ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of appellant's DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by appellant, and was otherwise illegal under state law?

## STATEMENT OF THE CASE

During its July 2011, term, a Richland County grand jury indicted Edward Maurice Dunn, Jr. ("Dunn") for armed robbery, kidnapping, first-degree burglary, and assault with intent to commit first-degree criminal sexual conduct. Prior to trial, appellant filed a motion to suppress DNA evidence and any evidence deriving from use of his DNA. R.___ (Motion Suppress DNA Evidence and Derivative Evidence). On May 21 – 24, 2012, appellant was tried before the Honorable G. Thomas Cooper, Jr. and a jury. Tr. 1. Margaret Fent-Bodman and Foster Matthews represented the State. Tr. 1. Victor Li and Deon O'Neil represented appellant. Tr. 1. The jury convicted appellant of kidnapping, armed robbery, and first-degree burglary. Tr. 523, ll. 11 – 22. The jury acquitted appellant of assault with intent to commit first-degree criminal sexual conduct. Tr. 523, ll. 6 – 10. Judge Cooper sentenced appellant to thirty years' imprisonment on all charges. Tr. 546, ll. 21 – 24. On May 29, 2012, appellant filed and served a notice of appeal. This appeal follows.

## ARGUMENT

The trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of appellant's DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by appellant, and was otherwise illegal under state law.

**Relevant Facts**

The Richland County Sheriff's Department ("Sheriff") keeps its own DNA database. Tr. 17, ll. 23 – 25. Dunn was a suspect in an unrelated burglary committed September 20, 2010, which was a year before the incident giving rise to the charges for which Dunn was tried in this case. Tr. 16, ll. 14 – 16. The Sheriff obtained Dunn's DNA profile in connection with the 2010 burglary. Tr. 16, ll. 17 – 24. The Sheriff obtained Dunn's DNA pursuant to his consent. Tr. 87, ll. 2 – 5. Dunn signed the Sheriff's consent form. Tr. 87, ll. 9 – 15; State's Ex. 4. The Sheriff told Dunn they needed a sample of his DNA to compare it to the DNA samples they obtained from the 2010 burglary. Tr. 91, ll. 12 – 15. Dunn was told by the Sheriff that giving his sample could "possibly help him" in that case. Tr. 95, ll. 5 – 10. Dunn's DNA profile did not match the samples from the 2010 burglary. Tr. 92, ll. 8 – 14.

The Sheriff admitted that no one told Dunn that his profile would be placed in the Sheriff's own database (or any other database). Tr. 91, ll. 16 – 21. Dunn's DNA profile was, in fact, placed in the Sheriff's own in-house database. Tr. 92, ll. 20 – 25. At the time Dunn signed the Sheriff's consent form and gave his DNA, he was sixteen years old. Tr. 93, ll. 1 – 2.

Dunn moved to suppress this DNA evidence and any evidence flowing from it and the court held a pretrial hearing on this motion. R. ___ (Motion Suppress DNA Evidence and Derivative Evidence). Dunn testified at the pretrial hearing. Dunn testified that no one told him that his DNA profile would be entered and maintained in the Sheriff's DNA lab. Tr. 97, ll. 6 – 9. Had the Sheriff told Dunn they were going to store his DNA, he would not have given it to them. Tr. 97, ll. 13 – 15. The Sheriff specifically told Dunn that he was going to use the swab to compare it to the 2010 burglary. Tr. 99, ll. 21 – 24. Dunn testified that the only reason he gave them his DNA was to compare it to the samples obtained from the scene of the 2010 burglary. Tr. 100, ll. 8 – 14. Dunn also testified that the only reason he gave the police a statement concerning his involvement in the instant crimes was because they told him they had a DNA match. Tr. 100, ll. 21 – 24. The State did not present any evidence as to whether Dunn was ever charged in connection with the 2010 burglary.

The DNA consent form used by the Sheriff had no warning that the Sheriff was free to use his profile for any purpose whatsoever. Tr. 102, ll. 12 – 23; R.___ (State's Ex. 4). The Sheriff's form did not notify Dunn that his DNA would be maintained in the Sheriff's own database or any other database. Tr. 102, l. 12 – 185, l. 11; R. ___ (State's Ex. 4).

The only way the Sheriff connected Dunn with the charges in this case was because seminal fluid was located at this crime scene. Tr. 31, ll. one – 5. The Sheriff sequenced the DNA from the crime scene and matched it to Dunn's profile in the Sheriff's database. Tr. 31, ll. one – 5; Tr. 346, l. 8 – 347, l. 4. After making the DNA match, the Sheriff arrested Dunn. Tr. 30, ll. for – 19. Immediately after his arrest, the

Sheriff told Dunn about the DNA match and gave Dunn his Miranda warnings. Tr. 30, l. 20 – 31, l. 8.

