STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
Perry H. Gravely, Circuit Court Judge

Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020)

2016-GS-39-2265

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

PETITIONER

APPELLATE CASE NO. 2017-002563

PETITION FOR WRIT OF CERTIORARI TO THE 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 September 10, 2020.

QUESTIONS PRESENTED

I. Did the Court of Appeals misconstrue this Court's precedent to require Petitioner prove her undisputed intoxication rendered her unconscious of what she was saying in order for a trial court to exclude her statement as involuntary and unknowing? In the alternative, did the Court of Appeals erroneously affirm the trial court's admission of Petitioner's statement where the evidence demonstrated Petitioner was so intoxicated by her prescription medication that she was incapable of knowingly and voluntarily waiving her rights and of voluntarily giving a statement?

II. Where the evidence showed (1) the lab conducted the tests pursuant to a request from the forensic pathologist, who was performing an autopsy on a toddler, (2) the police were investigating the death of a toddler, who displayed no obvious explanations for his death, and (3) the police suspected a drug overdose based upon the questioning of witnesses and items seized, did the Court of Appeals erroneously conclude the lab test results were not testimonial, and thus, permitting a forensic pathologist to testify regarding the results did not violate Petitioner's Sixth Amendment right to confront the witnesses against her?

STATEMENT OF THE CASE

On October 17, 2014, Petitioner was at home with her grandchild, Minor. R. 118, ll. 10-17; R. 184, ll. 8-19; R. 185, ll. 6-7; R. 136, ll. 15-16; R. 139, ll. 10-25. Shortly after 4 p.m., Petitioner's husband called her while he was driving home from work. R. 118, ll. 18-19; R. 119, ll. 2-4. While the two were talking, Petitioner tried to wake Minor from his nap, but he was not responsive. R. 118, l. 21 – R. 119, l. 9. When Petitioner's husband arrived home, he began

performing CPR while Petitioner called for help. R. 120, ll. 7-20. Despite the efforts of medical personnel, Minor died. R. 94, ll. 15-18.

On December 18, 2014, at 11:46 a.m., Pickens County Sheriff's Deputy Rita Burgess and SLED agent Christine Cauthen began interrogating Petitioner regarding the death of Minor. R. 34, ll. 3-25; R. 48, ll. 18-23; R. 49, ll. 20-22. During the interrogation, Petitioner 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. Nevertheless, the officers forged ahead with the interrogation. State's Exhibit #18. Cauthen and Burgess claimed Petitioner was coherent at the beginning of the interrogation. R. 36, l. 21 – R. 37, l. 2; R. 39, ll. 15-21; R. 51, ll. 5-7.

"At some point" it became clear to Burgess and Cauthen that Petitioner was "under the influence." R. 37, ll. 3-5; R. 51, ll. 13-14. According to Burgess, Petitioner "made a few statements that were - - that were incoherent." R. 37, ll. 8-9; see also State's Exhibit #18. Cauthen described Petitioner as no longer coherent when she "seemed to be falling asleep." R. 51, ll. 13-15; R. 53, ll. 16-20; see also State's Exhibit #18. Burgess admitted "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; see also State's Exhibit #18. Cauthen admitted Petitioner "just started sliding downhill." R. 54, ll. 11-15; R. 56, ll. 10-15. Petitioner told the officers that she had taken a valium around 10 a.m. R. 40, ll. 20-24; R. 52, ll. 7-15; R. 52, ll. 16-20. Thus, it was undisputed that Petitioner had ingested prescription oxycontin and valium prior to her interrogation by law enforcement.

Burgess and Cauthen then took a break. R. 37, l. 9; R. 51, ll. 19-20; R. 57, ll. 3-6; see also State's Exhibit #18. Cauthen walked Petitioner outside to see if she could wake up. R. 51, ll. 22-23; see also State's Exhibit #18. The interrogation resumed with Petitioner's condition steadily deteriorating. R. 52, ll. 7-9; R. 57, ll. 7-11; see also State's Exhibit #18.

On October 11, 2016, a Pickens County grand jury indicted Petitioner for homicide by child abuse (2016-GS-39-2265). R. 512. The state, represented by Brandi B. Hinton and Caroline H. Newton, called the case for trial on December 11-14, 2017, before the Honorable Perry H. Gravely and a jury. R. 1. John W. DeJong and Daniel M.H. King represented Petitioner. R. 1. The jury found Petitioner guilty as charged. R. 504, ll. 7-14. Judge Gravely sentenced Petitioner to twenty years imprisonment. R. 506, ll. 3-4; R. 514. On December 15, 2017, Petitioner served her notice of appeal. The Court of Appeals affirmed Petitioner's conviction. State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). Subsequently, Petitioner filed a petition for rehearing, which was denied on September 10, 2020. This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals misconstrued this Court's precedent to require Petitioner prove her undisputed intoxication rendered her unconscious of what she was saying in order for a trial court to exclude her statement as involuntary and unknowing. In the alternative, the Court of Appeals erroneously affirmed the trial court's admission of Petitioner's statement where the evidence demonstrated Petitioner was so intoxicated by her prescription medication that she was incapable of knowingly and voluntarily waiving her rights and of voluntarily giving a statement.

