sample comes from. It's going to analyze it and give you a number. And they did that in this case. They analyzed the specimen and got a number. Whether that number is reliable? I don't see how you can put any reliability in the number at all because we had such an exchange of volume of fluid here.
> Rec. on App. at 1096, ll 19-25.

He further testified:

> Q. (By Mr. Garrett) So have there been any studies on it to try to determine how to come to a conclusion?
> A. (By Dr. Valentine) No, Sir. There's been no scientific studies. And if you stop and think about it, you just can't do this ethically, because when you've got a person that's near death you can't start drawing blood samples from them to test for alcohol. You know, you'd have to do a whole bunch of them and you can't do that. It's unethical.
> Rec. on App. at 1097, l 20 to 1098, l 2.

If there are any reported cases involving the reliability of a blood test taken after massive blood transfusions, this writer has not found them. In one case the court simply noted in a footnote "The degree of the appellant's intoxication was in dispute from witnesses at the lounge. A blood-alcohol sample was taken at the hospital. However, due to a blood transfusion, the test results were deemed inaccurate." *State v. Bingham*, 910 S.W.2d 448, 451 (Tenn. Crim. App. 1995), n.1 , overruled on other grounds by *State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). In that case the Court made no reference to amount of blood transfusions. *See also State v. Fortner*, 451 S.W.3d 746, 753 (Mo. Ct. App. 2014)("Once Defendant voluntarily agreed to provide a blood sample for this purpose, Officer Grimes was entitled to obtain the blood sample and have it tested. This is true even though the blood sample had been previously drawn for 'medical purposes.' Moreover, due to the blood transfusion that Defendant received, this was the only blood sample available for testing.")

The possibility of blood transfusions has been held to be an exigent circumstance to permit the taking of a blood sample without a warrant. A South Dakota Court in finding exigent circumstances said, "As the court found, Sheriff Thaler believed he needed to obtain the blood draw before Fischer was airlifted because the officers did not know how medical procedures, such as possible blood transfusions or intravenous fluids could affect Fischer's BAC; there was a possibility that intravenous fluid could compromise the integrity of the BAC testing." *State v. Fischer*, 875

N.W.2d 40, 47 (2016). If science knew the impact of blood transfusions on an alcohol blood test, the possibility of blood transfusion would not create an exigent circumstance. As no case holds that a blood test after massive blood transfusions and saline solutions being placed in the body of a person is reliable, the State has failed in this case to establish the reliability of the SLED blood draw which was done after approximately 160% of the blood volume had been replaced.

The only testimony as to the test not being reliable came from the expert for Mr. Rowell. The State produced no testimony as to the reliability of the SLED blood draw taken in this case. While the State may argue that the credibility of Mr. Valentine was up to the jury, if the jury found Dr. Valentine not credible, that does not end the inquiry. The State has the affirmative duty to present testimony that their test, under the circumstances of this case, is reliable. They did not. An alleged finding by the jury as to the lack of credibility of Dr. Valentine hardly establishes the reliability of the test, an obligation the State has. Interestingly, the toxicologist for the state was asked about her opinion as to whether the test of a person who had received massive blood transfusions would be valid. She was asked:

> Q. (By Mr. Garrett) But if you're trying to test alcohol in somebody's blood and its already been pumped out and other stuff has been put in there, the blood's been put in there, it's not a valid result is it?
> A. (By Ms. Brown) I mean, my results are filed for what I received.
> Rec. on App. at 891, ll 7 - 11.

For the SLED blood draw in this case to be admissible, the answer should have been a simple, "The result is valid." While she may have obtained a reading on what she received, that is not the criteria for admissibility. For the foregoing reason, this Court should hold the SLED blood draw was improperly admitted into evidence, reverse the conviction of Adam Martyn Rowell and remand for a new trial.

Question IV

Did the trial court err in failing to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the Solicitor for the 8th judicial circuit when such a question was asked during jury voir dire?

