STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge

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S.C. SUPREME COURT

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THE STATE,

RESPONDENT,

V.

CARMINE JAMES MIRANDA, III,

PETITIONER

APPELLATE CASE NO. 2019-000479

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APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Carmine James Miranda, III, Appellant.

Appellate Case No. 2016-001786

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Appeal From Greenwood County
Donald B. Hocker, Circuit Court Judge

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Unpublished Opinion No. 2019-UP-007
Submitted November 1, 2018 – Filed January 4, 2019

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**AFFIRMED**

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Vann Henry Gunter, Jr., both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

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**PER CURIAM:** Carmine James Miranda, III appeals his conviction of felony driving under the influence (DUI). Miranda argues the trial court erred by (1) admitting the results of his blood test because the State failed to properly establish

the chain of custody and (2) instructing the jury pursuant to the implied consent statute that it could infer he was under the influence of alcohol if his blood alcohol content was above 0.08. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the admission of Miranda's blood test results: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("[T]his [c]ourt has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." (first alteration by court) (quoting *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007))); *State v. Smith*, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997) ("When moving to admit blood alcohol test results, the State must prove a chain of custody of the blood sample from the time it[ is] drawn until it is tested."); *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) ("Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete."); *Hatcher*, 392 S.C. at 92, 708 S.E.2d at 753 ("In applying this rule, we have found evidence inadmissible only whe[n] there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable.*" (second alteration and emphasis by court) (quoting *Carter*, 344 S.C. at 424, 544 S.E.2d at 837)); *State v. Trapp*, 420 S.C. 217, 231, 801 S.E.2d 742, 749 (Ct. App. 2017) ("When an analyzed substance has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture."); *Hatcher*, 392 S.C. at 91, 708 S.E.2d at 753 ("Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." (quoting *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206)); *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205-06 ("[I]f the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.").

2. As to the jury instruction: *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018) ("To warrant reversal, a trial [court's] charge must be both erroneous and prejudicial." (quoting *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003))); *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

("[T]he trial court is required to charge only the current and correct law of South Carolina." (alteration by court) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004))); *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result."); *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998))); S.C. Code Ann. § 56-5-2945 (2018) (defining the offense of felony DUI); S.C. Code Ann. § 56-5-2950(A) (2018) (providing that "[a] person who drives a motor vehicle in this [s]tate is considered to have given consent to chemical tests of [his] breath, blood, or urine for the purpose of determining the presence of alcohol . . . if arrested for an offense arising out of acts alleged to have been committed while . . . . driving . . . under the influence of alcohol" and establishing procedures for obtaining a chemical test under such circumstances); S.C. Code Ann. § 56-5-2950(G)(3) (2018) ("In the criminal prosecution for . . . [felony DUI] the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following: . . . . if the alcohol concentration was at that time eight one-hundredths of one percent [(0.08)] or more, it may be inferred that the person was under the influence of alcohol."); *State v. Prince*, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999) ("Statutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if reasonable."); *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015) ("In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" (alteration by court) (quoting *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007))); *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))); *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551 (Ct. App. 2013) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quoting *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010))); *State v. Kinner*, 301 S.C. 209, 210, 391 S.E.2d 251, 252 (1990) (holding the trial

court erred in charging the jury that it could infer the defendant was intoxicated when the blood alcohol test did not comply with the implied consent statute but affirming the defendant's conviction, finding the error was "harmless beyond a reasonable doubt because the record evince[d] overwhelming evidence" supporting the conviction).

