STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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

THE STATE,

RESPONDENT,

V.

ANGELA D. BREWER,

PETITIONER

APPELLATE CASE NO. 2020-001345

BRIEF OF PETITIONER

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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

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); App. 1-12. Subsequently, Petitioner filed a petition for rehearing, which was denied on September 10, 2020. App. 13-37. On October 29, 2020, Petitioner filed a petition for writ of certiorari asking this Court to review errors made by the Court of Appeals. Thereafter, on June 18, 2021, this Court granted certiorari and ordered briefing by the parties. This brief of petitioner 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.

Standard of review

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge's ruling on the voluntariness of the confession when the ruling is "so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Relevant facts

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 her grandson, Minor. R. 34, ll. 3-25; R. 48, ll. 18-23; R. 49, ll. 20-22; State's Exhibit #18. Petitioner indicated she "kinda" understood the role of SLED. State's Exhibit #18. She asked, "Should I

not talk to you?" and Cauthen responded that there was no reason not to talk to them. State's Exhibit #18. Petitioner also informed the agents 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. Indicating her intoxication level, she repeated the time. State's Exhibit #18. In fact, she was just about to take a nap prior to the interrogation. State's Exhibit #18. Nevertheless, the officers forged ahead with the interrogation.

Burgess advised Petitioner of her rights using a form. R. 35, l. 4 – R. 36, l. 13; R. 41, ll. 5-17; R. 50, ll. 1-12 R. 507; State's Exhibit #18. While Petitioner was reading the waiver, she slurred her words. State's Exhibit #18. Deputy Burgess claimed Petitioner "seemed very coherent." R. 36, ll. 21-24; R. 39, ll. 15-21. However, she later tempered her opinion to limit Petitioner's "coherent responses" to the "beginning" of the interrogation. R. 36, l. 25 – R. 37, l. 2; R. 39, ll. 15-21. Cauthen likewise stated that Petitioner appeared coherent at the beginning of the interrogation. R. 51, ll. 5-7.

"At some point" it became clear to Burgess and Cauthen that Petitioner was "under the influence of something." 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 (showing Petitioner's slurred speech and non-sensical responses from the beginning of the video). 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 (showing Cauthen repeatedly question Petitioner regarding her drowsiness and Petitioner 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).

Burgess admitted that Petitioner'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; see also State's Exhibit #18 (showing Petitioner's ability to comprehend deteriorate under the influence of her prescription medication). Cauthen even admitted that Petitioner "just started sliding downhill" during the interrogation. R. 54, ll. 11-15; R. 56, ll. 10-15. Upon questioning, 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. Burgess was adamant that Petitioner did not take any medications while Petitioner was in her custody, which included from the moment Burgess and Cauthen picked Petitioner up from her home through the interrogation. R. 38, l. 25 – R. 39, l. 14. Thus, it was undisputed that Petitioner had ingested prescription oxycontin and valium prior to her interrogation by law enforcement.

In response to what Cauthen described as Petitioner's sleepiness, Burgess and Cauthen stopped the interrogation. R. 37, l. 9; R. 51, ll. 19-20; R. 57, ll. 3-6; see also State's Exhibit #18. Burgess then stepped out of the interrogation room and contacted a judge regarding an arrest warrant. R. 37, ll. 10-11. Burgess ultimately obtained an arrest warrant for Petitioner and arrested her later that day. R. 38, ll. 2-9; R. 53, ll. 8-10. Cauthen walked Petitioner outside to see if she could wake up. R. 51, ll. 22-23; see also State's Exhibit #18. Cauthen and Burgess then resumed the interrogation with Petitioner's condition steadily deteriorating. R. 52, ll. 7-9; R. 57, ll. 7-11; see also State's Exhibit #18.

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.

Nevertheless, the state asked the judge to admit the entirety of the statement pursuant to Rule 404(b), SCRE. R. 59, ll. 20-23. The state wanted to use Petitioner's admittedly incoherent statement to law enforcement to show that she "was not honest and forthcoming about how she uses her oxycodone" in order to "prove motive, intent, and lack of mistake or accident." R. 60, ll. 7-12; R. 169, ll. 19-23. The state claimed it was "essential" to show the video to the jury "not for the point of showing, you know this is how she acts, but to show that she does not seriously take this medication and its effect seriously." R. 60, ll. 13-16.

