STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

APPELLANT

APPELLATE CASE NO. 2017-002563

Appeal from Pickens County

Perry H. Gravely, Circuit Court Judge

Opinion No. 2020-UP-255

PETITION FOR REHEARING

On August 26, 2020, this Court affirmed Appellant's conviction in an unpublished opinion without the benefit of oral argument. State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and misapprehended by this Court in reaching its conclusions.

Statement to law enforcement

Contrary to this Court's opinion, the trial judge erred in admitting a statement made by Appellant to law enforcement where the evidence demonstrated Appellant was so intoxicated by

her prescription medication that she was incapable of knowingly and voluntarily waiving her rights and of voluntarily giving a statement. In arriving at this conclusion, this Court misapprehended the Supreme Court's opinion in State v. Saxon, 261 S.C. 523, 201 S.E.2d 114 (1973). Furthermore, to the extent, this Court insists upon reading Saxon, supra, to mean that intoxication just short of unconsciousness may *never* render a statement involuntarily made, Appellant argued against precedent, and this Court failed to consider Appellant's argument that Saxon, supra, was wrongly decided.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda, supra. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The

prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: Did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted); see also Withrow v. Williams, 507 U.S. 680, 693-694 (1993). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000) (citations omitted); see also State v. Miller, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007).

This Court concluded "the circuit court properly considered the totality of the circumstances surrounding [Appellant]'s waiver and did not abuse its discretion by admitting part of the December statement." State v. Brewer, 2020-UP-255 (S.C. Ct. App. filed August 26, 2020). According to this Court, there was evidence in the record to show the circuit court considered the effect the prescription drugs had on Appellant's statement as shown by the judge's exclusion of a portion of the statement. Further, this Court noted that Appellant "hinge[d] her argument entirely on the fact that she was under the influence of prescription medication," but that "our state's legal precedent

ma[de] clear that the mere fact a defendant was under the influence is inadequate to prove her statement was involuntary." Id. (citing State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973)). In rendering this opinion, this Court misapprehended the holding in Saxon.

Over four decades ago, the South Carolina Supreme Court held "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). According to the Court, "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." Id. Further, the Court stated that "[p]roof of intoxication, short of rendering the accused unconscious of what he is saying, goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence." Id. Nevertheless, after making these pronouncements of the law, the Court ruled as follows:

> While there is testimony that [Saxon] had been drinking rather heavily and was not acting normally, there is other testimony from which the conclusion may be reasonably drawn that he was not drunk and fully comprehended what he was doing and saying. In fact, [Saxon] testified, and the inferences to be drawn from his own testimony amply support the conclusion that his statement was understandingly and voluntarily given. The testimony was properly admitted in evidence.

Id. at 529-530, 201 S.E.2d at 117. Thus, the Court analyzed the facts presented to the trial judge to determine whether there was evidence that Saxon was "not drunk and fully comprehended what he was doing and saying." This holding contradicted the legal principles previously enunciated, which suggested that unless an individual were intoxicated to the point unconsciousness, then any statements made by the individual were not *per se* inadmissible. The Court's holding in the case rested upon its view that evidence existed in the record that Saxon "was not drunk and fully comprehended what he was doing and saying."

Three years after Saxon, the South Carolina Supreme Court had the opportunity to examine another case in which a statement was allegedly made while the defendant was intoxicated. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). Collins and a co-defendant were charged with armed robbery of a local store. Id. at 568, 225 S.E.2d at 190-191. There was no dispute that on the day of the robbery, the men "had been drinking heavily." Id. at 568, 225 S.E.2d at 191. Collins was arrested on the day of the robbery for public drunkenness. Id. at 569, 225 S.E.2d at 191. A detective questioned Collins concerning the robbery about an hour after his arrest. Id. According to the detective, he "determined, by means of a field sobriety test, that [Collins] was capable of and did understand his rights before questions were asked." Id. To the contrary, the officer who arrested Collins "stated that in his opinion, [Collins] was still intoxicated" after being questioned. Id. at 569-570, 225 S.E.2d at 191.

