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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2013-000115
Lower Court Case No. 2008-GS-40-07372

State of South Carolina

Respondent

v.

Kendra Samuel

Petitioner

REPLY BRIEF OF PETITIONER

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ARGUMENT

In this case, when the State sought to admit into evidence the polygraph-procured confession of the Petitioner, the trial court faced a dilemma: admit into evidence the confession and all its attending circumstances (including the polygraph) in derogation of binding South Carolina authority; or admit into evidence only the substance of confession—permitting no mention of the polygraph—in violation of Jackson v. Denno[1] and its progeny. Whereas either outcome was undesirable, the trial court had no choice but to adhere to both State and federal law by refusing to allow details of a polygraph into evidence and refusing to permit the jury to consider a polygraph-procured confession without the totality of its circumstances.

The State's return asserts the trial court should have extended the holding of State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996) to provide for admissibility of the polygraph-procured confession under certain limitations. Both the State and the Court of Appeals err, however, in failing to recognize that the trial court is not a law-giving court and thus could not create such limitations absent instruction from this court. The State, the Court of Appeals, and the Petitioner do agree on one thing, however: a polygraph-procured confession *should be* admissible with certain limitations.

Finally, the State (and the Court of Appeals) errs in arguing the trial court, on remand, should "conduct[] an analysis pursuant to Council[2] to determine what evidence, if any, regarding the polygraph examination was admissible in the present case." State v. Samuel, 400 S.C. 593, 601-02, 735 S.E.2d 541, 546 (Ct. App. 2012). Injecting Council and Rule 702, SCRE, into the discussion confuses the central issue of this appeal—reconciling the "general rule" of polygraph inadmissibility and the "totality of the circumstances" requirements of Jackson v. Denno—with

[1] Jackson v. Denno, 84 S. Ct. 1774 (1964).

[2] State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

"the proper analysis for determining admissibility of scientific evidence." Council at 20, 515 S.E.2d at 518. Here, the details pertaining to Samuel's polygraph are not being offered as "scientific evidence." To the contrary, Samuel seeks to offer such details as evidence of coercion and involuntariness under Jackson v. Denno.

I. While the Trial Court Did Not Possess the Authority to Extend the Holding of *State v. Wright*, the Supreme Court May Do So

The dilemma faced by the trial court was rooted in the conflicting South Carolina "general rule" of inadmissibility polygraph evidence, see, e.g. State v. Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986) and Rutledge v. St. Paul Fire & Marine Ins. Co., 286 S.C. 360, 370, 334 S.E.2d 131, 137 (Ct. App. 1985), and Jackson v. Denno's requirement that "the jury should be instructed that they must find beyond reasonable doubt that the statement was freely and voluntarily given under **the totality of the circumstances** before the statement may be considered." State v. Torrence, 305 S.C. 45, 52, 406 S.E.2d 315, 319 (1991)(emphasis added). The State argues that no such dilemma existed because the trial court could have utilized this Court's holding in State v. Wright to craft certain exceptions to the "general rule" of polygraph inadmissibility.

The State correctly recognizes that in State v. Wright this Court suggested certain limitations might be applied to the admission of polygraph evidence in order to permit the jury to consider its coercive effect upon the declarant.

> Appellant sought to disclose the polygraph examiner's misinformation to show the jury that the confession was not given voluntarily. However, appellant did not suggest at trial nor on appeal what limitation could have been placed on the disclosure to limit prejudice to appellant. Without some limitation, the only inference the jury could reasonably have drawn from learning appellant's confession followed closely after a deceptive polygraph was that the confession was truthful and the answers given to the polygraph exam were untruthful. This would serve to bolster the

> confession rather than persuade the jury to believe the alleged coercion.

Wright at 256, 471 S.E.2d at 702. Wright, however, provided no guidance as to what "limitation" might be appropriate. Further, "any modification or limiting of [prior decisions] must be done by the Supreme Court." Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993). Thus, despite the suggestion of a "limitation" implicit within Wright, the trial court was not empowered to formulate its own limitation and correctly recognized that it was bound by the precedents of Pressley and Rutledge.

That being said, both the Petitioner and the State now present the Supreme Court with the opportunity to establish appropriate safeguards for the admissibility of polygraph evidence for the sole purpose of satisfying the "totality of the circumstances" requirement of Jackson v. Denno and its progeny. The State proposes the Maryland rule set forth in Johnson v. State, 31 Md. App. 303, 355 A.2d 504 (Md. 1976).

> [T]he jury should be admonished not to speculate upon the machine's results as they relate to the guilt or innocence of the accused, but to draw any logical inferences from the circumstances solely as to the question of whether the procedure used induced an involuntary confession.

Id. at 308, 355 A.2d at 508. The Petitioner, however, stands by the Oregon rule.

> 'In laying the legal foundation for the admissibility of a confession obtained before, during, or after a Polygraph examination, a prosecuting attorney is confronted with a task requiring considerable caution. He must seek to avoid any reference by prosecuting witnesses to the results of the Polygraph examination or even to the fact of the examination itself. The procedure that should be followed is to introduce as a witness the examiner, or someone else to whom the confession may have been made or repeated, and through him lay the foundation for the admissibility of the confession by merely proving its voluntary character (i.e., the absence of any threats, force, or objectionable promises); and all this without any mention of the fact that a Polygraph had been used or contemplated. In this way the prosecution will avoid any danger of reversible error occasioned by reference to the

> Polygraph. The choice, therefore, will rest with the defense attorney as to whether or not he wants to inject the Polygraph issue into the case for the purpose of attempting to show that it or the technique was a coercive factor which compelled the defendant to confess.'

