STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 5904

THE STATE,

RESPONDENT,

V.

ERIC EMANUEL ENGLISH,

APPELLANT

APPELLATE CASE NO. 2018-000850

PETITION FOR REHEARING

On April 6, 2022, this Court affirmed Appellant's conviction in *State v. English*, Op. No. 5904 (S.C. Ct. App. filed April 6, 2022) (Howard Adv. Sheet No. 12 at 82). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

On appeal, Appellant argued the court erred in his trial for criminal sexual conduct with a minor who had gonorrhea where it admitted test results showing Appellant had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratories responsible for the analyses testified, since pursuant to *State v. James*, 255 S.C. 365,

370, 179 S.E.2d 41, 43 (1971), test results offered to "connect a defendant directly with the commission of a crime" "must be substantiated by the person who conducted the tests." This Court affirmed Appellant's conviction.

Counsel respectfully asserts that this Court overlooked or misapprehended critical points in issuing its decision. First, Appellant asserts this Court misapprehended or overlooked the similarity of the facts of *State v. James*, *supra*, to this case. In *James*, 255 S.C. at 370, 179 S.E.2d at 43, the South Carolina Supreme Court held, "Where the results of tests or analyses are offered to prove an essential element of the crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses."

This Court held that *James* was distinguishable from Appellant's case since, unlike *James*, there was no Confrontation Clause problem because the test results in Appellant's case were non-testimonial under *Davis v. Washington*, 547 U.S. 813 (2006).[1] However, the test results in *James*, 255 S.C. at 367-68, 179 S.E.2d at 42, would also be considered non-testimonial under *Davis* since the medical testing in *James* was ordered by doctors for purposes of diagnosing and treating the victim, not for purposes of criminal prosecution. Here, too, the tests were ordered by medical practitioners, not law enforcement. Moreover, in this case, the test results directly connected Appellant to the crime. The minor had gonorrhea. Both Appellant and another man, Jamie Stroman, had been accused of separately sexually abusing the child. Stroman pled guilty prior to Appellant's trial and admitted he digitally penetrated the minor. R. 38, l. 24 – 39, l. 15; R. 231. The prosecution used Appellant's positive test result and Stroman's negative

[1] *Davis v. Washington*, 547 U.S. at 822, held that statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *See also Crawford v. Washington*, 541 U.S. 36, 68 (2004) (nontestimonial hearsay may be exempted from Confrontation Clause scrutiny but "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination").

test result to corroborate the minor's testimony that Appellant had sexual intercourse with her. R. 171, ll. 11-13; R. 179, ll. 4-8. However, no analyst was present to substantiate the test results from Appellant and Stroman. Instead, like in *James*, the results of Appellant's test and Stroman's test were admitted through testimony of medical providers who viewed the results after the tests had been completed; the testing was performed and the results were entered by laboratory technicians. R. 140, l. 19 – 146, l. 6; R. 241 – 244; R. 130, l. 9 – 136, l. 24. In both Appellant's case and in *James*, the tests were ordered by medical professionals and not by law enforcement. Therefore, the application of *James* should not turn on confrontation.

Moreover, the holding of *James* was not limited to testimonial hearsay. Although cross-examination was a significant concern for the Court in deciding *James*, the Court identified other concerns underpinning its decision beyond cross-examination, including the requirement that a declarant be under oath and responsible to answer for perjury. *See James*, 255 S.C. at 369, 179 S.E.2d at 43. Another concern underpinning its decision that was identified by the Supreme Court in *James* was the jury's role in determining credibility by observing the demeanor of the declarant. *Id.* These reasons exist apart from confrontation—they would also apply in a civil case, for example.

Second, Appellant asserts this Court misapprehended the holding of *Ex parte Dep't of Health & Env't Control*, 350 S.C. 243, 565 S.E.2d 293 (2002) (hereinafter *Ex parte DHEC*) and *Jamison v. Morris*, 385 S.C. 215, 684 S.E2d 168 (2009). This Court found that because the testing was for diagnosis and treatment, the trustworthiness of the records was presumed. However, the holding of *Ex parte DHEC* is not controlling since the issue in that case was whether medical records were admissible without a chain of custody. The holding of that case was limited to the unusual disease of HIV. Central to the reasoning of *Ex parte DHEC* was that

"Doe could be retested at any time to refute the evidence presented against him at trial. If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition." *Ex parte DHEC*, 350 S.C. at 250, 565 S.E.2d at 297. Here, gonorrhea is not a permanent condition since it may be easily cured with antibiotics. Therefore, the trustworthiness of these records should not be presumed as it is with HIV records. The gonorrhea tests were a snapshot in time that could not be refuted with later tests; they could only be challenged through cross-examination.