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

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in a criminal matter. U.S. Const. amend. V. Based on the Fifth Amendment's protection, the United States Supreme Court held that in criminal prosecutions, statements by the accused are not admissible unless the prosecution demonstrates the use of procedural safeguards. Miranda v. Arizona, 384 U.S. 426, 444 (1966). However, the required use of these safeguards is required only when the accused is in custodial interrogation. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444.

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); United States ex rel. Wakeley v. Russell, 309 F.Supp. 68, 73-74 (E.D. Penn. 1970) (concluding a defendant's statement was not the product of a rational intellect and free will where the defendant had a history of drinking dating from childhood, had been drinking heavily over an extended period of time prior to making the statement, a police detective present had no difficulty determining he was drunk, and earlier a police lieutenant thought he was just another drunk making up a story when he said he thought he had hurt someone); 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.

Standard of review

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted).

An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show

prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

Relevant facts

Prior to the pathologist, Dr. Fulcher, testifying, defense counsel objected to any testimony regarding lab tests conducted by NMS Labs in Willow Grove, Pennsylvania. R. 193, l. 2 – R. 194, l. 18. Defense counsel explained that the pathologist rendered his opinion on the cause of death based upon the findings of NMS Labs. R. 193, l. 23 – R. 194, l. 5. Specifically, defense counsel argued the testimony was inadmissible hearsay. R. 194, ll. 6-10. Additionally, defense counsel argued the testimony violated Petitioner's right to confrontation pursuant to the Sixth Amendment. R. 194, ll. 11-16. 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 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 and toxicology as part of that 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 although "they do a good job," 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 exact levels of oxycodone and oxymorphone found in Minor's blood, ocular fluid, and gastric contents. R. 392, ll. 2-21. According to the NMS lab report about the testing conducted on Minor's blood, "Oxycodone was present at 2,700

… nanograms per milliliter[,] Oxymorphone was present at 120 nanograms per milliliter." R. 392, ll. 2-8. Regarding the ocular fluid, "the same compounds were present at lower levels, 190 nanograms per milliliter Oxycodone, 15 nanograms per milliliter oxymorphone." R. 392, l. 9-14. Turning to the gastric fluid, NMS reported "the concentration of Oxycodone was 360,000 nanograms per milliliter" and "[O]xymorphone was present at 920 nanograms per gram." R. 392, ll. 15-21. Later, Dr. Fulcher told the jurors that he "believe[d]" Oxymorphone was the metabolite of Oxycodone. R. 396, ll. 20-22.

When asked to explain what "those numbers" meant, Dr. Fulcher read from the NMS report. R. 393, l. 9 – R. 394, l. 25. Dr. Fulcher told the jurors that what he was reading to them was "an interpretation of all the current literature" and "represent[ed] what the medical establishment thinks about this drug, period." R. 394, ll. 10-12. Reading from the report, he claimed that "[f]ollowing oral administration of Oxycodone, sustained release in regular formulations peak concentrations in adults at therapeutic levels are, generally, less than 100 nanograms per milliliter." R. 394, ll. 13-16. "[T]he sustained release preparation usually results in Oxycodone less than 10 … nanograms per milliliter." R. 394, ll. 16-18. Thereafter, Dr. Fulcher informed the jurors that the amount of drugs in Minor's system, which was "a level of 2,700" based upon the information provided by NMS, caused his death. R. 395, ll. 13-15.

Again, relying on the NMS Lab report, Dr. Fulcher recounted that Minor did not have methamphetamine in his blood. R. 396, ll. 23-25. To explain how it was "possible" that Minor's blood did not have methamphetamine in it, Dr. Fulcher hypothesized that either the concentration was "extremely small" or Minor "was in another room." R. 397, ll. 1-6. He claimed "[t]he half life of methamphetamine in the human body is approximately five to 10

hours." R. 397, ll. 6-7. Thus, he opined that it was "not unreasonable" for Minor's blood to be free of methamphetamine. R. 397, ll. 8-10.