Reasons to grant certiorari

The opinion issued by the Court of Appeals is in conflict with this Court's prior decisions in State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) and State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976) regarding how intoxication affects the analysis for determining the admissibility of statements; thus, this Court should grant certiorari. See Rule 242(b)(3), SCACR.

Relevant facts

The state argued Petitioner's recorded statement was admissible because Petitioner "was coherent at [the] point" that she was advised of her rights. R. 59, ll. 16-19; R. 169, ll. 8-11. According to the state, when she waived her rights, Petitioner "was competent to do so." R. 169, ll. 10-11. The state conceded that "[a]t some point," Petitioner became "clearly under the influence of something." R. 59, ll. 20-21; R. 169, ll. 11-14. In the state's view, the interrogation up to when the officers exited the room with Petitioner to walk around and get a snack was admissible in light of what the state perceived as a competent waiver. R. 169, ll. 15-18.

Defense counsel noted that when Petitioner first got on camera, her speech was already slurred. R. 170, ll. 17-21. Defense counsel emphasized the regression of Petitioner's cognition in the video to demonstrate that her lack of comprehension did not change suddenly. R. 170, ll. 17-21. The evidence was undisputed that Petitioner took her prescription for valium "not too long" prior to the officers picking her up from her home and starting the interrogation. R. 170, ll. 21-25. Defense counsel argued for the exclusion of the entire statement because she was intoxicated the entire time. R. 171, ll. 1-21.

Judge Gravely found there was "no question" that "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 Petitioner "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.

Discussion

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 v. Arizona, 384 U.S. 426, 444 (1966). 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)).

Over four decades ago, this 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 this 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, this 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, this 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, this 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 Court's holding 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, this 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. However, the officer who arrested Collins "stated that in his opinion, [Collins] was still intoxicated" even 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, this 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. Nevertheless, this 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").

The Court of Appeals misapprehended Saxon. According to the Court, "our state's legal precedent makes clear that the mere fact a defendant was under the influence is inadequate to prove her statement was involuntary." State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020). Thereafter, the Court declared that the evidence supported the trial court's finding that Petitioner was "not impaired to the point that she did not realize what she was saying during the earlier portion of her statement." Id. In essence, the Court of Appeals required the evidence show Brewer was unconscious of what she was saying. As explained supra, the Court of Appeals misconstrued Saxon in reaching this conclusion.

To the extent this Court determines that Saxon stands for the proposition that intoxication just short of unconsciousness may *never* render a statement involuntarily made, Petitioner argues against precedent. Petitioner urges this Court to review the entire Saxon opinion, which demonstrates this Court determined the trial judge did not abuse his discretion in finding Saxon's statement was voluntary because there was evidence in the record that Saxon was not intoxicated and fully understood what he was doing and saying. Additionally, Petitioner points to evidence in the record that her intoxication rendered her unable to understand the import of her constitutional rights and the waiver of those rights.

The video of the interrogation showed Petitioner's speech was slurred from the moment she walked into the interrogation room. 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 Petitioner'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 Petitioner 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 Petitioner'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 Petitioner'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 Petitioner'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, Petitioner did not give drugs to Minor to kill him. R. 445, ll. 10-11. Instead, it was the state's theory that Petitioner 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 Petitioner'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 Petitioner was intoxicated due to ingesting her prescription medication, and in which it was obvious she was intoxicated, to argue to the jury that Petitioner was intoxicated while she was tending to Minor on the day he died.

Petitioner's intoxication rendered her unable to voluntarily waive her constitutional rights and unable to know what she was saying when she spoke to police. The state capitalized on the trial judge's error by using the statement to argue that Petitioner was intoxicated on the day that she cared for Minor, which was the equivalent of extreme indifference to human life. Contrary to the judge's ruling, Petitioner did not suddenly become intoxicated during the interrogation; rather, she was intoxicated from the very beginning. Therefore, the entire statement was inadmissible.

II. Where the evidence showed (1) the lab conducted the tests pursuant to a request from the forensic pathologist, who was performing an autopsy on a toddler, (2) the police were investigating the death of a toddler, who displayed no obvious explanations for his death, and (3) the police suspected a drug overdose based upon the questioning of witnesses and items seized, the Court of Appeals erroneously concluded the lab test results were not testimonial, and thus, permitting a forensic pathologist to testify regarding the results did not violate Petitioner's Sixth Amendment right to confront the witnesses against her.

Reasons to grant certiorari

The opinion issued by the Court of Appeals conflicts with the holdings of the United States Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and this Court in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013); therefore, this Court should grant certiorari. See Rule 242(b)(3),(5), SCACR.

Relevant facts

Relying upon Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), defense counsel objected to the state's forensic pathologist, Dr. James Fulcher, testifying regarding lab tests conducted by NMS Labs in Willow Grove, Pennsylvania, because such testimony violated Petitioner's right to confrontation pursuant to the Sixth Amendment and was inadmissible hearsay. R. 193, l. 2 – R. 194, l. 18. Defense counsel explained the pathologist did not conduct any testing and relied exclusively on the results from the lab. R. 196, ll. 18-21. Defense counsel objected to the pathologist's findings, admitting the doctor could testify to anything he found at the autopsy, but objected to his findings regarding blood levels because the doctor had not conducted those tests. R. 198, ll. 8-12.