In deciding whether the trial judge abused his discretion in determining the statement by Collins was voluntarily and knowingly given, the South Carolina Supreme Court cited Saxon, supra, for the proposition that "[p]roof of accused's intoxication, short of rendering him unconscious of what he is saying, does not require in every case, that statements he made while in that condition be excluded from evidence." Id. at 572-573, 225 S.E.2d at 193. However, the Court based its ruling on the fact that "[t]he evidence, including the condition of the defendant presented a factual situation which the judge determined unfavorably to the defendant." Id. at 573, 225 S.E.2d at 193. See also, Gladden v. Unsworth, 396 F.2d 373, 381 (9th Cir. 1968) (ordering the state court to conduct a hearing on the voluntariness of Unsworth's statements where the undisputed evidence showed he was "in a state of gross intoxication" at the time of the making of the statements); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964) (holding a defendant's confessions "should not be permitted to stand as evidence against" the defendant where the "totality of all the circumstances,

such as the man's physical condition, in combination with the impact of narcotics, as well as the lack of clear-cut testimony regarding his mental condition at the time he gave the statements" meant the confessions "were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination"); State v. Young, 875 P.2d 1119, 1123 (N.M. Ct. App. 1994) (remanding where the trial court erroneously determined the defendant's intoxication was irrelevant to the issue of waiver because "voluntary intoxication is relevant to determining whether a waiver was knowing and intelligent"); State v. Bramlett, 609 P.2d 345, 350 (N.M. Ct. App. 1980) *overruled on other grounds by* Armijo v. State Through Transp. Dep't, 737 P.2d 552 (N.M. Ct. App. 1987) (holding the contradictory testimony from the officers that the defendant was too intoxicated to be released and was detained for his own protection, but was not so intoxicated that he could not provide a knowing waiver of his constitutional rights "offends the standards of fundamental fairness under the due process clause" "and is unworthy of the degree of belief necessary to sustain a finding of voluntary waiver").

Thus, the *holdings* of Saxon and Collins reveal that intoxication – even short of unconsciousness – may render a statement made to police involuntary. This Court's reliance upon the dicta from Saxon and Collins or misinterpretations of those opinions requires rehearing.

The interrogation of Appellant began at 11:46 a.m., on December 18, 2014, when the police obtained a waiver of rights from her. R. 34, ll. 3-25; R. 35, l. 4 – R. 36, l. 13; R. 41, ll. 5-17; R. 48, ll. 18-23; R. 49, ll. 20-22; R. 50, ll. 1-12; R. 507; State's Exhibit #18. During the course of the interrogation, Appellant explained that she had taken her prescribed oxycodone at 6 a.m. that morning. R. 36, ll. 18-23; R. 40, ll. 17-19; R.50, ll. 16-24; State's Exhibit #18. Later, it was revealed that Appellant took a valium shortly before the officers picked her up for the interrogation. R. 40, ll. 20-24; R. 52, ll. 7-15; R. 52, ll. 16-20. Thus, it was undisputed that

Appellant had ingested prescription oxycontin and valium prior to her interrogation by law enforcement.

Over the course of the interrogation, Appellant's mental and physical condition deteriorated. Appellant's conduct did not suddenly change; instead, "there was a steady and gradual decline in her ability to speak and her speech being slurred." R. 39, l. 25 – R. 40, l. 4; R. 54, ll. 11-15; R. 56, ll. 10-15 (officer testifying that Appellant "just started sliding downhill" during the interrogation); see also State's Exhibit #18 (showing Appellant's ability to comprehend deteriorate under the influence of her prescription medication).

"At some point" it became clear to the interrogating officers that Appellant was "under the influence of something." R. 37, ll. 3-5; R. 51, ll. 13-14; see also R. 37, ll. 8-9 (officer testifying that Appellant "made a few statements that were - - that were incoherent"); State's Exhibit #18 (showing Appellant's slurred speech and non-sensical responses from the beginning of the video). Appellant was no longer coherent and "seemed to be falling asleep." R. 51, ll. 13-15; R. 53, ll. 16-20; see also State's Exhibit #18 (showing officer repeatedly question Appellant regarding her drowsiness and Appellant showing signs of fatigue, slurring her speech, being thick-tongued, not remembering what she said just moments prior, and saying that she did not understand and could not remember). In response, the officers stopped the interrogation briefly. R. 37, l. 9; R. 51, ll. 19-20; R. 57, ll. 3-6; see also State's Exhibit #18. An officer walked Appellant outside to see if she could wake up. R. 51, ll. 22-23; see also State's Exhibit #18. The officer then resumed the interrogation with Appellant's condition steadily deteriorating. R. 52, ll. 7-9; R. 57, ll. 7-11; see also State's Exhibit #18. In other words, the interrogation did not end when Appellant became incoherent, as this Court stated in its opinion. In fact, the officers were

well aware of Appellant's state, but continued the interrogation with no regard for Appellant's ability to understand or comprehend.