Using the information in the NMS Lab report, Dr. Fulcher theorized Minor ingested the drugs in liquid form due to the "impressive" amount found by NMS. R. 398, ll. 9-18. Knowing the state's theory of the case involved extended release capsules, the solicitor asked Dr. Fulcher if he were familiar with "extended release versus immediate release." R. 399, ll. 3-4. Dr. Fulcher responded, "Not on a personal level, but on a professional level, generally speaking." R. 399, ll. 5-6. When questioned about the number of pills Minor ingested, Dr. Fulcher explained:

> When you do the math on his body weight and the concentration, it ends up being slightly over one pill on average. It's a range. I won't lie to you, I can't give you an exact number. Technically, it could have been one pill. But it is more likely than not that it was maybe one and half or two, that range. It's, certainly, not five pills.
>
> Keep in mind this is a baby that weighs 20 some odd pounds. So the concentration is going to be higher with an adult dose just by the nature of the adult dose.

R. 399, l. 23 – R. 400, l. 10.

Dr. Fulcher told the jurors that the concentration of Oxycodone found by the NMS Lab in Minor's system "probably set[] a record for this county … in any person, including adults." R. 402, l. 23 – R. 403, l. 3. He claimed the concentration of Oxycodone in the gastric contents was the highest he had ever seen in approximately 3,000 autopsies. R. 403, ll. 1-3. The "fact that the concentration [was] so high" and no pill fragments were found in the stomach led him to "think" the drug was ingested in liquid form, which was the state's theory to overcome accidental ingestion. R. 403, ll. 10-12. Dr. Fulcher, using the information provided by NMS Labs, opined the cause of death was acute oxycodone toxicity. R. 403, ll. 13-15. He elaborated that Minor

"died from respiratory suppression secondary to a very high concentration of Oxycodone present in his femoral blood." R. 403, ll. 16-19.

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. Although he did not know "what was done, how it was done, or if it was done properly" in this case, he nevertheless relied upon the NMS Labs report. R. 409, ll. 20-25.

During re-direct examination, Dr. Fulcher's vouching of NMS Labs 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. Specifically, the solicitor told the jurors that Dr. Fulcher said there were 2,700 nanograms per milliliter in Minor's blood and there were 360,000 nanograms per milliliter in his gastric fluid. R. 448, ll. 3-6. This was the highest Dr. Fulcher had ever seen having "done thousands of these cases" and that the number set "a record for this county." R. 448, ll. 6-8. Dr. Fulcher rejected the defense theory that Minor bit the pill and spit it out because it was "not consistent with the extremely high levels" that Dr. Fulcher found in Minor's system. R. 448, ll. 15-19. The state also used Dr.

Fulcher's testimony to defeat the defense argument that Minor bit into one pill because "it had to be slightly more than one pill" based on the "very high concentration" of the drug found in Minor's system. R. 449, ll. 1-7.

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 existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution." Id. at 361 (internal citations omitted). This is because "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished," and "the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." Id. Like an excited utterance, "[a]n ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency." Id.

Examining whether an on-going emergency existed, the Court explained the inquiry is "highly context-dependent." Id. at 363. According to the Court, the examination must include whether the threat is to police and the public. Id. "[T]he duration and scope of an emergency

may depend in part on the type of weapon employed." Id. at 364. Even the "medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." Id. at 365. Additionally, the "victim's medical state … provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public." Id.

However, the Court was quick to note that the presence of these factors does not suggest "that an emergency is ongoing in every place or event just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose." Id. The evolution from statements to determine the need for emergency assistance to testimonial statements may occur if "a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or … flees with little prospect of posing a threat to the public." Id.

Nevertheless, the existence of an "ongoing emergency" is but one factor for determining the primary purpose of the police encounter, which in turn, relates to the testimonial inquiry. Id. at 366. Formality must be considered as well as it "suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions." Id. at 366 (internal quotation omitted).

"[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." Id. at 367. The Court explained that if the

police tell a victim to tell who committed the crime so that person could be arrested and prosecuted, the victim's identification of the culprit "appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers." Id. at 368.

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.

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 the 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).