**AFFIRMED.**

**KONDUROS, MCDONALD, and HILL, JJ., concur.**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

CARMINE JAMES MIRANDA, III,

APPELLANT

APPELLATE CASE NO. 2016-001786

---

Appeal from Greenwood County

Donald B. Hocker, Circuit Court Judge

---

Opinion No. 2019-UP-007

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PETITION FOR REHEARING

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On January 4, 2019, this Court affirmed Appellant's conviction of felony driving under the influence (DUI). State v. Miranda, 2019-UP-007 (S.C. Ct. App. filed Jan. 4, 2019). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended when this Court affirmed Appellant's conviction. On appeal, Appellant raised two issues for review. The first issue challenged the trial judge's erroneous admission of Appellant's blood alcohol test performed by the hospital due to the state's failure to establish a chain of custody as far as practicable for Appellant's blood sample. The second issue challenged the trial judge's erroneous instruction that the jury may

infer Appellant was intoxicated if his blood alcohol level were greater than .08. Appellant respectfully requests this Court rehear both issues based on this Court's erroneous application of established law.

***Failure to establish a chain of custody***

The chain of custody for the results of Appellant's blood alcohol test was fatally incomplete as the state failed to identify the technician who tested and analyzed Appellant's sample. R. 196, l. 23 – R. 207, l. 23. According to the state's evidence, Appellant's blood was tested and analyzed in the chemistry lab at Self Regional Hospital in Greenwood. R. 193, ll. 14-23; R. 196, ll. 4-19. It was undisputed, however, that the state could *not* prove *who* tested and analyzed Appellant's blood. R. 193, l. 24 – R. 194, l. 8; R. 203, l. 25 – R. 204, l. 12. At best, the state could narrow it down to *two* people, only one of whom testified at the trial. App. 193, l. 24 – R. 194, l. 8; R. 204, ll. 6-12. Despite the clear requirement in the case law that the proponent of the evidence establish a chain of custody as far as practicable, particularly for fungible evidence such as blood, and the state's admitted failure to establish who analyzed Appellant's blood, this Court found no error in the trial judge's admission in the test results. This Court's string citation suggests that it was unnecessary for the state to establish who actually conducted the testing on Appellant's blood. In arriving at this conclusion, this Court misapprehended the controlling case law regarding chain of custody evidence.

The South Carolina Supreme Court "has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody

sufficient for admissibility. Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957); Sweet, 374 S.C. at 7, 647 S.E.2d at 206. If other evidence establishes the identity of those who handled the evidence and "reasonably demonstrates the manner of handling of the evidence," courts are willing to fill gaps in the chain of custody due to an absent witness. Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). This Court has found evidence inadmissible "only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." Id. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial. State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011)(quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987).

Put simply, the state has the duty to establish a chain of custody as far as practicable. State v. Governor, 362 S.C. 609, 608 S.E.2d 474 (Ct. App. 2005). Where a piece of evidence passes through the hands of several people, the question of who handled it and what was done with it from the time it was obtained cannot be left to conjecture. Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992); see also Tant v. Dan River Inc., 286 S.C. 140, 146, 332 S.E.2d 534, 537 (Ct. App. 1985) partially vacated on other grounds by Tant v. Dan River Co., 289 S.C. 325, 345 S.E.2d 495 (1986) (holding that the chain of evidence was "completely established" where the sample material was identified by the party who collected it and the DHEC lab technician who analyzed it). The proponent of the evidence must account for possession of the item from the time of the occurrence to the time the item is offered as evidence and establish that there were no alterations at any stage in the chain. State v. Wells, 336 S.C. 223,

426 S.E.2d 814 (Ct. App. 1992) overruled on other grounds by Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998) (holding that the trial court did not err in admitting clothes worn by defendant on night of murder where agent who collected the clothes could not testify to how the clothes were handled once in the evidence holding room, but where no forensic testing was done on the clothes).