State v. Green, 271 Or. 153, 170, 531 P.2d 245, 253 (Or. 1975), quoting Reid & Inbau, Truth & Deception: The Polygraph ('Lie-Detector') Technique at 254 (1966).

As stated above, the adoption of these limitations utilized in other states was beyond the province of the trial court, which is bound by the existing precedents of South Carolina's appellate courts. But both Petitioner and the State agree that evidence of the circumstances of the polygraph *should be* admissible. Now is the time for the court to establish the appropriate parameters of that admissibility.

II. Applying *Council* to the Polygraph Evidence in This Case Erroneously Applies Rule 702, SCRE to Lay Evidence

The Court of Appeals found—and the State's brief reiterates—that the dilemma reference above did not exist because "[t]he trial court could have conducted an analysis pursuant to Council to determine what evidence, if any, regarding the polygraph examination was admissible in the present case." Samuel at 601-02, 735 S.E.2d at 546. However, Council is irrelevant to the admissibility of evidence not being submitted as "scientific, technical, or other specialized knowledge." Rule 702, SCRE. Samuel would offer polygraph evidence in this case only to demonstrate its coercive effect on her statement to police. As the Maryland Court of Special Appeals noted in Johnson v. State, above, "[w]e are not here concerned with the results of a polygraph examination, but rather with the circumstance that it was used as a psychological tool in the interrogation process." Id. at 307, 355 A.2d at 507. Thus "the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold," State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009), is not implicated.

Furthermore, remanding the case to the trial court for the purposes of conducting a Council analysis would be a fruitless exercise. The Council appellant, in fact, argued "the trial judge erred in finding the results of a polygraph test are per se inadmissible." Id. at 22, 515 S.E.2d at 519. On this point, the Supreme Court agreed, but nevertheless held that "[a]fter an analysis under [Rules 702 and 403, SCRE and the Jones[3] factors], we find the polygraph evidence inadmissible in this case." Council at 24, 515 S.E.2d at 520. Neither Petitioner nor the State argues that the substantive Council analysis of polygraph evidence has changed in the intervening 14 years, thus it begs the question why the Court of Appeals mandated that such an analysis be conducted upon remand to the trial court. Should the trial court (once again) determine that a polygraph is inadmissible under Council, it will be forced to confront (once again) the question of whether it may submit a statement to the jury in the absence of the totality of the circumstances surrounding the statement.

In contrast with the lower court's opinion here, the Court of Appeals continues to recognize the "general rule" of polygraph inadmissibility where the polygraph is not being presented as "expert testimony" evidence under Rule 702, SCRE. In fact, six months after the Samuel opinion a different three judge panel of the lower court again recognized the "general rule" in the opinion of State v. Tynes, 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013).

> The trial court stated it raised the issue of the admissibility of the polygraph provision because of concerns that the provision would amount to an impermissible bolstering of Collins's credibility as a witness. We hold this concern was justified. Here, the State's decision not to exercise this right would have had the effect of bolstering Collins's credibility. See State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) (citing the "general rule" "that no mention of a polygraph test should be placed before the jury" and holding the trial court did not abuse its discretion in granting a new

[3] State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

> trial based on a reference by a state's witness to a polygraph test that she had taken); State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979) ("Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid any mention of a polygraph examination.").

Tynes at 219, 740 S.E.2d at 516. Similar to this case, Tynes did not seek to prove the truth or falsity of an assertion via introduction of the disputed evidence. Rather Tynes sought to use the mere fact that a State's witness agreed to submit to a polygraph—though no such examination was performed—as impeachment evidence.

With the "general rule" of polygraph inadmissibility alive and well, the State wrongly asserts that Pressley and Rutledge were superseded by the 1999 Council opinion and the 1995 adoption of the Rules of Evidence. The continuing relevance of these cases rests upon the fact that neither case considered the polygraph as "scientific" or "expert" evidence. This Court found, in Pressley, "the trial judge improperly allowed repeated references to appellant's **submission** to a polygraph examination." Id. at 252, 349 S.E.2d at 404 (emphasis added). The reliability of the results was never in question as, apparently, the results were never admitted. Similarly, in Rutledge—an insurance breach of contract case litigating a refusal to pay a fire claim—"the trial judge admitted the polygraph evidence, but he limited its consideration to the issue of a bad faith refusal by St. Paul and USF & G to pay insurance benefits." Rutledge at 370, 334 S.E.2d at 137. Thus in neither case was the polygraph evidence offered as "scientific" evidence or "expert testimony" that would be controlled by either Council or Rule 702, SCRE. Yet, in both cases, the polygraph evidence was excluded under the "general rule" of inadmissibility that remains in effect.

CONCLUSION

The United States Supreme Court recognizes the severe prejudice inflicted upon a criminal defendant who is prohibited from arguing the circumstances of his confession to the jury.

> [S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

Crane v. Kentucky, 106 S. Ct. 2142, 2146 (1986). The general rule of inadmissibility of polygraph evidence confronted by the trial court in this case presented this exact threat.

This court should reverse the opinion of the Court of Appeals and set forth the "limitations" hinted at in State v. Wright to be applied to the admission of polygraph evidence so that, on remand, the trial court may admit the details of the polygraph into evidence without offending the "general rule" of polygraph inadmissibility while protecting the Petitioner's constitutional rights under Jackson v. Denno and its progeny. Should the court choose to decline the invitation to delineate such exceptions to the "general rule," it should affirm the trial court's suppression of the polygraph-procured confession.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Heather Hardy, paralegal to Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, hereby certify that on September 8, 2014, I served by having the same placed in the U.S. Mail, first class postage affixed thereto, the following document to the below mentioned person(s):

Document: Reply Brief of Petitioner

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