The plurality concluded that even if the outside lab's report had been introduced for its truth, there was still no violation of the Confrontation Clause. Id. at 81-82. The plurality reformulated the test derived from precedent by stating that the abuses that prompted the adoption of the Confrontation Clause shared two characteristics – "they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct" and "they involved formalized statements such as affidavits, depositions, prior testimony, or confessions." Id. at 82. Turning to the case before it, the plurality determined the outside lab's report "viewed objectively, was not to accuse [Williams] or to create evidence of use at trial." Id. at 84. Rather, the "primary purpose was to catch a dangerous rapist who was

still at large, not to obtain evidence for use against [Williams], who was neither in custody nor under suspicion at that time." Id.

Justice Thomas concurred with the result.[1] Id. at 103 (Thomas, J., concurring). He reached this conclusion "solely" because the outside laboratory's statements "lacked the requisite formality and solemnity to be considered testimonial." Id. at 103-104 (internal quotations omitted) (Thomas, J., concurring). Justice Thomas rejected the argument that the outside laboratory's statements – that it produced a male DNA profile from the swabs – were introduced to show the basis for the expert's opinion and not for their truth. Id. at 104 (Thomas, J., concurring). As he explained, "there was no plausible reason for the introduction … other than to establish their truth." Id. (Thomas, J., concurring). The testifying expert opined that the defendant's DNA profile matched the male profile derived from the swabs by the outside laboratory. Id. at 107-108 (Thomas, J., concurring). The testifying expert relied on the outside laboratory's out-of-court statements; therefore, the validity of the testifying expert's opinion ultimately turned on the truth of the outside laboratory's statements. Id. at 108 (Thomas, J., concurring). He warned against allowing hearsay simply because an expert provides some opinion based on that hearsay. Id. at 110 (Thomas, J., concurring).

Having concluded the evidence was offered for its truth, Justice Thomas examined whether the evidence was testimonial for purposes of the Confrontation Clause. Id. (Thomas, J., concurring). According to Justice Thomas, the Confrontation Clause reached only formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting

[1] Justice Breyer concurred as well; however, he concurred in the plurality's opinion in full. Williams v. Illinois, 567 U.S. 50, 99 (2012) (Breyer, J., concurring). In light of Justice Thomas concurring, but not in full, his opinion is generally viewed as the concurring opinion. United States v. Turner, 709 F.3d 1187, 1189 n.1 (7th Cir. 2013) (referring to Justice Thomas' opinion as the concurrence because Justice Breyer concurred in full).

from formalized dialogue, such as custodial interrogation. Id. at 111 (internal quotations omitted) (Thomas, J., concurring). He then determined the outside laboratory's report lacked the solemnity of an affidavit or deposition because it was not sworn or a certified declaration of fact. Id. (Thomas, J., concurring). The report did not contain an attestation that its statements accurately reflect the DNA testing processes used or the results obtained. Id. (Thomas, J., concurring). Naïvely, Justice Thomas rejected the dissent's warning that prosecutors would elude the Confrontation Clause by using informal extrajudicial statements against the accused if his position were adopted as the majority. Id. at 113 (Thomas, J., concurring).

Justice Thomas rejected the notion that for a statement to be testimonial it need only survive the primary purpose test. Id. at 113-114 (Thomas, J., concurring). Instead, he required testimonial statements also exhibit formality and solemnity so as not to be divorced from history. Id. at 114 (Thomas, J., concurring). Nevertheless, he noted the "shortcomings of the original primary purpose test pale in comparison … to those plaguing the reformulated version" suggested by the plurality. Id. (Thomas, J., concurring). He remarked that the "new primary purpose test asks whether an out-of-court statement has 'the primary purpose of accusing a targeted individual of engaging in criminal conduct.'" Id. (Thomas, J., concurring). Justice Thomas found no "grounding in constitutional text, in history, or in logic" to this formulation. Id. (Thomas, J., concurring).

The four dissenting justices remarked that the plurality opinion authored by Justice Alito is actually a dissent because "[f]ive Justices specifically reject every aspect of its reasoning and every paragraph of its explication." Id. at 120 (Kagan, J., dissenting) (referring to Justice Thomas stating he shared the dissent's view of the plurality's flawed analysis). The dissent explained that Justice Thomas concurred in the result based upon his view that the report was

nontestimonial on a different rationale than the plurality, "[b]ut no other Justice joins his opinion or subscribes to the test he offers." Id. (Kagan, J., dissenting).

