STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County

Donald B. Hocker, Circuit Court Judge

Opinion No. 2019-UP-007 (S.C. Ct. App. filed Jan. 4, 2019)

2016-GS-24-00108

THE STATE,

RESPONDENT,

V.

CARMINE JAMES MIRANDA, III,

PETITIONER

APPELLATE CASE NO. 2016-001786

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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SC Court of Appeals

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 21, 2019. App. 20.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in concluding the state presented a sufficient chain of custody related to the test results from Petitioner's medical blood draw where the state failed to identify the hospital laboratory technician who tested and analyzed Petitioner's sample?

II. Did the Court of Appeals err in affirming the trial court's instruction that the jury may infer, pursuant to South Carolina's implied consent law S.C. Code Ann. § 56-5-2950, that Petitioner was under the influence of alcohol if his blood alcohol content was 0.08 or higher where the blood draw in Petitioner's case was undertaken for medical purposes and did not conform with the requirements of the implied consent statute?

STATEMENT OF THE CASE

On January 11, 2016, the Greenwood County grand jury indicted Petitioner for felony driving under the influence resulting in death. R. 256-257. On August 1-3, 2016, Petitioner proceeded to trial before the Honorable Donald B. Hocker and a jury. R. 1. Patricia Bolen and Elizabeth Able represented Petitioner; Elizabeth White and Will Maxey represented the state. R. 1. The jury found Petitioner guilty as charged. R. 261, l. 13 – R. 262, l. 5. Judge Hocker sentenced Petitioner to sixteen years imprisonment. R. 283, l. 2.

On August 10, 2016, Petitioner served his notice of appeal. After briefing, the Court of Appeals affirmed Petitioner's conviction and sentence without the benefit of oral argument. App. 1-4; State v. Miranda, 2019-UP-007 (S.C. Ct. App. filed Jan. 4, 2019). Subsequently, Petitioner filed a petition for rehearing. App. 5-19. On February 21, 2019, the Court of Appeals denied the petition. App. 20.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

I. The Court of Appeals erred in concluding the state presented a sufficient chain of custody related to the test results from Petitioner's medical blood draw where the state failed to identify the hospital laboratory technician who tested and analyzed Petitioner's sample.

The chain of custody for the results of Petitioner's blood alcohol test was fatally incomplete as the state failed to identify the technician who tested and analyzed Petitioner's sample. R. 196, l. 23 – R. 207, l. 23. According to the state's evidence, Petitioner'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 Petitioner'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 Petitioner's blood, the Court of Appeals found no error in the trial judge's admission in the test results. App. 1-4.

This 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. This 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. This 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.

This 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.

Petitioner'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 Petitioner's case, the state could identify who drew Petitioner'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 Petitioner's case was originally taken for medical purposes. In both cases, hospital documentation failed to complete the chain of evidence. In Petitioner'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.

The apparent effort by the state and the Court of Appeals 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 Petitioner's case, the final portion of the chain was missing. Nurse Rogers testified she drew Petitioner'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 Petitioner'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 Petitioner'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.

In its brief before the Court of Appeals, the state accused Petitioner of mischaracterizing the record concerning the evidence presented on whether Lazzo or Allsep tested the sample. FBOR at 12. According to the state, "Allsep testified that as part of his duties as a lab technician, he retrieved all samples from the centrifuge and placed them in the Vista 1500, which performed the analysis without any technician intervention." FBOR at 12. The state's position on appeal that Allsep tested the sample is contrary to the state's position at trial and runs counter to the evidence in the record. On October 16, 2014, Lazzo and Allsep were the only "lab techs on shift." R. 193, l. 24 – R. 194, l. 5. The two of them were "responsible for all blood alcohol testing that night." R. 194, ll. 6-9. Allsep explained the testing procedures in general. R. 194, l. 22 – R. 195, l. 5. The solicitor asked, "And do you, as part of your job as a lab tech, retrieve all the samples from the Centrifuge and put them in the machine?" R. 195, ll. 6-8. Allsep responded, "Yes, I do." R. 195, l. 9. On appeal, the state used this question and answer to argue that Allsep was the technician who actually tested Petitioner's sample. FBOR at 12. By doing so, the state took this question and answer out of context and neglected to recognize the solicitor's admission at trial that the person who analyzed Petitioner's sample was unknown.