The state argued Melendez-Diaz, supra, was inapplicable because the state intended to offer the pathologist's testimony under Rule 703, SCRE. R. 199, ll. 3-8. According to the state, this situation was distinguished from Melendez-Diaz, supra, because the state would present a witness the defendant could confront – the pathologist. R. 199, ll. 13-15. The judge a held the testimony was admissible. R. 201, ll. 4-7. The judge determined "the confrontation clause [was] met by the cross-examination of the witnesses here." R. 201, ll. 6-7; R. 383, ll. 5-16.

Thereafter, Dr. Fulcher, who was qualified as an expert in forensic pathology, 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 vouched 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.
>
> ***
>
> 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. 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 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, Dr. Fulcher's vouching continued:

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. However, 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.

Discussion

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

In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Court has held that statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006). As explained by the Court, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. Conversely, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove

past events potentially relevant to later criminal prosecution." Id. However, "there may be *other circumstances*, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Michigan v. Bryant, 562 U.S. 344, 358 (2011) (emphasis in original). When a court makes "the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." Id. at 358-359. According to the Court, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Id. at 359.

In Bryant, the Court provided "additional clarification with regard to what Davis meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" Id. (quoting Davis, 547 U.S. at 822). To make the determination about the primary purpose, the reviewing court must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." Id. One relevant inquiry is what purpose would reasonable participants have had as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. Id. at 360.

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.

This 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, this 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, this 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, this 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); see also United States v. Garcia, 793 F.3d 1194, 1211-1212 (10th Cir. 2015) (explaining that "[s]pecial considerations arise under the Confrontation Clause in the context of expert testimony" and to reconcile the expert evidentiary rule and the Confrontation Clause, the expert must exercise independent judgment in assessing and using the hearsay to reach an expert opinion to allow for an "original product that can be tested through cross-examination."

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, this 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 Petitioner's right to confront the witnesses against her.

The lab results were testimonial in nature and Petitioner did not have a prior opportunity to cross-examine the author of the statements contained within the lab report. Items 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, but he declined to do so because SLED is too slow for his liking.

As an initial matter, it was clear from the testimony of Dr. Fulcher that the report was a formal document. Contrary to the opinion issued by the Court of Appeals, the primary purpose of the lab report from NMS Labs was to establish past events that were potentially relevant to later criminal prosecution. Dr. Fulcher requested the testing in conjunction with his autopsy of a toddler where his examination of the internal and external body of Minor revealed no cause of death. Thus, while he may request toxicology in every autopsy, Dr. Fulcher's ability to determine Minor's cause of death depended wholly on the toxicology results.

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. Contrary to the opinion issued by the Court of Appeals, the authorities expected criminal activity and an overdose. Two deputies explained that at the hospital on the day of Minor's death, law enforcement questioned Petitioner regarding her medications, which included Oxycontin. R. 106, ll. 2-15; R. 326, ll. 19-22; R. 327, ll. 4-6.

Michael Hendricks with the Pickens County Sheriff's Office, who searched Petitioner's home on the day Minor died, noticed pill bottles on the kitchen counter, which he inventoried at Cauthen's instruction. R. 217, ll. 1-25; R. 220, ll. 7-18; R. 224, ll. 14-19; R. 225, ll. 6-13; R. 293, ll. 11-16. In fact, Cauthen directed the police to seize Minor's sippy cups. R. 292, ll. 20-24. On November 6, 2014, Hendricks conducted a follow-up interview of Petitioner, during which he and Petitioner "talked about if her - - if Minor could have got [sic] access to her OxyContin." R. 226, ll. 7-15; R. 232, ll. 9-12. According to Hendricks, Petitioner "was very argumentative about how it's not possible, he could not have done that." R. 232, ll. 12-13. Thus, at the time the lab issued its report on November 2, 2014, and Dr. Fulcher issued the autopsy report on November 17, 2014, the police investigation had zeroed in on Minor dying from a drug overdose.

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 of the cause of death. The results were offered to inform the jury of the drug levels present in Minor's body. 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. Petitioner was tried by a jury, not a judge. In fact, in closing, the solicitor used the lab test results to support the criminal charge against Petitioner – that Minor died as a result of a drug overdose at the hands of Petitioner. The jury was informed by Dr. Fulcher of the pristine reputation of NMS Labs and the unimpeachable results achieved in this case, but Petitioner was unable to explore the areas guaranteed to her by the Confrontation Clause including challenging the analyst's competency and judgment.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented. If this Court grants the petition, but dispenses with further briefing, Petitioner respectfully requests this Court reverse and remand for a new trial.

Respectfully Submitted,

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

This 29th day of October, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
Perry H. Gravely, Circuit Court Judge

Opinion No. 2020-UP-255 (S.C. Ct. App. filed Aug. 26, 2020)
2016-GS-39-2265

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

PETITIONER

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 Writ of Certiorari in this case has been served on 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; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 29th day of October, 2020.

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