Agreeing with Justice Thomas, the dissent also determined the outside lab's report was hearsay as it was offered for the truth of the matter. Id. at 126 (Kagan, J., dissenting). The dissent differed with Justice Thomas, however, on the question of whether the outside lab's report was testimonial. Id. at 133-134 (Kagan, J., dissenting). The dissenting justices criticized Justice Thomas' approach for granting constitutional significance to minutia. Id. at 139 (Kagan, J., dissenting). The fact that the outside lab's report was not marked as a certificate amounted to only a "nickel's worth of difference." Id. at 139 (Kagan, J., dissenting). Adopting Justice Thomas' approach "would turn the Confrontation Clause into a constitutional geegaw – nice for show, but of little value." Id. at 140 (Kagan, J., dissenting). "The prosecution could avoid its demands by using the right kind of forms with the right kind of language." Id. (Kagan, J., dissenting). In doing so, the prosecution would "turn the Confrontation Clause upside down" by introducing evidence – not excluded by the Confrontation Clause – simply by not requiring any sort of certification, which would likely make the evidence less reliable. Id. The dissent ultimately held the prosecution used the testifying expert as a conduit for the report of the outside lab. Id. at 123 (Kagan, J., dissenting).

Discerning the import of Williams has plagued courts and scholars. See e.g., id. at 141 (Kagan, J., dissenting) (remarking that the plurality and Justice Thomas' concurrence only create significant confusion); Stuart v. Alabama, 139 S. Ct. 36 (Mem.) (2018) (Gorsuch, J. dissenting from the denial of certiorari) (remarking that Williams "yielded no majority and its various opinions have sown confusion in courts across the country"); Chavis v. Delaware, 141 S. Ct. 1528 (Mem.) (2021) (Gorsuch, J. dissenting from the denial of certiorari) (same); United States

v. Turner, 709 F.3d 1187, 1189 (7th Cir. 2013) (stating "the divergent analyses and conclusions of the plurality and dissent sow confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify at trial"). Typically, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). Finding the position taken by the Members who concurred in the judgments on the narrowest grounds is no small feat here. See Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (acknowledging "there are cases in which the Marks test is more easily stated than applied to the various opinions supporting the result"); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 66 (1996) (providing that a decision is "of questionable precedential value" when "a majority of the Court expressly disagree[s] with the rationale of the plurality"); see also King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (explaining that "[t]he Marks rule presupposes, however, that the narrowest concurrence will represent a 'common denominator' rationale" and "[i]f one opinion 'does not fit entirely within a broader circle drawn by the others,' the Marks approach ceases to function as it was intended, and adhering to it in such circumstances would 'turn a single opinion' to which 'eight of nine Justices do not subscribe' into law").

"The problem with Williams, as the Second Circuit Court of Appeals has aptly observed, is that the Court made it impossible to identify the narrowest ground because the analyses of the various opinions are irreconcilable." State v. Sinclair, 210 A.3d 509, 522 (Conn. 2019) (referring to United States v. James, 712 F.3d 79, 95 (2d Cir. 2013)); see also State v. Dotson, 450 S.W.3d 1, 68 (Tenn. 2014) (explaining the "fractured decision" "provide[d] little guidance

and [was] of uncertain precedential value because no rationale for the decision – not one of the three proffered tests for determining whether an extrajudicial statement [was] testimonial – garnered the support of a majority of the Court"); State v. Michaels, 95 A.3d 648, 665-666 (N.J. 2014); The four dissenting justices advised lower courts to continue to use Melendez-Diaz and Bullcoming until a majority of the Supreme Court reversed them.[2] Williams, 567 U.S. at 141 (Kagan, J., dissenting). Most courts examining this issue have followed the dissent's advice. See e.g., James, 712 F.3d at 95-96; Sinclair, 210 A.3d at 522; Commonwealth v. Yohe, 79 A.3d 520, 554 (Penn. 2013) (distinguishing Williams and being guided by Melendez-Diaz and Bullcoming); State v. Kennedy, 735 S.E.2d 905, 916 (W. Va. 2012) (viewing Williams "with caution" and applying Melendez-Diaz and Bullcoming to resolve the issue presented). While others have tried to make sense of it all by concluding that a "statement is testimonial at least when it passes the basic evidentiary purpose test plus either the plurality's targeted accusation requirement or Justice Thomas's formality criterion." Young v. United States, 63 A.3d 1033, 1043-1044 (D.C. 2013); State v. Dotson, 450 S.W.3d 1, 69 (Tenn. 2014); see also State v. Deadwiller, 834 N.W.2d 362, 373-374 (Wisc. 2013) (applying the plurality decision and Justice Thomas' decision because Deadwiller and Williams were in substantially identical positions); Commonwealth v. Brown, 139 A.3d 208, 218 (Penn. 2016) (gleaning that the Confrontation Clause is not violated when an expert expresses his or her independent conclusions based upon his or her review of inadmissible evidence).