A judicial system that depends upon jurors also depends upon honest answers from honest jurors. This is basic to our system of justice. For when a juror lies in their response to a voir dire question we seldom will know what motivates the false answer. "Where a trial judge grants counsel's request that the judge ask a particular question on voir dire, counsel is entitled to a truthful answer to the question." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982). And this truthful answer must be so whether the response be with an affirmative answer or through a failure to respond. As one court has said, "The defendant places much importance on the fact that there were no 'false statements' actually made by the juror, but the distinction between a juror's coming forth with untruthful information and his failing to respond honestly to a direct question is not a valid one." *State v. McFerron*, 52 Or. App. 325, 330, 628 P.2d 440, 443 (1981)

In this case the record establishes that juror 164 gave a dishonest answer when he failed to disclose that he had pending criminal charges against him. The charges were being prosecuted by the office of the Solicitor for the 8th judicial circuit. He had been charged in January, before this trial started in February, with possession with intent to distribute marijuana, possession with intent to distribute marijuana within proximity to a school and unlawful conduct toward a child. Post trial

hearing at 28, ll 15-22.[5]

Near the end of the voir dire the trial judge advised the jury panel that he was about to ask a series of questions. He urged the jury panel to keep a good memory of the questions as he would speak with them privately after the questions were asked. The first question was:

> Question One, any member of the jury panel or any member of your immediate family members or close personal friend ever been arrested and charged with any criminal offense through whatever state, local or federal law enforcement agency.
> Rec. on App. at 56, ll16-20

After all the questions were asked, numerous jurors came forward in response to the questions asked. Of the ones that came forward, 12 were in response to Question One. They included jurors with pending charges or convictions. Rec. on App. at 56, l 16 to 74, l 18. Juror 164 did not come forward. His act of omission made the response not truthful. At the end of voir dire the trial judge made this statement to the jury panel, "What happens sometimes is that jurors are not honest and have really a real issue about serving on a jury, and we don't find out about it until after the fact." Rec. on App. at 74, l 24 to 75, l 2. Juror 164 again did not come forward after the statement.

In an email exchange after the hearing, defense counsel requested a hearing with the juror to determine why he did not respond. Rec. on App. at 1428-1449. The trial court declined to conduct a hearing with the juror. In ruling on this issue, the Court correctly stated the proper standard of reviewing a false answer by a juror. The court noted the "[I]nquiry is a 'fact-intensive determination

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[5] The State at the hearing suggested that Juror 164 did not report his arrest because he simply got a blue ticket. Rec. on App. at 1405, ll 13-17. A charge of possession with intent to distribute marijuana and a proximity charge cannot be issued on a blue ticket. *See* S. C. Code § 56-7-10.

that must be made on a case-by-case basis' to decide whether the concealment was intentional or unintentional. . . . Where a juror's concealment is found to be unintentional, the Court ends its inquiry, and no new trial is granted." Rec on App. at 1425 (Order dated December 27, 2017 at 3). (Internal citations omitted).

The Court correctly found that the question asked on its face was unambiguous and easily comprehended by the average juror. Rec on App. at 1426 (Order dated December 27, 2017 at 4). The Court then concluded that "The manner in which the question was asked, and the amount of time between the question posed and when it was meant to be answered could be confusing to the average juror." Rec on App. at 1426 (Order at 4). This conclusion is not supported by the record.

As noted earlier, twelve jurors had no difficulty remembering and responding to the question. No evidence in this record supports the conclusion that the question was confusing to the average juror. Without hearing from Juror 164, the Court then concluded, "[T]he Juror 164's concealment was unintentional." Rec on App. at 1426 (Order at 4). This conclusion is a credibility ruling that can only be resolved with testimony from Juror 164. The trial court refused to conduct such a hearing. Based upon this record, there are no facts upon which the trial court could determine that Juror 164's concealment was unintentional.

The South Carolina Supreme Court has established the basis upon which a new trial should be granted based upon juror misconduct in failing to properly respond to voir dire questions. The Court said "A party seeking a new trial based upon the disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict." *Gray v. Bryant*, 298 S.C. 285, 288, 379 S.E.2d 894, 896 (1989). In that case a juror failed to acknowledge

that she was a patient of the medical doctor being sued for malpractice. A new trial was ordered.

Mr. Rowell acknowledges that the granting of a new trial based on false answers in voir dire is within the discretion of the trial judge. When a decision of a trial judge is not based upon a consideration of the relevant facts, an abuse of discretion occurs. In reversing a sentence, the Minnesota Supreme Court said " We conclude that the district court's failure to consider all of the available facts relating to Schmit's sexual assault of A.M.H. before determining Schmit's sentence was an abuse of discretion." *State v. Schmit*, 601 N.W.2d 896, 899 (Minn. 1999). The Utah Supreme Court has said, "Failure to consider pertinent facts makes it impossible for the trial court to exercise a fully informed discretion." *Kallas v. Kallas*, 614 P.2d 641, 646 (Utah 1980). Obviously making factual conclusions that are contrary to the actual facts is an abuse of discretion.