Judge Gravely found there was "no question" that even "at the first of" the interrogation there was "some little slurring." R. 171, ll. 22-24. However, he thought "her responses to the question and her general conversation" showed "it was voluntary, that she [knew] what [was] going on." R. 171, l. 24 – R. 172, l. 2. He concluded there was "definitely a point where … the influence of the valium seem[ed] to kick in more based on what she said." R. 172, ll. 3-5. He found that Appellant "definitely, at some point, [became] almost incoherent and mention[ed] something about a 300-degree fever." R. 172, ll. 6-8. He also found that "after the break," she was "much worse." R. 172, ll. 8-9. Thus, the judge found the statement admissible from the point in time that the rights were given until the police took a break, but required some redactions. R. 176, ll. 18-23.

Appellant respectfully requests this Court rehear this matter to examine the significant facts overlooked or misapprehended that demonstrate the totality of the circumstances rendered the entirety of the statement inadmissible. The video of the interrogation showed Appellant's speech was slurred from the moment she walked into the interrogation room, as Judge Gravely found. The video showed a woman who contradicted herself repeatedly. State's Exhibit #18. Within seconds of answering a question, she would forget the answer she had provided. State's Exhibit #18. She constantly mumbled, requiring the officers to request her to repeat her answers multiple times. State's Exhibit #18. Her responses lacked internal coherence and were inconsistent with prior statements and undisputed facts, which the officers realized was result of intoxication, not an attempt to mislead. State's Exhibit #18. Comparing Appellant's conduct during an earlier interrogation, see State's Exhibit #17, with her conduct during the interrogation conducted by

Burgess and Cauthen, it is apparent that Appellant was grossly intoxicated due to the use of her prescription medication at the time of the Burgess and Cauthen interrogation.

Even the state admitted that Appellant's speech was slurred and that she struggled to stay awake during the interrogation. R. 446, ll. 9-12. In fact, the state used this interrogation and Appellant's conduct to say that she was "kind of flippant about her medication." R. 446, ll. 9-12. The state told the jurors that the evidence to support Appellant's "flippant" attitude about her medication was evidence in the interrogation "where she's slurring her speech and hard to stay wake." R. 446, ll. 9-12. This was essential to the state's case because even under the state's theory, Appellant did not give drugs to Minor to kill him. R. 445, ll. 10-11. Instead, it was the state's theory that Appellant gave drugs to Minor so that he would sleep. R. 445, ll. 12-13; R. 451, ll. 16-18. Thus, it was necessary for the state to show that Appellant's conduct was "flippant" in connection with her pain medication in order to satisfy its burden of proving extreme indifference beyond a reasonable doubt. Further, the state encouraged the jurors to watch the "three interviews" to see "three very different Angela Brewers." R. 449, ll. 8-11. The state theorized that the "Angela Brewer [who] was there on October the 17th, 2014," when Minor died, "was probably a little bit more like the last interview." R. 449, ll. 10-12. In other words, the state used the interrogation in which Appellant was intoxicated due to ingesting her prescription medication, and in which it was obvious she was intoxicated, to argue to the jury that Appellant was intoxicated while she was tending to Minor on the day he died.

This Court erred in concluding the circuit court properly considered the totality of the circumstances surrounding Appellant's waiver and statement. State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). Appellant respectfully disagrees because the circuit court erred in admitting Appellant's statement to law enforcement because the totality of the

circumstances – her severe intoxication – showed Appellant's intoxication rendered her unable to voluntarily waive her constitutional rights and unable to know what she was saying when she spoke to police from the moment the interrogation began. Shortly before the interrogation, Appellant used two prescription narcotics to treat the pain she suffered. Appellant's inability to understand her constitutional rights and what she was saying to police rendered her statement involuntary. Contrary to the judge's ruling, Appellant did not suddenly become intoxicated during the interrogation; rather, she was intoxicated from the very beginning. Therefore, the entire statement should have been ruled inadmissible. The state capitalized on the trial judge's error by using the statement in its closing to show that Appellant was intoxicated from her use of her prescription drugs during the interrogation to argue that Appellant was intoxicated on the day that she cared for Minor, and to argue that Appellant's intoxication was the equivalent of extreme indifference to human life.