When challenged, the chain of custody for blood alcohol test results must trace possession of the specimen from the time it is taken from the body to the time it is analyzed. Raino, 309 S.C. at 258, 495 S.E.2d at 100; see also State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990) (evidence of blood test was inadmissible where there was no evidence of who took and sealed or transported blood sample); see also Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957) (holding that "the party offering [a blood alcohol sample] 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**")

In Raino, the plaintiff was injured in a car accident and sued Goodyear alleging the tires on his car were defective. 309 S.C. at 257-258, 422 S.E.2d at 99-100. In an effort to prove that the plaintiff's intoxication was the proximate cause of the accident, not its tires, Goodyear sought to enter the results of the plaintiff's blood alcohol test into evidence. Id. After the accident, Raino was taken to the hospital for treatment. A blood sample taken revealed Raino had a .10 BAC. Id. However, the trial court found the test results inadmissible because Goodyear failed to establish "any chain of evidence or custody." Id.

On appeal, Goodyear argued that the tests should have been admitted because all hospital employees who handled the sample in the emergency room were medically qualified and the sample was immediately taken to the hospital lab. Id. The Supreme Court disagreed and found the chain fatally incomplete as Goodyear did not know who handled the blood sample, including

who handled it in the lab. Id. The Court explained: "There are not mere gaps in the chain. [Goodyear] failed to establish the proper chain of custody." Id.

In State v. Cribb, the defendant appealed his conviction for three counts of felony DUI raising, among other issues, the trial court's admission of his blood alcohol test results. Cribb argued that the state had failed to establish the chain of evidence as far as practicable. 310 S.C. at 522, 426 S.Ed.2d at 309. Two nurses treated Cribb when he arrived at the hospital. Id. One nurse administered an intravenous solution ("IV"). It was the hospital's practice to have the nurse administering the IV conduct the blood draw. Id. However, the nurse who administered the IV did not recall drawing Cribb's blood, but *assumed* that she would have due to the hospital's practice. Id. The evidence established that the second attending nurse did *not* conduct the blood draw. Id. Additionally, the state was also unable to identify who brought the blood sample to the lab for testing. Id.

The Supreme Court reversed Cribb's conviction, holding that the state failed to establish the identity of the persons who handled the test sample. Id. "The evidence in the record of this case does not identify those persons who handled the blood from the time it was drawn until the time it was tested." Id. Therefore, admitting the results of the blood alcohol test constituted an abuse of discretion. Id.

Appellant's case is a mirror image of Cribb. As explained, in Cribb, the state could prove who tested the blood sample, but could not prove who drew the sample or transported it to the lab. In Appellant's case, the state could identify who drew Appellant's blood sample and who transported it to the lab, but state simply could not prove who tested the sample. R. 196, l. 23 – R. 207, l. 23. Like the blood sample in Cribb, the blood draw used in Appellant's case was originally taken for medical purposes. In both cases, hospital documentation failed to complete the chain of

evidence. In Appellant's case, the results of the blood alcohol test included two express disclaimers stating that the blood sample had no chain of custody and that the "RESULT MUST NOT BE USED FOR NON MEDICAL PURPOSES (EMPLOYMENT OR LEGAL TESTING). R. 284.

This Court's apparent effort to equate the state's failure to identify who tested the sample with the failure, in other cases, to identify everyone who came into contact with the disputed evidence misapprehends the controlling case law. See e.g., State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997) (officer transporting sample left sample in his home refrigerator for two days); State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct. App. 1995) (chain of evidence for crack cocaine was complete despite discrepancy in the date the drugs were turned over to the evidence technician because all handlers were identified); State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) (possession of purse that defendant's fingerprint was recovered from was sufficiently established despite purse being returned to owner prior to fingerprinting); S.C. Dept't. of Soc. Servs. v. Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005) (courier for blood sample unknown). The governing case law provides that where the person who collected the sample to be tested and the person who finally analyzed the sample are both known and testify, the chain is sufficiently established absent proof of tampering, bad faith, or ill-motive. State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004).