In an attempt to justify not granting a new trial, the trial judge argued that the fact of the arrest of Juror 164 was not concealed. The trial court argued, "Juror 164 failed to answer a question, but he did not prevent Defendant or State from seeking and seeing his arrest record." Rec on App. at 1426 (Order at 4). As the arrest record was a public record, the trial court has argued Mr. Rowell was not entitled to expect truthful answers from jurors during voir dire. This is not and should not be the law in South Carolina. As this Court has said, "It is the duty of every potential juror to make true and full disclosures during voir dire because counsel is entitled to rely on the answers in determining whether to exercise a peremptory strike." *Long v. Norris & Associates, LTD*, 342 S.C. 561, 573, 538 S.E.2d 5, 11 (Ct. App. 2000).

In *Long*, the Plaintiff contended that the Defendant could have obtained the truthful information that the juror lied about had they conducted a simple background check. In rejecting this argument this Court said, "This Court declines to expand the duty of parties and attorneys to include

investigation of prospective jurors." *Id.* at 571, 538 S.E.2d at11. This is especially true when a truthful answer would have revealed what the investigation would have shown. Under the trial court's requirement, a lawyer would have to check the criminal history on each juror for each county, each state and the federal records. The trial judge abused his discretion in making such a requirement.

In *State v. Woods,* 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000), aff'd, 345 S.C. 583, 550 S.E.2d 282 (2001), this Court held the failure of a juror to disclose that she worked part time as a volunteer in the solicitor's office was a ground for granting a new trial. The Court noted the following facts that were learned at the post trial hearing.

> At a post-trial hearing conducted on Woods' motion, the juror in question testified she had served "off and on for about a good three years" as a volunteer in the victim's advocate program administered by the solicitor's office, the last time being in 1998, the year of Woods' trial. Regarding her failure to answer the trial court's question about any business association or social acquaintance with any of the counsel connected with the case, the juror testified she did not "realize that [the question] would mean advocate because the attorneys themselves I really don't have [very] much to do with them." Regarding her failure to answer the trial court's question about being either a contributor or supporter of any organization that protected victims' rights, the juror testified she did not recall the question being asked and, even if she did hear the question, "it just didn't synchronize [sic]."
> *Id.* at 563, 527 S.E.2d at 129

In reversing the case because the juror gave an improper response, this Court said, "Here, as in *Gulledge*, the juror did not justify her failure to disclose particular information that was specifically sought by a voir dire question addressed to all jurors. The juror, when she testified, stated she did not recall being asked any question on voir dire about having contributed to or supported a victims' rights organization. She did not claim the question was not asked. The record clearly shows

it was." *Id.* at 564, 527 S.E.2d at 129–30. Because the trial judge in this case declined to conduct a hearing we do not know the basis for Juror 164 not truthfully answering the question.

Without any testimony the trial judge first found the failure to disclose was unintentional. Under *Wood,* this fact is not relevant. A claim one did not hear the question is not controlling when the question was in fact asked. No question exists about the question being asked in this case. Numerous jurors had no problem understanding and remembering the question. Trial counsel stated on the record they would have excused any juror that had a charge pending that was being prosecuted by the same Solicitor's Office that was prosecuting this case. Rec. on App at 1407, l 18 to 1408 l 1 (Post-Trial hearing). That position seems logical. The trial court erred in failing to grant a new trial because of false statement of Juror 164.

This Court should reverse the conviction of Adam Martyn. Rowell based upon the untruthful answer of Juror 164 during the voir dire process. A remand for a hearing as to Juror 164 would serve no purpose as memories will have faded. In addition, there is no dispute that the relevant question was asked.

CONCLUSION

For the foregoing reasons, this conviction and sentence of Adam Martyn Rowell should be reversed and this matter remand for a new trial with instructions that the blood alcohol test result be excluded.

Dec 5th, 2018

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Hon. Donald Hocker, Circuit Court Judge

Appellate Case No. 2018-000022

State of South Carolina ..... Respondent,

vs.

Adam Rowell ..... Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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