To the extent this Court's opinion was based upon the premise that Saxon stands for the proposition that intoxication just short of unconsciousness may *never* render a statement involuntarily made, Appellant argues against precedent. In other words, if this Court affirmed the circuit court's admission of Appellant's statement into evidence because Appellant's sole argument was that her intoxication made her unable to understand the import of her constitutional rights and the waiver of those rights, and this Court's reading of Saxon is that intoxication alone is insufficient to render a statement involuntary, Appellant respectfully requests this Court rehear the matter to explain that intoxication alone may result in an involuntary statement.

Conduit testimony in violation of the Confrontation Clause

This Court held the admission of the toxicology lab results through the pathologist, who did not conduct the toxicology tests, was not a violation of the Confrontation Clause because the lab

results were not testimonial as the results did not have "the primary purpose of assisting in an eventual criminal investigation." State v. Brewer, 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). This Court rests its holding upon the fact that the pathologist requested the toxicology screen at a time when the police did not suspect the deceased died as a result of a drug overdose or that a crime had been committed. According to this Court, "[t]here had been no arrest made, nor was there clear evidence of criminal activity." Id. Appellant respectfully requests this Court rehear this matter because the Court has misapprehended or overlooked critical facts and controlling case law.

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987); Pointer v. Texas, 380 U.S. 400 (1967). The South Carolina Constitution also provides that "[a]ny person charged with an offense shall enjoy the right … to be confronted with the witnesses against him." S.C. Const. art. I, § 14.

The United States Supreme Court analyzed a case similar to the one sub judice – testimony regarding a forensic lab report from a witness who did not conduct the actual testing that resulted in the report. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). "The Massachusetts courts admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine." Id. at 307. The Court was to answer whether those affidavits were testimonial, meaning the affiants were witnesses whose presence was required pursuant to the Sixth Amendment. Id. Police found numerous bags containing a white substance on Melendez-Diaz's person and in a location where he had been. Id. at 308. The police submitted the evidence to a state laboratory for chemical analysis. Id. During Melendez-Diaz's trial for distributing and trafficking cocaine,

the prosecution presented three "certificates of analysis" showing the results of the chemical testing performed on the evidence at the state lab. Id. The certificates indicated the only key facts necessary for the prosecution of Melendez-Diaz – the weight of the substance and that the substance was cocaine. Id. Melendez-Diaz objected to the certificates as violating his right under the Confrontation Clause. Id. at 309.

The Supreme Court held there was "little doubt" that the certificates fell "within the core class of testimonial statements" described in Crawford. Id. at 310. While the documents were labeled certificates, the documents were "quite plainly affidavits." Id. The certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" Id. at 310-311 (quoting Davis, 547 U.S. at 830)). "[N]ot only were the affidavits 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" but under state law, the sole purpose of the affidavit was to provide evidence of the composition, quality, and net weight of the substance. Id. at 311 (quoting Crawford, 541 U.S. at 52). Thus, the Court held Melendez-Dias was entitled to be confronted with the analysts at trial. Id.

The Court rejected the argument that forensic analysts were excepted from the Confrontation Clause because they conducted so-called "neutral scientific testing." Id. at 318. The Court explained "[f]orensic evidence is not uniquely immune from the risk of manipulation." Id. Noting that most laboratories producing forensic evidence are administered by police agencies and report to the heads of those agencies. Id. As a result, the forensic scientists "sometimes face pressure to sacrifice appropriate methodology for the sale of expediency." Id. (internal quotation omitted). Thus, "[c]onfrontation is one means of assuring accurate forensic analysis." Id. "Confrontation is designed to weed out not only the fraudulent

analyst, but the incompetent one as well." Id. at 319. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." Id. at 320.

Particularly important for the case sub judice, the Court pointed out that the affidavits submitted against Melendez-Diaz were "bare-bones" stating only that the substance was cocaine. Id. "At the time of trial, [Melendez-Diaz] did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." Id. Such areas are ripe for cross-examination to explore the exercise of judgment and risk of error in the chosen methodology. Id.