Only after his arrest and being confronted with the DNA evidence did Dunn give a statement implicating himself. Tr. 32, l. 13 – 33, l. 9. Dunn told the police that a man named "Shorty" asked him to participate in the burglary of a woman's house. Tr. 32, ll. 13 – 21. Dunn was the lookout. Tr. 32, ll. 22 – 24. Shorty called Dunn into the house. Tr. 32, ll. 22 – 24. Dunn saw Shorty having sexual intercourse with a woman. Tr. 32, l. 25 – 33, l. 4. Dunn told the police "that he became excited by that act and that he masturbated, ejaculated and then used a rag that was on the floor to wipe himself." Tr. 33, ll. 1 – 4. The seminal fluid from this rag was used to obtain a DNA profile and compared to the DNA profile given by Dunn in connection with the 2010 robbery.

Dunn filed a pretrial motion to suppress this DNA evidence. R. ___ (Motion Suppress DNA Evidence and Derivative Evidence). In the pretrial motion, Dunn alleged that the retention of his DNA sample violated the Federal and South Carolina constitutions. R. ___ (Motion Suppress DNA Evidence and Derivative Evidence). Dunn also argued in the motion and before the court that the retention of his DNA sample exceeded the scope of any alleged consent. Tr. 101, ll. 7 – 110, l. 9; Tr. 116, l. 82 – 128, l. 12. Dunn further argued that any other evidence in the case was fruit of the poisonous tree and should be suppressed. Tr. 101, ll. 7 – 110, l. 9; Tr. 116, l. 82 – 128, l. 12. Stating that he would leave this issue "for another court to decide," Judge Cooper denied the

suppression motion and ruled that the DNA results were admissible.[1] Tr. 127, ll. 11 – 21.

**Discussion**

Without his consent, Dunn's DNA—taken when he was a juvenile—was kept in a database whose existence violated state law. The retention of Dunn's DNA in this database violated the terms of the contract giving consent, Dunn's Fourth Amendment rights, his rights under the South Carolina Constitution, and state law concerning the collection and retention of DNA. Since the only evidence linking Dunn to this crime was obtained from a comparison with his illegally retained DNA, it should have been suppressed. Any evidence that followed was fruit of the poisonous tree and also should have been suppressed.

*The Contract for Taking Dunn's DNA in 2010 was Voided and Illegal*

The State's case relied solely on the taking of Dunn's DNA for an unrelated robbery in 2010. The solicitor admitted this in his opening statement. Tr. 181, ll. 8 – 12. This taking of Dunn's DNA was done solely by consent, so it should be analyzed under contract principles and not those used to validate taking of DNA by warrant, pursuant to arrest, or any other such procedure. Dunn's consideration for the contract was the giving of his DNA to test and exculpate him from a burglary. The Sheriff's consideration was the promise to test his DNA to compare it to DNA collected *at that crime*.

[1] This was a final ruling. During the defense's opening statement, Dunn was forced by this ruling to admit to the jury that he was present at the scene and that he was guilty of burglary and armed robbery. Tr. 187, l. 1 – 188, l. 5. He denied the sexual assault and the jury acquitted him of it. Dunn also made contemporaneous objections to the admission of the 2010 DNA profile. Tr. 313, ll. 16 – 22; Tr. 332, ll. 12 – 24; Tr. 339, ll. 1 – 6.

At no point did the State show that Dunn gave consent exceeding the contract described above. The form signed by Dunn does not inform him that his DNA will be placed in a database for all eternity. Since this form was drafted by the Sheriff, it should be narrowly construed against the Sheriff. Davis v. KB Home, 394 S.C. 116, 129 n.4, 713 S.E.2d 799, 806 n.4 (Ct. App. 2011). As Dunn argued at the motion to suppress, any other use of Dunn's DNA was beyond the scope of this contract and illegal.

The case relied on by the solicitor and the trial court actually supports Dunn's position. State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). In McCord, the defendant gave a blood sample to the FBI in an unrelated case "pursuant to a written consent form." Id. at 483, 562 S.E.2d at 692. The consent form stated that the FBI could use the blood sample "for whatever purpose the [FBI] may see fit." Id. This Court held that the defendant lost his expectation of privacy in the blood sample when he gave it to federal authorities "without any limitation on the scope of his consent." Id. at 485, 562 S.E.2d at 693. Unlike McCord, the Sheriff's consent form contains no such broad language. Therefore, Dunn's consent must be narrowly construed as only for the limited purpose of exculpating him from the 2010 burglary. The Sheriff had no contractual right to keep Dunn's DNA past the time necessary to test it in connection with that burglary.