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

[2] Additionally, the plurality decision in Williams v. Illinois, 567 U.S. 50 (2012) may best be understood as applying only to bench trials, which was one rationale offered by the plurality for why the evidence did not violate the Confrontation Clause – it was not offered for its truth and would have been understood by the trier of fact – the judge – as not offered for its truth.

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' [was] not to constitute evidence in a criminal trial." Id. The statements were "exempt from the Confrontation Clause." Id. See also State v. Trapp, 420 S.C. 217, 236-239, 801 S.E.2d 742, 752-754 (Ct. App. 2017) (holding non-testimonial evidence included testimony from one officer regarding the role of another officer in the chain of custody, an evidence log-in form, a form to certify the chain of physical custody, and the drug analysis request form because the primary purpose for their creation and maintenance was to document seized evidence).

Recently, the South Carolina Court of Appeals held an expert's testimony violated the Confrontation Clause because she had no independent basis for her testimony where the testifying expert served as the peer reviewer for the non-testifying analyst. State v. McCray, 413 S.C. 76, 89-90, 773 S.E.2d 914, 921-22 (Ct. App. 2015). The testifying DNA analyst in McCray "merely served as a conduit for introducing the results of DNA tests that were performed by an expert who did not testify." Id.; see also Matter of Bilton, 432 S.C. 157, 163-167, 851 S.E.2d 442, 445-446 (Ct. App. 2020) (remarking that if the case were a criminal matter, "the error

would not be debatable" because a testifying expert may not act as a conduit or surrogate for someone else's scientific analysis and holding the error violated due process where the state's expert testified as to a test performed on Bilton that she neither administered nor observed).

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, 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.

There can be little question that the lab results testified to by Dr. Fulcher were offered for the truth of the matter asserted.[3] 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, at least according to the plurality, 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 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. The primary purpose of the lab report was to establish or prove past events – the level of toxins in Minor's system at the time of death where no obvious cause of death existed based on the pathologist's examination – potentially relevant to later criminal prosecution, which is exactly as Crawford and its progeny envisioned.[4] The lab report was made under circumstances that would lead an

[3] Tellingly, respondent never argued the NMS Labs report was not offered for the truth of the matter asserted.

[4] The Court of Appeals agreed with the state's argument that NMS would not have had an objectively reasonable belief that the results would be used in a criminal case because the lab

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.

Importantly, the 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 where his examination of the internal and external body of Minor revealed no cause of death. Thus, while

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was merely providing a toxicology report as part of a routine autopsy as requested many times by Dr. Fulcher. State v. Brewer, Op. No. 2020-UP-255 (S.C. Ct. App. filed August 26, 2020); App. 11. Accordingly, if this reasoning holds, then no toxicology report ordered as part of a routine autopsy would rise to the level of testimonial evidence. Thus, the Confrontation Clause would be reduced to mere words with no meaning as Justice Kagan warned in Williams.

he may request toxicology in every autopsy, Dr. Fulcher's ability to determine Minor's cause of death depended wholly on the toxicology results.

In its return, the state argued there was "no indication the report had the 'solemnity of an affidavit or deposition' required under Justice Thomas' evaluation of whether a statement is testimonial in nature." Ret. at 15. While the NMS Labs report was not admitted, the report was treated by all involved as having the solemnity of an affidavit or deposition. The solicitor even had Dr. Fulcher guarantee the trustworthiness of the report by stating that he would not have used it or signed his name to the autopsy report using the NMS Labs report unless he were absolutely certain of its accuracy and reliability. While this portion of Dr. Fulcher's testimony involved his improper vouching of NMS Labs, it also demonstrated how the parties considered the report – as one purporting to provide the truth under penalty of perjury. This was exactly how the solicitor argued the jury should treat the report.