Next, the Court rejected the argument that the affidavits were admissible because they were akin to the types of official and business records admissible at common law. Id. at 321. The Court explained that while "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status," such documents may not be admitted "if the regularly conducted business activity is the production of evidence for use at trial." Id. (citing Palmer v. Hoffman, 318 U.S. 109 (1943)). Thus, the analysts' certificates did not qualify as business or public records. Id. at 321-322.

Confronted with a variation on the issue presented in Melendez-Diaz, the Supreme Court held the Confrontation Clause affords an accused the right to be confronted with the actual analyst who conducted the forensic chemical testing of his blood which was used against him in his driving while intoxicated (DWI) trial – not a "surrogate witness." Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011). Following an automobile accident involving Bullcoming, the police arrested him for DWI and obtained his blood for chemical testing. Id. at 652. To

determine Bullcoming's blood alcohol level, the police sent the sample to a state lab. Id. at 652-653. The lab produced a standard form identifying the participants in the testing and the forensic analyst's finding. Id. at 654. The form was certified by the forensic analyst. Id. At Bullcoming's trial, the state introduced the certified form against Bullcoming as a "business record" through another analyst who neither observed nor reviewed the actual analyst; the state did not call the actual analyst who conducted the testing and produced the form. Id. at 655.

The Supreme Court held the "surrogate testimony" of the second analyst could not satisfy the Confrontation Clause. Id. at 659-662. The Court rejected the argument that the analyst was a "mere scrivener" of what the gas chromatograph machine generated. Id. at 659-661. For example, the actual analyst's report indicated the sample arrived intact with the seal unbroken, the sample matched the lab number, that he performed a particular test on the sample, and that he adhered to certain protocol. Id. at 660. These representations were exactly the types of areas for a lawyer to probe on cross-examination. Id. Further, the Court rejected the suggestion that an analyst's report drawn from machine-produced data overcomes the Sixth Amendment bar because the Constitution requires the reliability of such evidence be tested by the crucible of cross-examination. Id. at 661.

Addressing the argument that the surrogate witness was qualified as an expert witness with respect to the gas chromatograph machine and the lab's procedures, thus enabling his testimony to satisfy the Confrontation Clause, the Court held the "surrogate testimony of the kind" the witness "was equipped to give could not convey what [the actual analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed." Id. "Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." Id. at 661-662. The Confrontation "Clause does not tolerate

dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id. at 662.

The South Carolina Supreme Court applied Melendez-Diaz and Bullcoming in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013). Brockmeyer objected to a witness reading into evidence computerized chain-of-custody logs of items that were introduced by the state. Brockmeyer, 406 S.C. at 339-340, 751 S.E.2d at 653. The Court concluded the chain-of-custody records at issue were non-testimonial. Id. at 352, 751 S.E.2d at 660. Reading Melendez-Diaz very narrowly, the Court concluded the chain of custody documents "were not created 'for the sole purpose of providing evidence against the defendant.'" Id. (quoting Melendez-Diaz, 557 U.S. at 323). Additionally, the Court was persuaded that the documents were not testimonial because they did "not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items." Id. Thus, the Court concluded "the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their 'primary purpose' is not to constitute evidence in a criminal trial." Id. The statements were "exempt from the Confrontation Clause." Id.

In a case analyzing the connection between the Confrontation Clause and expert testimony, the United States Supreme Court addressed whether an expert who testified that a DNA profile produced by an outside laboratory matched a profile produced by the state police lab using a sample of the defendant's blood violated the Confrontation Clause. Williams v. Illinois, 567 U.S. 50, 56 (2012). Writing for four justices, Justice Alito noted that "an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be

true" as long as the party who calls the expert introduces other evidence establishing the facts assumed by the expert. Id. at 57. The Court carefully crafted the opinion to explain that "this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted." Id. at 57-58. "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." Id. at 58.

Very important to the resolution of the Williams case, the Court held the expert did not testify to the truth of the matter concerning the work done by outside laboratory in the case nor did the expert "vouch for the quality of the [outside laboratory]'s work." Id. at 71. As mentioned, it was critical that the expert's testimony concerning the conclusions of the outside laboratory was not offered for the truth of the matter, but merely to show what the expert relied upon on arriving at her own conclusions. Id. at 71-72. Finally, and perhaps most significantly, the Court explained its conclusion was dictated by the fact that Williams was tried by a judge, not a jury. Id. at 72.