*Dunn Never Ratified the Contract as an Adult*

The retention of Dunn's DNA was also illegal because the contract granting the Sheriff permission to use it was voidable by Dunn. It is undisputed that Dunn gave his consent prior to turning eighteen, the age of majority. S.C. Const. art. XVII, § 14. As such, any consent given by him was voidable after Dunn attained the age of majority. Little v. Duncan, 9 Rich. 55, 43 S.C.L. 55, 1855 WL 3189 (S.C. Ct. App. 1855). A "child" is any

person under the age of eighteen. S.C. Code Ann. § 63-1-40(1). Contracts made before the age of majority are not deemed ratified unless done so in writing. S.C. Code Ann. § 63-5-310. At no point did the State present any evidence that Dunn ratified the contract taking his DNA in 2010. To the contrary, when Dunn discovered that his DNA had been kept, he asked that it be suppressed. Tr. ____; Ex. ___ (Motion to Suppress DNA). Therefore, Dunn voided the contract and Sheriff was not in legal possession of his DNA.

To the extent the Court chooses to analyze this case under traditional waiver principles, the totality of the circumstances shows that Dunn did not knowingly and voluntarily waive his privacy rights in his DNA profile. Dunn could not knowingly and voluntarily waive a right of which he was not aware. The Sheriff admitted it did not inform him that his DNA profile would be maintained in their database. With no evidence in the record that Dunn knew about the maintenance of his profile, it would be an error of law to find that the State proved Dunn made a knowing and voluntary waiver. See State v. Miller, 375 S.C. 370, 379-81, 652 S.E.2d 444, 448-50 (Ct. App. 2007) (applying totality of the circumstances test to voluntariness of statement made while in custody).

*The Sheriff is Maintaining an Illegal Database*

Finally, even if the State could somehow show that Dunn consented to the Sheriff retaining his DNA, such a contract would be void *ab initio* as an illegal contract. The Sheriff has no authority to maintain its own database of citizens' DNA. The sole repository of citizens' DNA profiles is SLED. See S.C. Code Ann. § 23-3-600 *et seq.* (the "State DNA Database Act"). The State DNA Database Act was enacted in 1994. Id. The State DNA Database Act prevents the collection of DNA samples from juveniles

unless they are adjudicated delinquent or ordered to do so by a court. S.C. Code Ann. § 23-3-620(2). The State presented no evidence that Dunn was adjudged delinquent with respect to the 2010 burglary or that he was ordered to give his DNA by a court.

Any DNA analysis must comport with the standards used by the FBI. S.C. Code Ann. § 23-3-640(A). The samples "must" be securely stored by SLED unless SLED designates another laboratory to maintain them whose standards are at least as stringent as SLED's. S.C. Code Ann. § 23-3-640(D). The State DNA Database Act makes it clear that SLED is responsible for maintaining DNA profiles and determining whether someone's DNA profile shall be stored in the state database. S.C. Code Ann. § 23-3-650(A) and (B).

This comprehensive regulation of the retention of citizens' DNA profiles preempts any attempt by local governments to create their own databases. Local authorities are preempted by state law from acting in areas that are comprehensively regulated by the state. See Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 486 n.2, 511 S.E.2d 361, 363 n.2 (1999) (noting that state regulation of motorized watercraft on navigable waters preempted any local encroachment in this area).

The Attorney General agrees with this conclusion. See Attorney General Op. dated April 7, 2011, 2011 WL 1740752. The Attorney General stated, "Reviewing the language and purposes of the Act, there appears very little doubt the Legislature intended SLED, as the chief investigative agency in South Carolina, to implement and administer the collection of DNA samples." Id. "Given that the Legislature expressly empowered SLED to administer the collection of DNA samples, it is the opinion of this office that a DNA collection program outside the parameters of the Act would be inconsistent with the legislative intent for uniformity in this area and is impliedly preempted." Id.