Additionally, *Ex parte DHEC* is distinguishable because its holding was aimed at the issue of chain of custody. Appellant does not assert a complete chain of custody needs to be established, instead, he only argues the analyst should be present, pursuant to *James*.

Similarly, *Jamison v. Morris*, 385 S.C. at 227, 684 S.E.2d at 174, is not controlling as the Court there addressed a different issue (chain of custody). As seen, Appellant did not challenge the evidence's admissibility based on chain of custody, he instead challenged it based on the prosecution's failure to substantiate the results through testimony from the person who conducted the tests pursuant to *James*, *supra*, and these cases are not controlling.

Third, Appellant asserts this Court overlooked the lack of facts that could support a finding of trustworthiness under Rule 803(6), SCRE. This Court concluded that nothing in the record demonstrated a lack of trustworthiness as to the records, since the records were generated before law enforcement was involved. However, missing from the trial was information from which the trial court could have determined trustworthiness. Under Rule 803(6), SCRE,

> memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the

> mode of preparation of the record; and **(5) found to be trustworthy by the court**.

Ex parte DHEC, 350 S.C. at 249-50, 565 S.E.2d at 297 (emphasis added); Rule 803(6), SCRE. Appellant's test results were admitted through the doctor who viewed and "verified" them, and Stroman's results were admitted through a nurse practitioner who viewed and "signed off" on them. R. 140, l. 19 – 146, l. 6; R. 241 – 244; R. 130, l. 9 – 136, l. 24. There was no testimony on what constituted "verifying" or "signing off" on the results. There was no testimony about laboratory accreditation or inspection, specimen integrity, type of testing, and the presence or use of any confirmatory testing, even though the laboratory was in Lexington County and the trial was in Lexington County, so obtaining the appearance of an analyst from the laboratory was within the prosecution's ability. Absent such information about the methods and qualifications of the analysts, the results could not be found trustworthy by the trial court.

Interestingly, the prosecution knew how to correctly substantiate test results in this situation since it did so with the minor's test results. When it introduced the minor's positive test results, it presented testimony from a pathologist who was the medical director at the (different) laboratory that analyzed the minor's samples. That witness testified about that laboratory's oversight, accreditation, laboratory inspections by various entities, how the laboratory maintains specimen integrity, how the records were generated, and the types of testing that were done, as well as the fact that both an initial and a confirmatory test were performed on the samples. R. 109, l. 2 – 120, l. 3. The test results of Appellant and Stroman here were inadmissible under Rule 803(6) absent testimony about the methods and qualifications of the testers. *James*, 255 S.C. at 370, 179 S.E.2d at 43; Rule 803(6), SCRE.

Fourth, the adoption of the evidence rules should not distinguish *James*. This Court found that although *James* has not been expressly overruled, the enactment of the South Carolina Rules

of Evidence, which provide hearsay exceptions and which occurred after *James* was decided, distinguished *James*. However, *James* should be read consistently with Rule 803(6), SCRE, to require testimony by an analyst when the relevant business records directly connect a defendant to the crime. *See State v. White*, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009) (analyzing admissibility of expert testimony by dog tracker under Rule 702, SCRE and principles from case law that existed prior to adoption of rules); *State v. Page*, 406 S.C. 272, 291 n. 7, 750 S.E.2d 623, 633 (Ct. App. 2013) (discussing admissibility of evidence under Rule 401, SCRE and applicable case law).

Appellant respectfully requests this Court rehear the matter and reverse his conviction.

s/ *Joanna K. Delany*
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ATTORNEY FOR APPELLANT

This 21st day of April, 2022.

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Honorable Eugene C. Griffith, Circuit Court Judge

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Eric Emanuel English, #375952, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 21st day of April, 2022.

s/ *Joanna K. Delany*
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