The Court explained the trier of fact – the judge – would have understood that the expert's statements regarding the work conducted by the outside laboratory were not offered as substantive evidence. Id. The Court held that if Williams had been tried by a jury "there would have been a danger of the jury's taking [the expert's] testimony as proof that the [outside laboratory] profile was derived from the sample obtained from the victim's vaginal swabs." Id. "Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could *not* have gone to the jury." Id. (emphasis added). Where Williams was tried by a judge

only, the Court "assume[d] that the trial judge understood that the portion of [the expert]'s testimony … was not admissible to prove the truth of the matter asserted." Id. at 72-73.

Recognizing that its opinion had the potential to open the door to abuse – allowing an expert to express an opinion based on factual premises not support by any admissible evidence and revealing the out-of-court statements on which the expert relied – the Court posited "four safeguards to prevent such abuses." Id. at 79-80.

> First, trial courts can screen out experts who would act as mere conduits for hearsay be strictly enforcing the requirement that experts display some genuine "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Second, experts are generally precluded from disclosing inadmissible evidence to a jury. Third, if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises. And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact.

Id. at 80-81 (internal citations omitted).

Particularly helpful for resolution of the case sub judice is the Tenth Circuit Court of Appeals' opinion in United States v. Garcia, 793 F.3d 1194 (10th Cir. 2015). Garcia challenged the admissibility of a "gang expert" whose testimony was based on conversations with gang members. Garcia, 793 F.3d at 1211. Garcia argued the expert's testimony consisted of parroting testimonial hearsay from those he had interviewed. Id. The Tenth Circuit explained that "[s]pecial considerations arise under the Confrontation Clause in the context of expert testimony." Id. at 1212. The relevant rule of evidence in federal court, much like the South Carolina rule, permits an expert to rely on testimonial hearsay; however, the rule cannot override the Confrontation Clause. Id. Thus, the Tenth Circuit reasoned that to reconcile the rule and the Confrontation Clause, the expert must exercise independent judgment in assessing and using the

hearsay to reach an expert opinion. Id. In this way, "[t]he expert's opinion will be an original product that can be tested through cross-examination." Id. (citing United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009)).

In South Carolina, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Rule 703, SCRE. Nevertheless, the Supreme Court has held that "merely because testimony does not violate applicable rules of evidence does not necessarily mean it meets constitutional standards." State v. Hutto, 325 S.C. 221, 221, 481 S.E.2d 432, 433 (1997). Here, Dr. Fulcher's testimony regarding the testing and results of that testing by NMS Labs violated Appellant's right to confront the witnesses against her.

As an initial matter, it must be noted that although this Court affirmed the circuit court's decision to admit the lab results through a conduit witness, this Court's analysis centered upon a finding that the lab results were not testimonial, which was not the finding made by the circuit court. In fact, the circuit court made no attempt to analyze the purpose of the lab results. Instead, the circuit court judge found simply that the Confrontation Clause was satisfied because Appellant could cross-examine the pathologist. This finding was erroneous. Additionally, this Court's conclusion that the lab results were not testimony because the lab results were not obtained with the primary purpose of establishing past events potentially relevant to later criminal prosecution is not supported by the evidence.

This Court correctly noted that the pathologist requested the toxicology screen prior to an arrest; however, this Court's indication that the police did not suspect that a crime had been

committed was not correct. On October 17, 2014, the police officers were confronted with a deceased child with no apparent cause of death from a visual inspection of the exterior of the child. The police immediately suspected the child did *not* die as a result of natural causes. Further, the police questioned Appellant on the day of the child's death about what medications Appellant used. R. 106, ll. 2-15. Such questioning is not surprising in light of what the police suspected. Based on the items seized from Appellant's home *on the day of death*, it appears the police suspected the deceased suffered from a lethal overdose of Appellant's prescription medications. Using a consent to search, the police seized and/or took photographs of Appellant's medications and "sippy cups" found throughout the house. R. 220, l. 5 – R. 226, l. 6; R. 292, ll. 20-24 (lead investigator directed forensics to seize the sippy cups). Most importantly, the police questioned Appellant on November 6, 2014, which was after the lab issued its report, but prior to the pathologist issuing his autopsy report and there was no indication the police were aware of the lab report at the time, about the access of the deceased's to Appellant's medications. R. 232, l. 9 – R. 233, l. 2. Although the date was not given by one of the lead investigators, it was clear that the police requested the sippy cups be tested by SLED, which occurred prior to the interrogation of Appellant on December 18, 2014. R. 281, l. 21 – R. 282, l. 10; R. 311, ll. 1-3 (one investigator "believed" the results were received in December 2014); R. 374, ll. 17-21 (SLED agent testifying his report was dated December 12, 2014). Appellant requests rehearing because these significant facts were overlooked or misapprehended by this Court in arriving at its opinion.