In Appellant's case, the final portion of the chain was missing. Nurse Rogers testified she drew Appellant's blood. Courier Lomax testified that he delivered the blood sample to the lab intact. However, there was no testimony as to who tested and analyzed Appellant's blood sample and how the sample was tested. R. 193, l. 12 – R. 208, l. 15. Specifically, hospital employment records established that Chris Allsep and Christy Lazzo were the two employees working in the hospital's lab on the night of the accident. R. 205, l. 16 – R. 206, l. 13. Allsep testified that he

did not remember whether he or Lazzo tested Appellant's blood sample, and his testimony was restricted to what was *normal* procedure in the lab with like samples. R. 193, l. 14 – R. 196, l. 22. The state did not call Lazzo as a witness. Like in Cribb, the state was limited to generating testimony on the lab's *usual practice and routine*, not what actually happened in Appellant's case with Appellant's blood sample. As Cribb makes clear, this is insufficient. The inexplicable failure to produce any evdence regarding which technician tested Appellant's blood sample was more than a weak link in the chain of evidence, it was a fatal gap. This Court's conclusion to the contrary ignores controlling case law; therefore, Appellant respectfully requests this Court rehear this matter due to the significant points misapprehended in arriving at its conclusion.

***Erroneous jury instruction***

The string citation offered by this Court in affirming Appellant's conviction related to his challenge to the judge's erroneous jury instruction provides little insight into how this Court analyzed the issue. Specifically, it is unclear if this Court determined the charge was erroneous or if this Court determined simply that the instruction was a harmless error. In light of this lack of clarity in the opinion, Appellant will address both the error and the how the error was not harmless and respectfully requests this Court rehear the matter as to both aspects.

The trial judge instructed the jury that the law permitted an inference that Appellant was intoxicated at the time of the car accident because his blood alcohol content was greater than .08. Specifically, the trial judge charged the jury as follows:

> Inferences of the amount of alcohol in the Defendant's blood at the time of the alleged violation is shown by chemical analysis of the Defendant's breadth or other bodily fluids may be considered by you in deciding whether the Defendant was under the influence. If the alcohol concentration was 8/100ths of one percent, commonly known as .08, or more, it may be inferred that the Defendant was under the influence. This inference is simply an evidentiary fact to

> be considered by you along with the other evidence in this case and you may give it the weight you decide it should receive.

R. 258, ll. 2-15. The inference applies only where the blood testing was conducted pursuant to the implied consent statute. Appellant's blood was not tested pursuant to the implied consent statute, which was an undisputed fact at trial. Therefore, the inference did not apply, and the trial judge erred in instructing the jury that such an inference was permissible. This Court's opinion to the contrary misapprehended the applicable case law and governing statute. Furthermore, in light of the evidence presented against Appellant, the error was not harmless beyond a reasonable doubt.

South Carolina Code Section 56-5-2950 establishes a comprehensive implied consent regime detailing how evidence of a suspected DUI is to be collected, documented, and stored. Under S.C. Code Ann. § 56-5-2950(A), the "arresting officer" can administer a breathalyzer test or, under certain circumstances, order a urine or blood test on a suspect he has arrested on suspicion of drunk driving.

Unlike blood draws undertaken for medical purposes, a blood draw pursuant to the implied consent statute is done at the direction of law enforcement after the suspect has been arrested. See Cribb, 310 S.C. at 520-521, 426 S.E.2d at 308. In addition to empowering police, S.C. Code Ann. § 56-5-2950 also contains a number of procedural and evidentiary safeguards. S.C. Code Ann. § 56-5-2950(J).

> No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:
>
> (1) the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court;

> (2) the person's privilege to drive must be suspended for at least one month with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
>
> (3) the person has the right to have a qualified person of the person's own choosing conduct additional independent tests at the person's expense;
>
> (4) the person has the right to request a contested case hearing within thirty days of the issuance of the notice of suspension; and
>
> (5) if the person does not request a contested case hearing or if the person's suspension is upheld at the contested case hearing, the person shall enroll in an Alcohol and Drug Safety Action Program.

S.C. Code Ann. § 56-5-2950(B).