Appellant agrees with the Attorney General that the Sheriff cannot collect and maintain its own DNA database. The Sheriff had no authority to create its own database. SLED is the sole entity allowed to maintain a database of citizens' DNA in this state.[2] As the Sheriff's database was illegally maintained, any contract that Dunn purportedly entered into allowing the Sheriff to maintain his profile is illegal and *void ab initio.*

Furthermore, retention of Dunn's DNA profile was an express violation of the State DNA Database Act. The act makes SLED responsible for the expungement of citizens' profiles from the database. S.C. Code Ann. 23-3-660. If the charges against a person are nolle prossed, then their DNA record and profile must be expunged. S.C. Code Ann. § 23-3-660(A)(1)(a). Court's Exhibit 9 is a copy of Dunn's juvenile record. (Court's Ex. 9). It only shows one burglary charge, dated September 20, 2010. (Court's Ex. 9). Dunn's DNA consent form is dated September 21, 2010. R. ___ (State's Ex. 4). This burglary charge was nolle prossed. (Court's Ex. 9). Therefore, Dunn's DNA profile should have been expunged.

This conclusion is further bolstered by the South Carolina Constitution's express right of privacy. S.C. Const. Art. I, § 10. The Sheriff's creation of its own DNA database is an "unreasonable invasion" of Dunn's privacy. Id. It is therefore not only in contravention of the State DNA Database Act, but also the state constitution. The Fourth Amendment of the federal constitution also compels this result. See United States v. Davis, 690 F.3d 226 (4th Cir. 2012). In Davis, the Fourth Circuit found that retention of

[2] The State's DNA expert and the investigator admitted that the Sheriff even keeps **victims'** DNA profiles in its database. Tr. 360, l. 12 – 361, l. 3; Tr. 384, ll. 7 – 12.

an individual's DNA profile in Maryland's database violated the Fourth Amendment. Id. at 250.

Nor does the United States Supreme Court's recent decision in Maryland v. King, No. 12-207 (June 3, 2013) compel a different result. King, a 5-4 decision, merely upheld Maryland's state law authorizing the collection of arrested persons' DNA for identification purposes. Here, there is no evidence that Dunn's DNA was collected pursuant to any booking procedure or for identification purposes. The only evidence in the record is that Dunn signed a consent form for the Sheriff to collect his DNA. Therefore, King is inapplicable.

In any event, this Court should decline to adopt any of the King majority's reasoning on state law grounds. Justice Scalia, in a scathing dissent, eviscerated the majority's basis for its ruling. Justice Scalia said the majority's ruling departed from longstanding Fourth Amendment precedent that required some measure of individualized suspicion for an invasive search. Certainly the South Carolina Constitution's right to privacy would lead our appellate courts to agree with Justice Scalia and restrict the collection and retention of South Carolinians' DNA. See State v. Koivu, 272 P.3d 483, 488-89 (Id. 2012) (rejecting application of the good faith exception to the exclusionary rule and noting that Idaho's state courts had a duty to protect their citizens from violations of their citizens' constitutional rights at the hands of federal officers).

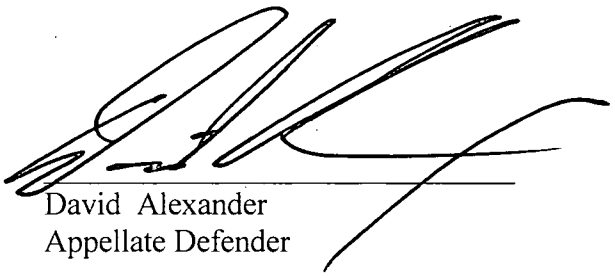
Therefore, the retention of Dunn's DNA was illegal because it exceeded the scope of his consent, was taken when he was a juvenile, did not comport with the State DNA Database Act, and his profile was kept in an illegal database. Furthermore, the South Carolina Constitution's right to privacy compels a narrow construction of the

government's rights to take and store citizens' DNA. These reasons require this Court to reverse the trial judge's ruling on Dunn's suppression motion. As any other evidence collected in this case began with the use of Dunn's illegally maintained DNA profile, it is the fruit of the poisonous tree and must also be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

## CONCLUSION

For the above-stated reasons, Dunn's conviction should be reversed.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of June, 2013.

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Appeal from Richland County
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THE STATE,

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V.

EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

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**DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

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Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Trial Transcript pages 1-7; 16-18; 24-128; 177-253; 310-364; 379-456; 523; 532-533; 546-547;
(3) State's Exhibit 4 (DNA Consent Form);
(4) Court's Exhibit 2 (Motion Suppress DNA Evidence and Derivative Evidence);
(5) Court's Exhibit 9 (Juvenile Record) (to be transported).

I certify that this designation contains no matter which is irrelevant to this appeal.

June 10th, 2013

David Alexander
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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served up on Mr. Edward M. Dunn, #351031 Kirkland Correctional Institution 4344 Broad River Road Columbia, SC 29210, this 10th day of June, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of June, 2013.

_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: July 24, 2022.