This was also not a case of an expert offering his independent judgment based in part upon reliance upon the inadmissible toxicology report. Cf. United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009). Rather, Dr. Fulcher was a conduit for the toxicology report – he literally read the report to the jury. Dr. Fulcher simply parroted the out-of-court testimonial toxicology report. See id. The Fourth Circuit Court of Appeals determined that "an expert's use of testimonial hearsay is a matter of degree" and the question for the court to resolve is whether the expert is "giving an independent judgment or merely acting as a transmitter of testimonial hearsay." Id. Here, Dr. Fulcher merely transmitted the information from NMS Labs to the jury.

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.

Finally, respondent argued "if admission of the specific findings of the NMS lab report violated Petitioner's rights under the Confrontation Clause, the admission of those case specific findings were entirely harmless in light of other evidence in the record." Ret. at 15. According to respondent, "the testimony by Dr. Fulcher which would have been excluded by the Confrontation Clause … was the testimony regarding the specific concentration of Oxycontin found in the minor victim's blood, eye fluid, and stomach contents." Ret. at 16. Respondent surmised that Dr. Fulcher's testimony including his finding of cause of death as Oxycontin overdose would have stood, and the specific concentration was not necessary to prove the state's case. Ret. at 16. The record refutes respondent's harmless error analysis.

Repeatedly, Dr. Fulcher vouched for the reliability of NMS Labs. This vouching must be considered as part of the Confrontation Clause violation, as it is just this type of vouching that the Court feared would occur with conduit testimony, and as part of the determination of the harm Petitioner suffered from the erroneously admitted evidence. Dr. Fulcher called the lab the "best in this country," and his over-the-top and repeated acclamations of the lab actually grew wearisome. His glowing praise of the lab included his personal guarantee of the lab technician's abilities.

Furthermore, the concentrations of the drugs found in Minor's system was the evidence necessary for the state to prove its case. Without the concentrations, Dr. Fulcher would have been unable to testify Minor died due to an overdose. Without the concentrations, Dr. Fulcher

would have been unable to testify to the comparison between the levels in Minor's system and a therapeutic level. Without the concentrations, Dr. Fulcher would have been unable to testify to his opinion that the drug was ingested in liquid form. Without the concentrations, Dr. Fulcher would have been unable to testify to his opinion that Minor ingested more than one pill. This evidence was necessary for the state to overcome the defense theory of an accidental overdose, which was precisely how the solicitor used it in closing. Pointedly, the solicitor encouraged the jurors to reject the defense theory that Minor bit one pill and spit it out because it was not consistent with the extremely high levels of the drug that were found in Minor's system – the very reason offered by Dr. Fulcher for rejecting this theory.

Significantly, the solicitor's closing argument also demonstrated how the erroneous admission of Dr. Fulcher's testimony regarding the NMS Labs report was not harmless beyond a reasonable doubt. The solicitor compared the NMS lab to the SLED lab. The jury heard from a SLED analyst about the lab's protocols and methodologies employed for certain tests. Using that testimony, the solicitor informed the jurors that the SLED testing 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. In essence, the solicitor equated the SLED lab with the NMS lab in terms of reliability of the science. The solicitor pointedly requested the jurors use Dr. Fulcher's testimony to guarantee the accuracy and

reliability of the testing performed by NMS Labs by recalling Dr. Fulcher's regarding his signature.

Here, it is undisputed the NMS Labs report was offered for the truth of the matter asserted. The report was testimonial as it was prepared with an eye toward criminal prosecution as evidenced by the officers' suspicions and the unexplained death of a child. The report was formal and solemn as evidenced by how Dr. Fulcher treated it. At a minimum, it became a formal and solemn document when Dr. Fulcher testified to his personal guarantee of its accuracy. 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. The erroneous admission of the report was not harmless beyond a reasonable doubt because the report allowed Dr. Fulcher to testify regarding specific concentrations in Minor's system, which assisted the solicitor in refuting the defense theory of accidental ingestion.

CONCLUSION

Petitioner respectfully requests this Court reverse her conviction and remand for a new trial.

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

ATTORNEY FOR PETITIONER

This 16th day of July, 2021.