In addition, any blood test must be administered within three hours of a suspect's arrest. S. C. Code Ann. § 56-5-2950(A). The arresting officer must also provide "affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests." S.C. Code Ann. 56-5-2950(E).

In exchange for following the procedures and safeguards of S.C. Code Ann. § 56-5-2950, police and prosecutors are given a powerful evidentiary instruction:

> In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:
>
> (1) if the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol;
>
> (2) if the alcohol concentration was at that time in excess of five one-hundredths of one percent but less than eight one-hundredths of one percent, this fact does not give rise to any inference that the person was or was not under the influence of alcohol, but this fact

> may be considered with other evidence in determining the guilt or innocence of the person; or
>
> (3) if the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.

S.C. Code Ann. § 56-5-2950(G). The inference of intoxication instruction is the state's incentive for complying with the due process safeguards imposed by South Carolina's implied consent laws.

It was undisputed that Appellant's blood was not drawn and tested pursuant to the implied consent statute. Therefore, the judge's instruction to the jury based upon the implied consent statute was improper. The court's instruction was based on an improper interpretation of the scope of S.C. Code Ann. § 56-5-2950 that contravened not only the clear intent of the legislature when crafting South Carolina's DUI laws, but also disregarded the cannons of statutory interpretation and existing case law.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). The legislature's intent should be ascertained primarily from the plain language of the statute. Morgan, 352 S.C. at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Id. Courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v.

State, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577. Finally, penal statutes must be strictly construed against the State and in favor of the defendant. Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper construction should be resolved in favor of the citizen against the state. State v. Cutler, 374 S.C. 376, 264 S.E.2d 420 (1980); see also Yates v. United States, 135 S.Ct. 1074 (2015) (ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

Furthermore, case law interpreting the reach of S.C. Code Ann. § 56-5-2950 has consistently distinguished between tests conducted under the statute and tests conducted under circumstances not conforming to S.C. Code Ann. § 56-5-2950. In State v. Carrigan, this Court found error where the trial court instructed jurors that they could presume Carrigan was intoxicated based on a blood alcohol level of .164. 284 S.C. 610, 615-616, 328 S.E.2d 119, 122 (Ct. App. 1985). At the time of the decision, the implied consent statute only permitted testing by breathalyzer. Id. Carrigan underwent a blood draw. Id. The Supreme Court reversed Carrigan's conviction finding that jury instruction on the inference of intoxication in the implied consent statute was inapplicable to Carrigan for a number of reasons, two of which are relevant to Appellant's case. Id.

First, the Court concluded that Carrigan's blood draw was not conducted at the direction of the arresting officer, but was taken by a hospital technician for medical treatment purposes. Id. The Court also noted that the State failed to prove the technician was qualified to conduct the blood draw. Id. Second, the Court held that "it does not appear that the amount of alcohol in Carrigan's blood was shown by chemical analysis of his breath," as required by the plain language of S.C. Code Ann. § 56-5-2950(B), as it was written at the time of the offense for

which Carrigan was charged. Id. Therefore, the Supreme Court held that the trial court erred in instructing jurors that they could infer Carrigan was intoxicated pursuant to S.C. Code Ann. § 56-5-2950. Id.; see also State v. Kinner, 301 S.C. 209, 391 S.E.2d 251 (1999) (applying Carrigan when concluding that the trial court erred in giving the inference of intoxication instruction where defendant underwent a blood test.).

In Cribb, the Supreme Court held that the implied consent statute does not apply to a blood sample obtained prior to a suspect's arrest. 310 S.C. at 520-521, 426 S.E.d2d at 308. In reversing Cribb's convictions, the Supreme Court analyzed whether the implied consent statute applied when the defendant was not in custody at the time of chemical testing. Id. Looking to the language of S.C. Code Ann. § 56-5-2950, the Court concluded that the statute did not apply, "[i]n our view, the references to arrest and apprehension, when given their plain and ordinary meaning, indicate that the legislature intended to limit the operation of section 56-5-2950(a) to testing for evidence of driving under the influence after an arrest has been effected." Id. at 521, 426 S.E.2d at 308.

Carrigan and Cribb make clear that, in order to properly instruct jurors on the inference of intoxication, police must have strictly complied with the requirements of S.C. Code Ann. § 56-5-2950. In Appellant's case, the state asserted that the blood draw was done for medical purposes and not at the direction of Deputy Stevens, the arresting officer. R. 17, l. 5 – R. 30, l. 6; R. 211, l. 3 – R. 213, l. 24; see also State v. Hunter, 305 S.C. 560, 410 S.E.2d 242 (1991) (holding that blood test results taken for the purposes of medical treatment were admissible despite failure to comply with implied consent statute as "implied consent statute had no relevance" under the circumstances).

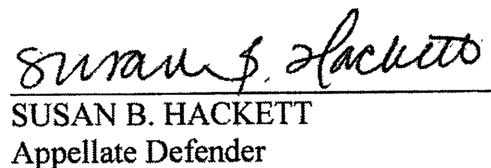
The judge's instruction permitting the jurors to infer Appellant was intoxicated was not harmless beyond a reasonable doubt. Pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments, the state must prove every element necessary to constitute the crime with which the accused is charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Thus, a court must not charge a jury with an evidentiary presumption that has the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime. Sandstrom v. Montana, 442 U.S. 510 (1979). Recently, the South Carolina Supreme Court has warned of the dangers of even permissible inferences in jury charges. In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), the Court overruled prior law and held "that a jury charge instructing that malice *may* be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." (emphasis added). The Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity." Id. at 611, 685 S.E.2d at 809.

In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," the Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Id. at 612, 685 S.E.2d at 810. Specifically, the Court stated the prejudice resulting from the charge was "highlight[ed]" because evidence of self-defense was presented. Id. The Court concluded that it "need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt." Id.

While the inference in the case sub judice was couched in terms to make it permissible and not mandatory, the import of the inference was obvious – anyone with a blood alcohol level greater than .08 was considered intoxicated in the eyes of the law. In fact, in closing, the solicitor told the jurors that "[i]n South Carolina there's a legal inference that if you are over a .08 you're too drunk to drive." R. 235, ll. 16-19. The solicitor then informed the jury that Appellant's blood alcohol level was "A 208. That's over twice the limit. And that was his blood that tested for that." R. 235, ll. 19-20. Therefore, the judge's error in giving the jury an instruction that permitted them to infer that Appellant was intoxicated based upon the blood alcohol test, which was not conducted pursuant to the implied consent statute, was not harmless beyond a reasonable doubt.

Based on the foregoing, Appellant respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points misapprehended and/or overlooked by this Court in affirming Appellant's DUI conviction.

Respectfully Submitted,



SUSAN B. HACKETT
Appellate Defender

This 22nd day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenwood County

Donald B. Hocker, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CARMINE JAMES MIRANDA, III,

APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Carmine Miranda, #369204, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 22nd day of January, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 22nd day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

# The South Carolina Court of Appeals

The State, Respondent,

v.

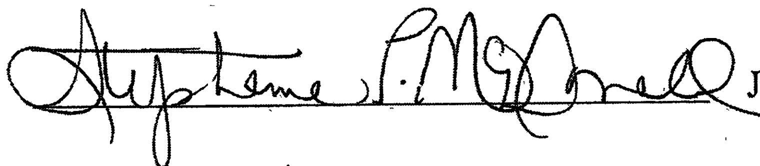
Carmine James Miranda, III, Appellant.

Appellate Case No. 2016-001786

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.

J.


J.

J.

Columbia, South Carolina

FILED
February 21, 2019

cc:
Alan McCrory Wilson, Esquire
Vann Henry Gunter, Jr., Esquire
David Matthew Stumbo, Esquire
Susan Barber Hackett, Esquire