Dr. Fulcher explained how he handles autopsies requiring blood tests. He noted that he is "a member of a private group" that "charge[s] money for all these services to cover [their] costs." R. 390, ll. 13-16. He and his partner "decided as a protocol to use" whom the two

believed was "the best laboratory in the country to run all [their] specimens." R. 390, ll. 17-18. According to Dr. Fulcher, that best laboratory in the entire country was "National Medical Services, … located in a suburb of Philadelphia." R. 390, ll. 19-20. He went on to explain that he used NMS instead of SLED because SLED was "slow." R. 390, ll. 21-25. Next, Dr. Fulcher went on to vouch for the work performed by NMS.

> I believe in them. They have been the preeminent lab in uncovering novel opiates. And one of the best things I like about them is they take specimens from the entire country. So they see the really weird stuff first, because they do more volume across the country.
>
> They've got a handful, like five or six people that have died from this really weird opiate in two rural counties in Pennsylvania. It happened in a week period and went away. They got a test for that compound. If you sent that anywhere else, they wouldn't find it.
>
> So when I get their report back - - I can never say a report is absolute, you know. Only - - only God knows what is absolute truth. And we are trying to get as best we can to that. However, as far as our ability to test, this represents the finest lab in this country that we can send specimens to.

R. 391, ll. 7-22.

Dr. Fulcher then informed the jurors about the results of the testing conducted by NMS labs. Specifically, he informed the jurors of the specific levels of oxycodone and oxymorphone found in Minor's blood, ocular fluid, and gastric contents. R. 392, ll. 2-21. When asked to explain what "those numbers" meant, Dr. Fulcher read from the NMS report. R. 393, l. 9 – R. 394, l. 25.[1] Thereafter, Dr. Fulcher informed the jurors that the amount of drugs in Minor's system caused his death. R. 395, ll. 13-15.

On cross-examination, Dr. Fulcher stated he sent the specimens to the Pennsylvania lab via FedEx. R. 408, ll. 12-16. He elaborated:

[1] Defense counsel objected again when the witness began reading from the NMS lab report. R. 393, ll. 12-16. The judge overruled the objection. R. 393, ll. 21-23.

> I package them in a box. I seal the box. I initial the box. I put it in a sealed envelope for FedEx marked as biohazardous substances. It's next day aired to the lab. They open the package, document that the box hasn't been tampered with, it's still sealed, and start their analysis documenting their processing of the specimens along the way.

R. 408, l. 20 – R. 409, l. 1. He admitted he was not present when the package was opened. R. 409, ll. 2-4. He also admitted that he was not present when the tests were performed and could not address any questions related to the controls or protocols that were used in this particular case. R. 409, ll. 5-15. He admitted to the ever-present possibility of contamination. R. 409, ll. 16-19.

During re-direct examination, the state sought to clean up the mess it had created with using Dr. Fulcher to testify about the NMS lab results:

> Q. Dr. Fulcher, how often do you use this lab in Pennsylvania?
>
> A. 100 percent of the time, which would approximately be 700 case - - well, 650 cases a year.
>
> Q. Okay. And on those 650 cases, do you always give a cause of death and a manner of death?
>
> A. I do, yes.
>
> Q. And do you sign that report?
>
> A. I do.
>
> Q. Would you add your signature to the report if there was any concern of you that this lab does not appropriately test substances?
>
> A. At some point, you have to trust people to do the right thing, so, yes.
>
> Q. Do you have any concern that this lab does not appropriately test substances?
>
> A. I do not. I've had conversations with their director, PhD toxicologists about more unusual substances showing up. And I feel like they're offering me the best product I can purchase.