During argument on the motion to exclude the evidence, defense counsel noted that Allsep could not say that he was the one to analyze Petitioner's sample because "[i]t was down to him or one other person." R. 199, ll. 21-22. Defense counsel repeated, "the state can't establish that it was Mr. Allsep versus Ms. Lazzo who would have handled the blood." R. 204, ll. 4-5. Thereafter, the state admitted it could not prove which person – Allsep or Lazzo – analyzed Petitioner's blood. R. 204, ll. 6-12. Specifically, and contrary to the state's position on

appeal, the solicitor said, "It had to have been one - - they were the only two people working the lab that night. They're not the ones who would have actually performed any additional analysis. They simply would have put the tube in the machine." App. 204, ll. 6-10. The judge's questioning of the state further showed that the state could not demonstrate whether Lazzo or Allsep performed the analysis:

> THE COURT: What document reflects the fact that it was Chris Allsep and Christy Lazzo who was in the lab that night? Is it on this ---
>
> MR. MAXEY: It's not on that form. No, sir.
>
> THE COURT: How are you able to determine that?
>
> MR. MAXEY: Payroll records of who was working in the lab that night.
>
> THE COURT: So how does he know that either he or Lazzo were the two lab techs that actually did the analysis, or put the thing in the Vista machine to do the analysis?
>
> MR. MAXEY: They were the only two on shift that night.
>
> THE COURT: Well, that's what you're telling me. How does he know that?
>
> Q: How do you know that?
>
> THE COURT: That he was working on the October 16th of 2014.
>
> THE WITNESS: My payroll records show that I was working that night, and I was in chemistry.
>
> THE COURT: You've looked at those records to - -
>
> THE WITNESS: Yes.
>
> THE COURT: - - confirm that you were working, and that Lazzo was working?
>
> THE WITNESS: Correct.

R. 205, l. 23 – R. 206, l. 13. The state's position on appeal that because Allsep said he takes all samples from the centrifuge and places them in the testing machine meant that Allsep was the

person who analyzed Petitioner's sample runs contrary to the record – when read *in toto* – and to the state's admissions at trial. What is clear from the record is that the state did not know who performed the analysis on Petitioner's sample. The state used employment records to narrow down the potential individuals to Lazzo and Allsep, but the state could present no evidence to show which of the two performed the actual testing. While Allsep testified to general practices in the lab, Lazzo did not testify at all.

Like in Cribb, the state was limited to generating testimony on the lab's *usual practice and routine*, not what actually happened in Petitioner's case with Petitioner's blood sample. As Cribb makes clear, this is insufficient. The inexplicable failure to produce any evidence regarding which technician tested Petitioner's blood sample was more than a weak link in the chain of evidence, it was a fatal gap. The conclusion of the Court of Appeals to the contrary ignores controlling case law; therefore, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on this issue. See Rule 242(b)(3), SCACR.

II. <u>The Court of Appeals erred in affirming the trial court's instruction that the jury may infer, pursuant to South Carolina's implied consent law S.C. Code Ann. § 56-5-2950, that Petitioner was under the influence of alcohol if his blood alcohol content was 0.08 or higher where the blood draw in Petitioner's case was undertaken for medical purposes and did not conform with the requirements of the implied consent statute.</u>

The trial judge instructed the jury that the law permitted an inference that Petitioner 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. Petitioner'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. Furthermore, in light of the evidence presented against Petitioner, 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 Petitioner'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, 284 S.C. 610, 615-616, 328 S.E.2d 119, 122 (Ct. App. 1985), the Court of Appeals found error where the trial court instructed jurors that they could presume Carrigan was intoxicated based on a blood

alcohol level of 0.164. At the time of the decision, the implied consent statute only permitted testing by breathalyzer. Id. Carrigan underwent a blood draw. Id. This 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 Petitioner's case. Id.

First, this 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. This Court also noted that the State failed to prove the technician was qualified to conduct the blood draw. Id. Second, this 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, this 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, this 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, this 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, this 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 Petitioner'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 Petitioner 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), this 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). This 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.

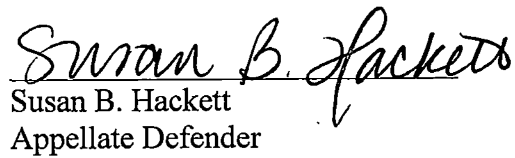
In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," this Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Id. at 612, 685 S.E.2d at 810. Specifically, this Court stated the prejudice resulting from the charge was "highlight[ed]" because evidence of self-defense was presented. Id. This 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 Petitioner'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 Petitioner 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.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on both issues presented.

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2019-UP-007 (S.C. Ct. App. filed Jan. 4, 2019)
2016-GS-24-00108

THE STATE,

RESPONDENT,

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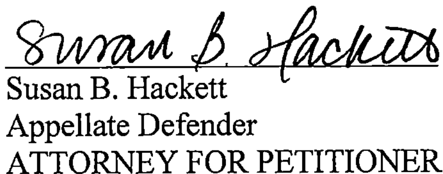
CARMINE JAMES MIRANDA, III,

PETITIONER

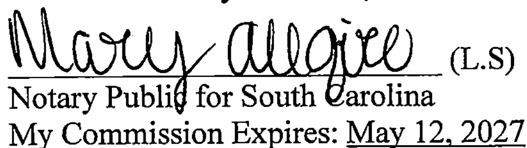
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, 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 March, 2019.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

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


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

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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 22, 2019

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MAR 22 2019
SC Court of Appeals

J. Benjamin Aplin, Esquire
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Re: The State v. Carmine James Miranda, III

Dear Mr. Aplin:

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/emm

Enclosures

cc: Court of Appeals