R. 413, ll. 6-25.

In closing, the solicitor likened the NMS lab to the SLED lab about which the jurors had heard when a SLED analyst testified regarding the lab's protocols and methodologies employed for certain tests. The solicitor informed the jurors that the SLED testing conducted in the case on liquid found in Minor's sippy cup was "solid and reliable evidence." R. 447, ll. 1-3. According to the solicitor, the SLED analyst "discussed at length that the testing that he does is reliable. That it is peer reviewed. That it is incredibly scientific." R. 447, ll. 4-6. The SLED agent also "testified that he takes putting his signature on a report very seriously. And unless he firmly believes that that is what happened, he's not going to attach his signature to it. And he's not going to risk his professional reputation on a report that he doesn't think is accurate. And Dr. Fulcher told you the same thing." R. 447, ll. 16-22.

Continuing on this point, the solicitor admitted there was "some question about sending it off to a lab, a nationally-recognized lab." R. 447, ll. 23-24. Any question was absolved by Dr. Fulcher's signature – Dr. Fulcher, according to the solicitor, said "I would not attach my signature to the thousands of reports that I give if I didn't believe in what that lab was doing, if I didn't believe it was secure." R. 447, l. 24 – R. 448, l. 2. Thereafter, the solicitor recounted Dr. Fulcher's testimony regarding the NMS Lab report. R. 448, ll. 3-11.

The lab results were testimonial in nature and Appellant did not have a prior opportunity to cross-examine the author of the statements contained within the lab report. The blood, ocular fluid, and gastric contents were sent to NMS Labs from Dr. Fulcher who was acting in his capacity as a medical examiner for Greenville County investigating the death of Minor. Dr. Fulcher admitted that he could have sent the specimens to SLED, the state lab, but he declined to do so because SLED is too slow for his liking. The primary purpose of the lab report from NMS

Labs was to establish past events that were potentially relevant to later criminal prosecution. The lab report was made under circumstances that would lead an objective witness reasonably to believe that the report, and the statements contained therein, would be available for use at a later trial. While the report was not admitted into evidence, it was clear from the testimony of Dr. Fulcher that the report was a formal document.

Repeatedly, Dr. Fulcher vouched for the reliability of NMS Labs. He called the lab the "best in this country" and his frequent praise of the lab actually grew wearisome. His glowing praise of the lab included his personal guarantee of the lab technician's abilities, which the solicitor used in closing argument to ask the jurors to trust Dr. Fulcher's testimony regarding the lab tests. Although Dr. Fulcher was equipped to interpret the lab results for his purposes related to the autopsy, he was not equipped to give the testimony that would have been necessary from the lab technician who performed the actual tests – what the analyst knew, what the analyst observed about the testing, and the particular test used. Not presenting the actual analyst prevented defense counsel from cross-examining the analyst on the lack of proper training, any deficiencies in judgment, and the risk of error in the chosen methodology – all areas protected by the Confrontation Clause.

There can be little question that the lab results testified to by Dr. Fulcher were offered for the truth of the matter asserted. The results also were not offered simply to explain Dr. Fulcher's analysis or determination for the cause of death. The results were offered to inform the jury of the drug levels present in Minor's blood, ocular fluid, and gastric contents. Thus, unlike the DNA results offered in Williams, supra, the lab results presented in the instant case were offered for the truth of the matter asserted. Additionally, the Supreme Court relied heavily upon the fact that Williams was tried by a judge only, not a jury. As the Court explained, had Williams been

tried by a jury, the evidence as presented – without the calling of the analyst who arrived at the result relied upon by the other analyst – could not have gone to the jury. Appellant was tried by a jury, not a judge, who would have been able to discern when evidence was not being offered for the truth of the matter asserted. In fact, in closing, the solicitor used the lab test results to support the criminal charge against Appellant – that Minor died as a result of a drug overdose at the hands of Appellant. The jury was informed by Dr. Fulcher of the pristine reputation of NMS Labs and the unimpeachable results achieved in this case, but Appellant was unable to explore the areas guaranteed to her by the Confrontation Clause including challenging the analyst's competency and judgment.

Appellant respectfully requests this Court rehear this matter based upon the significant points overlooked or misapprehended.

Respectfully Submitted,

s/*Susan B. Hackett*
SUSAN B. HACKETT
Appellate Defender

This 1st day of September, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov; and Angela D. Brewer, #374893, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 1st day of September, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT