The Supreme Court of South Carolina

DANIEL E SHEAROUSE
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May 14, 2012

Melody Jane Brown
PO Box 11549
Columbia SC 29211

Breen Richard Stevens
1330 Lady St , Ste 401
Columbia SC 29201

Re The State v Wylie, Clifford
Appellate Case No 2010-151187

Dear Counsel

This case is scheduled for oral argument at 10 30 a m on Tuesday, May 22, 2012 The following oral argument times have been allocated

Appellant	10 minutes
Respondent	10 minutes
Appellant in Reply	5 minutes

Very truly yours,

Debbie Hopkins

ADMINISTRATIVE ASSISTANT

The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

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To Appellate Defender Breen Stevens

From Daniel E Shearouse

Date March 21 2012

RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of May 1 2 3 22 and 23 Please notify this office in writing prior to March 28 2012 as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

The State v Wylie, Clifford

The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

P O BOX 11330
COLUMBIA S C 29211
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To Senior Assistant Attorney General Melody Brown

From Daniel E Shearouse

Date March 21 2012

RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of May 1 2 3 22 and 23 Please notify this office in writing prior to March 28 2012 as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

The State v Wylie, Clifford

The Supreme Court of South Carolina

The State, Respondent

v

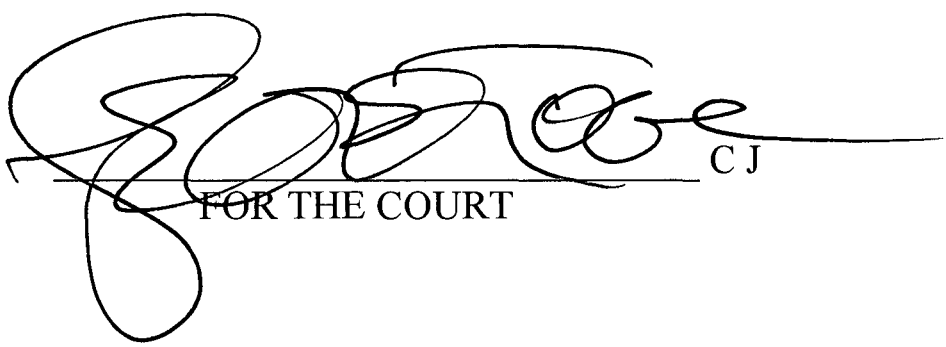
Clifford A Wylie, Appellant

The Honorable G Edward Welmaker
Pickens County
Trial Court Case No 2009-GS-39-00413
2009-GS-39-01406
2009-GS-39-01407

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court

IT IS SO ORDERED



CJ

FOR THE COURT

Columbia, South Carolina

March 20, 2012

cc Appellate Defender Breen Stevens
Senior Assistant Attorney General Melody Brown
The Honorable Jenny Kitching

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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November 16, 2011

Appellate Defender Breen Stevens
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re The State v Wylie, Clifford

Dear Counsel

The following Order has been endorsed on your Motion to Amend the Designation of Matter to Be Included in the Record on Appeal in the above entitled case on appeal

"Granted

John Cannon Few,C J
For the Court

By s/ Tanya A Gee
Clerk

The Supplemental Record on Appeal is due to be served on or before November 28, 2011

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/lb
cc Senior Assistant Attorney General Melody Brown

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

MOTION TO AMEND THE DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Counsel for Clifford Wylie respectfully requests the Court's permission to amend the designation of matter to be included in the record on appeal and to file a supplemental record on appeal in this case In support of this motion counsel shows

1 The Record on Appeal is due to be filed and served on today, September 26, 2011

2 While preparing the record on appeal, counsel discovered that the sentencing sheets where inadvertently left out of the designation of matter to be included in the record on appeal

3 These pages directly relate to an issue briefed on appeal, and counsel respectfully moves this Court to allow him to amend the designation and include these pages in the record

4 Counsel, Melody J Brown, of the South Carolina Attorney General's Office has kindly consented by telephone to this request

5 Counsel makes this request in good faith and not for purposes of delay

WHEREFORE, the undersigned counsel respectfully requests this Court's permission to amend the designation of matter to be included in the record on appeal

Respectfully submitted,

Breen R Stevens
Appellate Defender

Attorney for Appellant

September 26, 2011

GRANTED
JOHN CANNON FTW, C.J.
FOR THE COURT
By (Clerk) (Deputy Clerk)

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Amend the Designation of Matter to be included in the record on appeal in the above referenced case has been served upon Melody J Brown, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 26th day of September, 2011.

Breen R Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of September, 2011

(L S)
Notary Public for South Carolina

My Commission Expires December 4, 2017

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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September 1, 2011

Appellate Defender Breen Stevens
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re The State v Wylie, Clifford

Dear Counsel

The following Order has been endorsed on your Motion to Accept the Initial Reply Brief of Appellant as Filed Out of Time in the above entitled case on appeal

"Granted

John Cannon Few,C J
For the Court

By s/ V Claire Allen
Deputy Clerk

The Initial Reply Brief of Appellant has been received, accepted, and filed with the Court The Record on Appeal is due to be served on or before September 26, 2011

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/lb
cc Senior Assistant Attorney General Melody Brown

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

MOTION TO ACCEPT THE INITIAL REPLY BRIEF
OF APPELLANT AS FILED OUT OF TIME

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the undersigned counsel requests the relaxation of Rule 263(b), SCACR, and allow leave in which to file the Initial Reply Brief of Appellant in this case out of time In support of this motion counsel submits the following

1 The Initial Brief of Respondent and Designation of Matter in this case were filed with this Court on August 8, 2011

2 However, counsel received a copy of the Initial Brief of Respondent and Designation of Matter on August 15, 2011 and accordingly calendared ten days (10) from this date to file the initial reply brief However, this date was inadvertently miscalendared

3 Counsel has prepared the Initial Reply Brief of Appellant and is filing it simultaneously with this motion

4 Counsel for the Attorney General's office consents to this request as shown by signature below

5 Counsel makes this request in good faith and not for purpose of delay

WHEREFORE, the undersigned counsel respectfully requests that the Court grant counsel's request to relax Rule 263(b), SCACR, and allow leave in which to file the Initial Reply Brief of Appellant in this case out of time based upon the above exigent circumstances

Respectfully submitted,

BREEN RICHARD STEVENS
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of August, 2011

I Consent

Melody J Brown, Esquire

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By V Anne Allen
(Clerk) (Deputy Clerk)

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

INITIAL REPLY BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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ARGUMENTS IN REPLY

I The letter faxed from the Department of Mental Health did not constitute a report by the designated examiner

The State asserted that the fax supplied to the prosecution by the Department of Mental Health supervisor constituted a report, and that the first issue of Wylie's appeal is based on "the form and completeness of the report relied upon by the judge" Brief of Respondent, p 5 and 7 This is incorrect

The clear and unambiguous language of the statute mandates that "the designated examiners shall make a written report to the court" and contain not only the "diagnosis of the person's mental condition," but also the "clinical findings" S C Code Ann § 44-23-420(A) through (B) (West, Westlaw current through end of 2010 Sess) Yet, the author of the letter to the prosecutor was not the designated examiner, and the letter itself was devoid of the necessary clinical findings in support of the diagnoses asserted by the non-examiner allegedly on behalf of the designated examiner Rather, it is merely a letter from the non-examining supervisor purported to contain the designated examiner's conclusions Far from being the report prepared by the designated examiner and sent to the court, as mandated by law, the letter faxed to the prosecutor amounts to nothing more than hearsay within hearsay document proffered by the State Accordingly, the letter is not a report under the facts of the case and law of South Carolina

II Wylie's Sixth Amendment Confrontation Clause right was violated when Dr Fulcher relied extensively upon, and read from, the autopsy report that was performed and prepared by a different forensic pathologist

The State appears to assert that Dr James Fulcher's testimony regarding the autopsy report was permissible, and not in violation of Wylie's Sixth Amendment Confrontation Clause right, pursuant to its interpretation of the recent United States Supreme Court case, Bullcoming v New Mexico, 131 S Ct 2705 (2011) Brief of Respondent, p 15-16

The Bullcoming decision was made "in line with controlling precedent" of Crawford v Washington, 541 U S 36, 124 S Ct 1354 (2004) and Melendez-Diaz v Massachusetts, 557 U S ___, 129 S Ct 2527 (2009) Id 131 S Ct at 2713 As such, Bullcoming did not change or alter those prior decisions, rather, those decisions dictated the result of Bullcoming

The Bullcoming Court reiterated the Crawford holding that "fidelity to the Confrontation Clause permitted admission of testimonial statements of witnesses absent from trial only where the declarant is unavailable, and only where the defendant has had prior opportunity to cross-examine" Id 131 S Ct at 2713 (internal quotations omitted) The Court then reaffirmed that "Melendez-Diaz, relying on Crawford's rationale, refused to create a 'forensic evidence' exception to this rule" Id Therefore, it is unsurprising that the Court maintained its position that "analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme Curie and the veracity of Mother Theresa'" Id 131 S Ct at 2715 (quoting Melendez-Diaz, 557 U S at ___, n 6, 129 S Ct at 2537, n 6)

As a result, the surrogate forensic scientist in Bullcoming could not testify in court as to the report produced by a non-testifying scientist who actually performed the forensic

examination, even where the surrogate was "qualified as an expert witness" with respect to the equipment and procedures utilized by the non-testifying scientist Id 131 S Ct at 2713-14 Again, this is because "the 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 131 S Ct at 2716

Although the Bullcoming Court did not reach the specific issue of "an expert witness asked for his opinion about underlying testimonial reports that were not themselves admitted into evidence," Wylie submits that such a decision will likely be guided by current Supreme Court precedent, as was the Bullcoming case, and forbid such Crawford statements to enter into evidence through the testimony of a different witness 131 S Ct at 2722 (Sotomayor, J concurring in part) Further, the precedent of United States v Ayala, 601 F 3d 256 (4th Cir 2010) and United States v Johnson, 587 F 3d 625 (4th Cir 2009) already touched on the admissibility of forbidden Crawford statements through an expert witness' in-court testimony an expert is permitted to utilize a statement barred by Crawford in reaching an independent judgment, so long as he does not act as a transmitter for the testimonial hearsay in the guise of an expert opinion Ayala, 601 F 3d at 275, Johnson, 587 F 3d at 635 Under this standard, an end-run around Crawford is prevented, and courts still will not permit one witness' out-of-court testimonial statement to enter into evidence through a different witness' in-court testimony Bullcoming, 131 at 2715 Therefore, the rationale of both Ayala and Johnson regarding expert testimony comports with the Sixth Amendment Confrontation Clause principles discussed and applied in Bullcoming

In the present case, the autopsy was performed and the report was completed by a different forensic pathologist, and the report was not offered into evidence Tr 267, ln 24—

Tr 268, ln 4, Tr 274, ll 7-11 Further, Dr Fulcher went beyond simply giving his expert opinion based upon the underlying autopsy report Instead, portions of the autopsy report were extensively relied upon, and sometimes read aloud, as part of his in-court testimony Tr 262, ll 13-21, Tr 268, ln 17—Tr 270, ln 1, ll 24-25, Tr 274, ll 12-14, Tr 277, ll 3-11, Tr 279, ll 6-11 Thus, regardless of Dr Fulcher's qualification as an expert in forensic pathology, he acted as a mere vector for portions of the autopsy report, his testimony violated Wylie's rights under the Confrontation Clause

For the remaining arguments advanced by the State in the Brief of Respondent, Wylie respectfully stands upon his prior brief to the Court

CONCLUSION

For the foregoing reasons in reply to the Respondent's brief, as well as those advanced in Appellant's initial brief, Clifford Wylie respectfully requests reversal of his convictions and remand for a new trial

Respectfully submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of August, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Melody J Brown, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 25th day of August, 2011

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of August, 2011

(L.S.)

Notary Public for South Carolina
My Commission Expires December 4, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
G Edward Welmaker, Circuit Court Judge

The State,

Respondent,

vs

Clifford Wylie,

Appellant

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

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Federal Cases

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I Whether it was error to deny a continuance seeking to allow the court ordered mental health examination reports regarding Wylie's competency and criminal responsibility to be furnished by the Department of Mental Health before trial?

II Whether Wylie's Sixth Amendment Confrontation Clause right was violated when the autopsy report prepared by the doctor performing the autopsy was used in the testimony of a different doctor at trial?

III Whether the psychologist's testimony regarding statements of the Child was impermissible hearsay, and violated Wylie's Sixth Amendment Confrontation Clause right, when the Child was an available witness but uncalled by the State?

IV Whether the trial court imposed an illegal sentence upon Wylie by sentencing him to five (5) years for the charge of possession of a weapon during the commission of a violent crime when he was already sentenced to LWOP for the charge of murder?

(FBOA, p 4)

RESPONDENT'S STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Clifford Wylie ("appellant") in April 2009 for the murder of Melissa Davis Wylie (R p *) The grand jury also indicted appellant in September 2009 for unlawful conduct towards a child and possession of weapon during the commission of a crime (R p *) A jury trial was held January 15, 19, and 20, 2010, before the Honorable G Edward Welmaker The jury convicted as charged (Tr p 640, lines 2-19) The trial judge sentenced appellant to ten (10) years imprisonment for the unlawful conduct towards a child, a consecutive life sentence for murder, and, five (5) years imprisonment, concurrent and subsumed by the life sentence, on the weapon charge (Tr p 649, lines 1-13)

This appeal follows

RESPONDENT'S STATEMENT OF FACTS

On February 13, 2009, appellant shot and killed his wife in presence of their eight year old son At approximately 8 57 p m , wife was on the phone with the Clemson Police Department requesting help Wife stated that her husband had a gun and was going to shoot her (Tr p 163, lines 22-24) The dispatcher testified that while trying to calm the wife, she heard wife begin to scream (Tr p 165, lines 17-19) The dispatcher testified the first sounds were quite loud, then she "could hear her place the phone actually down, like it fell against something," then her voice became "more indistinct," before stopping altogether (Tr p 173, line 22 - p 174, line 13, p 165, lines 20-22)

Officers responded within approximately two minutes of the dispatch call (Tr p 200, lines 2-5) Appellant opened the door for the officers, after having pushed the body away from the front door Wife had apparently fell against the door and partially blocked it (Tr p 201, line 21 - p 202, line 16, p 288, lines 21-25, p 442, lines 8-15, p 484, line 21 - p 485, line 1, p 489, lines 2-10) The telephone was off the hook, in a chair, and still indicated the 911 call (Tr p 329, lines 14-22, p 489, lines 2-16) When asked where the shooter was, appellant admitted that he was the shooter (Tr p 204, lines 5-10) Appellant advised the responding officer where he placed the gun in the home (Tr p 206, lines 9-13) The gun was subsequently recovered in the described location (Tr p 331, lines 11-20) Ballistic testing confirmed the fragments collected from autopsy bore markings indicating the bullet had been fired by the gun, with the possibility of a match to another weapon "way below" what the analyst considered "possible " (Tr p 399, line 22 - p 400, line 8) Gun powder residue on the wife's shirt indicated that she was one to three feet away from the

muzzle when shot (Tr p 548, lines 22-25) Wife was already dead when the first responders entered (Tr p 290, line 15 - p 291, line 5) Emergency medical personal arriving approximately ten minutes after the officers, confirmed the victim was dead at the scene (See also Tr p 251, line 1 - p 253, line 17)

The responding officers also noticed appellant's son in the hallway, and asked the child to go into his bedroom (Tr p 207, lines 7-15) When approached in the bedroom, the child asked about his mother (Tr p 208, lines 11-22) Officers attempted to shield the young boy while taking him from the murder scene (Tr p 208, line 24 - p 209, line 13) The child was told of his mother's death at the police station He became pale, looked as if he would faint, and became ill (Tr p 471, lines 15-19) The child's therapist opined the child suffered from post-traumatic stress disorder (Tr p 531, lines 14-15) The child was still undergoing treatment therapy at the time of trial (Tr p 531, lines 15-21)

ARGUMENT

I

The trial judge did not abuse his discretion in denying appellant's motion for a continuance where the trial judge had confirmation from DMH that the evaluating doctor opined appellant was competent to stand trial and found appellant demonstrated criminal responsibility and that he did not lack sufficient capacity to conform his conduct on the day of the murder There was no dispute appellant was properly evaluated, and no objection that the lack of the formal report hampered the defense In short, appellant failed to show cause to continue the matter

Relevant Facts

On November 25, 2009, the trial judge issued an "Order for Competency to Stand Trial Evaluation Pursuant to State v Blair" (R p *) At the time of the January 15, 2010 pre-trial hearing, the trial judge had no report directly from the evaluating doctor However, the State relied upon a fax report from the evaluating doctor's immediate supervisor that confirmed the doctor found appellant competent to stand trial, criminal responsibility, and did not lack sufficient capacity to conform his conduct on the day of the murder (Tr p 76, line 19 - p 77, line 8) The State also noted that appellant, though he noticed the possibility of an insanity defense, had not pursed the defense

> As you will recall, this is actually the second time that we have delayed this case for the defendant On November the 25th, the Court signed an order for him to be evaluated for criminal responsibility and competency to stand trial and a capacity to conform He was - - that order was signed by the Court November the 25th of '09
>
> On November the 30th of '09, I was served with notice of intent to use an insanity defense To this date, I've gotten no documents whatsoever No names of witnesses No names of anything or anybody Mr DeJong intends to use to prove that

(Tr p 76, lines 6-19)

Defense counsel objected only to the extent that a formal report by the evaluating doctor had not been received (Tr p 77, line 11 - p 79, line 21) The trial judge addressed appellant directly to determine whether he understood the proceedings (Tr p 81, line 8 - p 83, line 18) In consideration of the fax summary, and appellant's responses to the trial judge's questions on procedure and court functions, the trial judge found appellant competent to stand trial (Tr p 83, line 19 - p 84, line 22) The trial judge specifically provided that he would allow appellant to "re-raise[]" the issue during trial, and cautioned that he would revisit the ruling if "anything occurs that may give me some trepidation or hesitancy about that ruling " (Tr p 84, lines 7-12) Defense counsel never raised any issue on competency during the trial, and offered no evidence of insanity In fact, at sentencing, defense counsel stated as to appellant's background

> No real history of mental health history I think there was some peripheral history of mental health

(Tr p 647, line 24 - p 648, line 2)

Discussion

Appellant complains the trial judge erred in granting his request for a continuance in order to receive a formal report from the Department of Mental Health ("DMH") (FBOA, p 9) As a first matter, his complaint centers merely on receipt of the report, not on any substantive finding or supportive evidence (See Tr p 77, lines 11-12, " I have a copy of the letter, but I have a problem with the process ") All the parties understood the doctor's findings, and there was no objection to the findings, or defense evidence presented that would rebut those findings (Tr p 76, line 22 - p 77, line 22) *Compare Pate v Robinson*, 383 U S 375, 384 (1966)("counsel throughout the proceedings insisted that Robinson's

present sanity was very much in issue With this record we cannot say that Robinson waived the defense of incompetence to stand trial ") Moreover, the lack of objection as to the merits of the mental health evidence is consistent with appellant's position at sentencing, that there was no history of significant mental health issues "The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance " *State v Weik*, 356 S C 76, 81, 587 S E 2d 683, 685 (2002), *adhered to on reh g*, 354 S C 382, 581 S E 2d 834 (2003) See also S C Code Ann § 17-24-10 ("The defendant has the burden of proving the defense of insanity by a preponderance of the evidence ") The only evidence presented was the report of findings that supported, along with the trial judge's colloquy with the appellant, the trial judge's ruling that appellant was competent to stand trial Indeed, a hearing is not required at all where there is no evidence of controversy *State v Hall*, 312 S C 95, 99, 439 S E 2d 278, 281 (1994)("Prior to trial, the State's psychologist determined that Hall was, in fact, competent Moreover, Hall himself indicated that he understood the proceedings The evidence of record negates the necessity of a competency hearing ") The trial judge did not abuse his discretion in finding appellant competent and that he demonstrated criminal responsibility with ability to conform, and the trial judge's ruling should be upheld *Weik*

At any rate, the "process" defense counsel complained of is not the denial of an evaluation or a hearing on the findings, but rather the form and completeness of the report relied upon by the trial judge It is this process, and purported failure to present a report as required by statute, that appellant argues entitles him to relief (See FBOA, p 11 (reciting

"statutory scheme" and "statutorily mandated procedures") Based on the completely speculative nature of the request for evaluation,[1] and in light of appellant's reasonable and appropriate responses to the trial judge concerning "the pending charges, the purpose of the proceedings, and the roles of the individuals involved,"[2] it would not have been an abuse of discretion to decline to order an evaluation at all *State v Burgess*, 356 S C 572, 574-576, 590 S E 2d 42, 43-44 (Ct App 2003) However, one was ordered, a report of the findings was made, an in-court evaluation of appellant by the trial judge was made, and the trial judge considered all the evidence in finding appellant competent with no evidence he lacked criminal responsibility or ability to conform This included the summary report of findings

Second, the basis for the motion for a continuance is suspect, not only because there was no objection raised as to interference with defense evidence, but also because the case has been continued once before over the State's objection (Tr p 26, lines 1-6), and appellant made two other motions to continue Appellant attempted to fire counsel because he believed he needed more time, (Tr p 73, lines 3-16)(See also Tr p 586, lines 1-5), and, appellant sought a continuance based on a reporter's passing contact with two potential

---

[1] In upholding in habeas a state court decision denying a continuance, the Fourth Circuit has noted that an appointment "three months before trial" allows time for independent research into facts supportive of the defense *Hutchins v Garrison*, 724 F 2d 1425, 1433-34 (4th Cir 1983) Again, appellant presented no evidence to rebut the findings during the hearing Moreover, the solicitor noted, without objection or qualification, that the evaluation was ordered out of an abundance of caution rather than real concern, and there is no evidence of a real psychiatric disorder (Tr p 79, line 23 - p 81, line 7)

[2] The record also shows a continuing ability, and no destabilization during trial, supported by appellant's appropriate interaction with the trial judge when discussing appellant's right to testify (Tr pp 583-586) *See State v Colden*, 372 S C 428, 442, 641 S E 2d 912, 920 (Ct App 2007)("court's inquiry during the waiver of his right to testify, indicated that Colden had no difficulty conversing effectively")

jurors, when the only reference was to the type of case (murder), not any facts, (Tr p 20, line 15 - p 29, line 15) The pattern of seeking delay is curious, but, the pattern of delay in conjunction with the total lack of evidence as to insanity or even a history of severe mental illness as cause for seeking a continuance for receipt of a fuller report indicates the continuance was little more than another attempt to slow the trial At any rate, the trial judge specifically informed counsel that he was willing to revisit the issue at any time during trial as necessary (Tr p 24, lines 4-22) This record does not support appellant was pushed forward unfairly and to his prejudice

Again, the issue is squarely one of sufficiency of the report pursuant to statute – not a denial of the right to a hearing The State is obliged to offer an opportunity for the defendant claiming lack of competency an opportunity to be heard *State v Blair*, 275 S C 529, 533, 273 S E 2d 536, 537 (1981)("Section 44-23-430 provides a competency to stand trial hearing 'shall' be held after a psychiatric examination has been ordered under s 44-23-410") *See also Thomas v Cunningham*, 313 F 2d 934, 938 (4th Cir 1963) ("procedural due process requires that a state shall afford him adequate opportunity to raise the issue") A particular form of report, though, is not required

It should not be lost in the arguments on appeal that a hearing was held, and that the findings of the evaluator were considered, along with any evidence the defense wished to offer – the defense simply offered none Again, there is no due process violation The issue here simply boils down to whether the trial judge could accept the assertions of DMH without a formal, detailed report There is no bar to the receipt of this evidence While defense counsel argued below that the failure to receive a detailed report should prevent the

hearing, (Tr p 79, lines 6-21), the only clear argument made in objection to the summary report of the findings was "hearsay" (Tr p 77, lines 20-23, p 79, line 12) It is well settled that the report is not hearsay *State v Franklin*, 318 S C 47, 50, 456 S E 2d 357, 359 (1995)("report is a statutory exception to the rule against hearsay") Defense counsel did argue that "without either the Blair hearing or a copy of that evaluation" to be made an exhibit, the trial court could not rule (Tr p 79, lines 6-21) Respondent interprets the argument as the summary report is not a report as required by statute to prompt the statutorily required hearing It is this argument appellant appears to make on appeal (See FBOA, pp 10-13) To make such an argument, however, appellant reads much into the statutory requirement of the report that simply is not there

The statute requires a "report" – not any particular form or completeness to the report S C Code Ann § 44-23-420 requires only the barest of reports to include 1) any "diagnosis of the person's mental condition" and 2) "clinical findings bearing on the issues of whether or not the person is capable of understanding the proceedings against him and assisting in his own defense" (or could obtain the ability) While certainly there is an accepted customary expectation to form of the report, the statute does not mandate the form of the report Moreover, at least one other case references a letter from other staff relating findings by another *See State v Bradley*, 343 S C 461, 462-63, 539 S E 2d 720, 721 (Ct App 2000)(referencing both a report, and "DMH letter accompanying the evaluation" in which " an Associate Director"advised "'the hospital staff finds that [Bradley] shows Mild Mental Retardation'") Again, it is not disputed that the evaluation was made, (Tr p 77, lines 13-14), and the examiner, through his supervisor, made a report of his findings to the trial court

The dispute was the absence of "underlying data" (Tr p 77, lines 22-23) Such data is not required, by statute, to be attached to the report

In a similar vein, the Idaho Court of Appeals, in *State v Wells*, 645 P 2d 371 (Idaho Ct App 1982), evaluated a completeness issue in regard to report received The report in *Wells* failed to state the required statutory finding, but "did state that the psychiatrist found no mental disease or defect" 645 P 2d at 374 As the trial judge did here, the *Wells* trial judge allowed the defendant to present any and all information that he wished to present at trial The court of appeals specifically noted that no challenge to the "adequacy of the evaluation" was made, nor was Wells' "fitness to stand trial" made an issue *Id* The court held "that appellant was not deprived of due process He was afforded every reasonable opportunity to prepare for, and to present, a defense on the grounds of mental disease or defect We find no fundamental error on the part of the trial court" 645 P 2d at 375 Similarly, there is no fundamental error here The report, as it is, supports that the evaluation was made, and the findings – on both competency to stand trial and criminal responsibility – were reported to the court Like *Wells*, there is no "fundamental error" Unlike *Wells*, though, there was a report here of the findings Thus, this case is stronger, and even more removed from the possibility of "fundamental error"

Further, appellant's reliance on *United States v Walker*, 537 F 2d 1192 (4th Cir 1976), (FBOA, pp 14-16), is misplaced As appellant correctly states, competency to stand trial and criminal responsibility are separate and distinct concepts (FBOA, p 9) The trial judge here ordered evaluations for both competency and responsibility with capacity to

conform [3] (R pp *) As noted above, the letter from DMH addressed both (See Tr p 77, lines 2-3) Relief in *Walker* (which was simply a remand), was premised on the fact that while ordered to report on both, the doctor "failed to state any conclusion as to Walker's mental capacity to commit the offense " *Walker*, 537 F 2d at 1194 Here, appellant cannot point to a failure to report on either *Walker* is factually different

As to appellant's assertion that he was denied access to evidence, (FBOA, p 15), this issue is procedurally barred *See e g State v Dunbar*, 356 S C 138, 142, 587 S E 2d 691, 693 (2003)("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge ") Defense counsel's argument below remained squarely on the procedural necessity of receipt of a detailed report (See Tr p 78, lines 4-14) There was no objection to denial of access to evidence, or even a request for another evaluation And, again, appellant failed to pursue an insanity defense at trial, and, at sentencing, conceded a lack of significant history of mental health issues at all (Tr p 647, line 24 - p 648, line 2) There is no basis for an assertion he was denied access to evidence supportive of an available defense

Lastly, if entitled to anything, appellant is entitled to a hearing on remand to determine competency after receipt of the detailed report *State v Blair*, 275 S C at 534, 273 S E 2d at 538 ("on remand, if the hearing reveals Blair was incompetent to stand trial, an order reversing his conviction should be entered and a new trial granted when he is presently

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[3] "Section 44-23-410 does not apply to evaluations for criminal responsibility, it governs only evaluations to determine competency to stand trial" but "[t]he trial judge has the discretion to order a mental health evaluation where the defendant indicates an intent to introduce evidence at trial that he lacked criminal responsibility " *Monahan v State*, 365 S C 130, 133, 616 S E 2d 422, 423-24 (2005)

competent to stand trial However, if the hearing reveals Blair was competent to stand trial, the conviction will stand ") *See also State v Evans*, 309 S C 471, 476, 424 S E 2d 512, 515 (Ct App 1992)(remanding and directing evaluation with provision "if the hearing reveals that Evans was competent to stand trial, the conviction stands") The same is true if this Court should determine error as to the report on criminal responsibility *United States v Walker*, 537 F 2d at 1196 ("we remand the case to the district court with directions to appoint a psychiatrist to determine whether there exists a substantial question as to Walker's criminal responsibility If the report of the examining psychiatrist indicates such a question, and if the defense counsel represents that he intends to rely upon it on retrial, the judgment will be vacated and a new trial granted Otherwise, the judgment will stand affirmed ") It would be inconceivable to grant a new trial on an issue where an appellant demonstrated no prejudice and suffered no prejudice Here, such relief would be particularly egregious where the parties and the judge were well aware of the DMH findings which showed findings appellant was competent and demonstrated criminal responsibility with capacity to conform at the time of the murder There is not one iota of evidence or opinion that would support a lack of competence or criminal responsibility and capacity to conform However, appellant is not entitled to any relief, including such a remand

"The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion " *State v Colden*, 372 S C 428, 435, 641 S E 2d 912, 916 (Ct App 2007) Petitioner has shown no abuse of discretion Therefore, the trial judge's ruling should not be disturbed on appeal

Appellant's argument to the contrary must be rejected

II

The trial judge did not abuse his discretion in allowing Dr Fulcher to testify as an expert in forensic pathology where Dr Fulcher merely used the autopsy report of another pathologist as part of the basis for his own opinion on the manner or cause of death There is no confrontation clause infringement where appellant had the opportunity to cross-examine Dr Fulcher on his own opinion

Relevant Facts

During pre-trial motions, defense counsel objected to another pathologist (Dr Fulcher) testifying based on the examining pathologist's (Dr Ward's) report He argued a confrontation issue and relied upon the United States Supreme Court ruling in *Melendez-Diaz*[4] (Tr p 102, line 18 - p 104, line 22) The solicitor initially relied upon *State v Cutro*,[5] which found that an autopsy report was a business record and not inadmissible hearsay (Tr p 106, line 1 - p 107, line 4) The solicitor continued, however, that even if that were not the case, the Dr Fulcher would be testifying to his own opinion, thus a hearsay exception would not be necessary (Tr p 108, lines 1-9) The trial judge conditionally ruled that the issue may be "moot," but took the matter under advisement (Tr p 109, lines 9-17)

Dr Fulcher was qualified as an expert in forensic pathology without objection (Tr p 266, lines 17-23) Dr Fulcher testified that he did not perform the autopsy, however, he reviewed the files from the autopsy – photographs and report – and also reviewed crime scene photographs provided by the coroner (Tr p 267, line 24 - p 268, line 23) As a result of his review, he determined "[t]he manner of death in this case is a gunshot wound to the

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[4] *Melendez–Diaz v Massachusetts*, 557 U S ——, 129 S Ct 2527 (2009)

[5] 365 S C 366, 377, 618 S E 2d 890, 896 (2005)

back, the right shoulder specifically." (Tr p 269, lines 6-7) He described the wound to the shoulder, and the evidence of blood from the mouth as shown in the crime scene photographs, and opined that the bullet severely damaged the aorta, leading to death within seconds (Tr p 269, line 10 - p 273, line 12)

On cross-examination, Dr Fulcher also confirmed that his testimony was based upon his own medical opinion (Tr p 276, lines 5-6) Further, defense counsel twice acknowledged – though the form of the question – that Dr Fulcher's testimony consisted of his own observations and opinions based on his medical training, though part of that review was review of the autopsy report (See Tr p 277, lines 17-19, p 278, lines 14-17)

On redirect, Dr Fulcher testified that it was not "unusual" for one doctor to use another doctor's autopsy report in forming an opinion on cause of death (Tr p 281, lines 16-25)

Appellant complains on appeal that his right to confrontation was violated by allowing Dr Fulcher to testify as to cause of death when the testimony was "based primarily upon the autopsy report prepared by Dr Ward" (FBOA, p 18)

Discussion

A defendant certainly has the right to confront his accusers However, the facts here do not show that Dr Ward's opinion and results were simply admitted through Dr Fulcher Rather, Dr Fulcher used the report of facts from the autopsy, along with photographs of the crime scene as provided by the coroner, to form his own opinion concerning the cause of death As such, there was no confrontation clause issue This issue is best resolve by review

of *Melendez-Diaz* the latest *Melendez-Diaz* based ruling, *Bullcoming v New Mexico*, 131 S Ct 2705, 2709 (2011)

In *Melendez-Diaz*, the Supreme Court held that an affidavit prepared by the analyst showing the results of laboratory drug testing could not be introduced without the analyst testifying at trial unless the testing analyst was "unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine" the testing analyst 129 S Ct at 2532 In *Bullcoming*, the Supreme Court similarly found that the analyst who tested defendant's blood-alcohol concentration level was required to testify Specifically, the Court found that substituting another analyst for the testing analyst was not sufficient to satisfy the constitutional guarantee of the right to confront the witness *Bullcoming*, 131 S Ct at 2710 ("We hold that surrogate testimony of that order does not meet the constitutional requirement ") However, the Court underscored an important fact in why the substitution was not sufficient – that "the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample " 131 S Ct at 2709 In other words, the witness offered had no personal knowledge of the testing or validity of the result 131 S Ct at 2715 ("surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, i e , the particular test and testing process he employed Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part ") The witness was available, essentially, to read from the report of another There was no assertion that the testifying analyst "had any 'independent opinion' concerning Bullcoming's BAC " 131 S Ct at 2716

The factual premise here is directly contrary to the impermissible "surrogate" testimony in *Bullcoming* Here, Dr Fulcher repeatedly testified that he formed his own opinion, and Dr Ward's report was not admitted into evidence Further, Dr Fulcher testified that it was a common practice in forensic pathology to use the medical finding from an autopsy performed by another in support of an opinion on cause of death Dr Fulcher's use of Dr Ward's report fits squarely under Rule 703, SCRE ("The 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 inference upon the subject, the facts or data *need not be admissible in evidence* ") Thus, Dr Fulcher's use of the report, regardless of whether it is admissible on its own,[6] was proper in forming his opinion Dr Fulcher was entitled to testify as to his opinion Id See also Rule 702, SCRE (experts may testify based on "knowledge, skill, experience, training, or education in the form of an opinion or otherwise ") Therefore, the testimony was properly admitted under the rules governing expert testimony, and there was no infringement on appellant's confrontation rights

Further, the testimony tracks almost precisely one of three exceptions carefully proposed in the Justice Sotomayor's concurring opinion, which was written in part, to set out the parameters and limitations of the majority's decision

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[6] Though not at issue in the instant case, an autopsy is arguably not included in the *Melendez-Diaz* ruling 129 S Ct at 2546 (KENNEDY J dissenting)(citing to law review comment that "that every court post-Crawford has held that autopsy reports are not testimonial") Moreover, our state supreme court has found such reports to be business records and not barred as hearsay *State v Cutro*, 365 S C 366, 377, 618 S E 2d 890, 896 (2005)

> this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence See Fed Rule Evid 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted) As the Court notes, ante, at 2715 – 2716, the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration Rather, the State explains, "[a]side from reading a report that was introduced as an exhibit, Mr Razatos offered no opinion about Petitioner's blood alcohol content " Brief for Respondent 58, n 15 (citation omitted) Here the State offered the BAC report, including Caylor's testimonial statements, into evidence We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence

131 S Ct at 2722 (SOTOMAYOR, J concurring) [7]

Again, the constitutional limitation is not at issue on these facts The record simply cannot support appellant's assertion on appeal that the doctor simply read from the autopsy report (See FBOA, p 22, allegation Dr Fulcher "parroted portions of Dr Ward's report") The doctor freely admitted that he used the report, in part, in forming his opinion But the record does not support he "surrogate witness" procedure denounced in *Bullcoming* Consequently, appellant has failed to show error at all Lastly, even if the evidence was improper, the error could only be harmless

---

[7] The United States Supreme Court has granted certiorari in a similar case which relied upon this distinction *See People v Williams*, 939 N E 2d 268 (Ill 2010), *cert granted*, 10-8505, 2011 WL 2535081 (U S June 28, 2011) The Illinois court recognized the traditional exception " This Court has long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion " 939 N E 2d at 278 Further, the court rejected the *Melendez-Diaz* ruling as affecting same, noting the expert at issue was not simply reading from the report but giving her own opinion 939 N E 2d at 281-282

A ruling that is in "violation of the Sixth Amendment right to confrontation is not a per se reversible error" but subject to a harmless error analysis *State v Smith*, 315 S C 547, 552, 446 S E 2d 411, 414 (1994) Here, the error could only be harmless based on the nature of the testimony and the wealth of evidence of guilt in the record For instance, the testimony simply established a gunshot wound that killed the victim Officer James Maw of the Clemson City Police Department had previously identified a photograph from the autopsy, which he had attended, as showing the entry wound on the victim's body (Tr p 259, lines 5-21) Further, the responding officers, at the home with minutes of the victim having called 911, found the victim slumped on the floor, already dead (Tr p 283, lines 1-22, p 288, lines 21-25, p 290, line 10 - p 291, line 5) Emergency paramedics were at the scene at 9 09 (the victim's 911 call having been received at 8 57, (Tr p 163, lines 3-24)), and concurred that the victim had already died (Tr p 251, line 1 - p 253, line 17) The doctor's testimony regarding a quick death by shooting was, in this case, cumulative *State v Haselden* 353 S C 190, 577 S E 2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence), *State v Evans*, 378 S C 296, 299, 662 S E 2d 489, 491 (Ct App 2008)(evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless) Further, there was substantial and overwhelming evidence of guilt

"[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached " *State v Price* 368 S C 494, 500, 629 S E 2d 363, 366 (2006), *citing State v Bailey* 298 S C 1, 5, 377 S E 2d 581, 584 (1989), *Arnold v State* 309 S C 157, 172, 420 S E 2d 834, 842 (1992) Where the record shows any error to be harmless beyond a

reasonable doubt, the error will not afford relief *Price*, 368 S C at 499, 629 S E 2d at 366, *citing State v Pickens* 320 S C 528, 531, 466 S E 2d 364, 366 (1996) The evidence of guilt not only depends upon the evidence above mentioned, but also appellant's own statement to responding officers that he was the shooter (Tr p 204, lines 1-10, p 233, lines 9-12) Further, appellant related the location of the gun that fired the fatal shot (Tr p 206, line 9-13, p 331, lines 5-8, p 399, line 22 - p 400, line 8) Here, there is substantial and solid evidence of guilt Even so, respondent maintains the record shows no error

Appellant's argument to the contrary must be rejected

III

Appellant preserved no issue regarding Dr Threadgill's testimony relating a statement by the child victim – that "he believed this to be his fault" – in support of her opinion that testifying would be detrimental to the child The only evidence in the record is that appellant, after initially objecting, withdrew his objection

Relevant Facts

Appellant objected *in limine* to any hearsay statement presented in Dr Threadgill's testimony Appellant referenced the doctor's report that set out, in detail, the various statements from the child and from others, such as family and teachers, which supported her opinion (Tr p 425, lines 6 - p 427, line 10) The State agreed that the report contained such hearsay and further agreed the hearsay should not be presented (Tr p 427, lines 13-20) The trial judge asked if any statements regarding the facts of the murder would be elicited, to which the assistant solicitor answered "Absolutely not, Your Honor I agree that would be improper " (Tr p 428, lines 14-18) Defense counsel agreed with the proposed scope of the testimony, and conditionally agreed on admissibility depending upon whether the testimony at trial conformed to the agreement (Tr p 429, line 19 - p 429, line 8)

Dr Threadgill testified that the child suffered from post-traumatic stress disorder (Tr p 531, lines 14-21) The defense objected only once, during the doctor's opinion as to what affect testifying would have on the child – specifically, when the doctor stated "one of the first things he said was - - " (Tr p 531, line 22- p 532, line 6) After a bench conference, the doctor was allowed to testify as follows

> A I believe it would be detrimental to Pierson because of some of the symptoms that he experienced after the event and that he may have a recurrence of some of those symptoms
>
> Q Okay And you started to say one of the first things he told you

A One of the first things he said to me is he believed this to be his fault

(Tr p 532, line 21 - p 533, line 5)

Discussion

As a first matter, appellant has not preserved an issue for review in this Court regarding the counsel's testimony Appellant raised an objection but after a bench conference, and subsequent hearing of the limited testimony, made no further comment or argument on admissibility of the testimony In fact, when the solicitor referenced the bench conference, and asked if the discussion was on the record, defense counsel declined the opportunity to place a full objection on the record (Tr p 586, line 22 - p 587, line 11)

"In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground " *State v Holliday*, 333 S C 332, 338, 509 S E 2d 280, 283 (Ct App 1998), Rule 103, SCRE ("Error may not be predicated upon a ruling which admits or excludes evidence unless" in addition to prejudice, there is a timely and specific objection, or the ground is otherwise clear from the context) "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review " *York v Conway Ford Inc* , 325 S C 170, 173, 480 S E 2d 726, 728 (1997)

Appellant certainly failed to place any specific argument on the record to preserve the issue for appellate review on any testimony from this witness Therefore, the issue is procedurally barred from review *Id* It is not a foregone conclusion that the objection was to hearsay, as that could have been an objection based on context The objection could also have been on the scope of the witnesses expertise, or the inadmissibility of the underlying

facts of the opinion See generally Rule 702, SCRE, (confining expert opinion to that which based upon "scientific, technical, or other specialized knowledge" that will "assist" the jury "to understand the evidence or to determine a fact in issue"), Rule 703, SCRE("expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data ") To the extent the context would support an objection on the grounds of hearsay, the issue, if preserved, would be without merit

The State maintained below and continues to maintain here, that the doctor should not be allowed to be used as a conduit for hearsay statements relating facts from the shooting (See Tr p 427, line 13- p 428, line 18) The statement at issue, however, though attributed to the child, did not relate facts of the shooting and cannot be hearsay

Hearsay is an out of court statement offered as proof of the stated matter Rule 801(c), SCRE "Evidence is not hearsay unless it is offered to show the truth of the matter asserted " *State v Sims*, 304 S C 409, 420, 405 S E 2d 377, 383 (1991) See also *State v Plyler*, 275 S C 291, 294, 270 S E 2d 126, 127 (1980)(testimony not barred by hearsay rules as "the challenged evidence does not appear to have been offered for the substantive truth of the matter asserted, but rather to place appellant at the scene of the crime") The statement presented did not offered to prove the murder was the child fault, rather, the child's statement reflected a emotion guilt and or emotion strain that may be exacerbated by reliving the event through testimony Moreover, the impact of the murder on the child was the very basis of the charge of unlawful conduct toward a child Thus, the child's present statement of mind was very much a fact for the jury to consider At any rate, the statement was offered for state of mind and not for the truth of the matter Therefore, it was not hearsay *Id See also State*

v Edwards, 373 S C 230, 236-37, 644 S E 2d 66, 69 (Ct App 2007), *aff d as modified*, 383 S C 66, 678 S E 2d 405 (2009)(child victim's statement indicating defendant had hit her mother not hearsay, where statement offered "to explain why the victim behaved as she did") Respondent notes that the record supports the trial judge was very careful to protect the record from the hearsay statements that could have negatively and prejudicially affected the jury's consideration of the evidence of murder For example, the trial judge denied the state's request to offer the child's statements made in the patrol car to the effect "that he heard his mother screaming He had heard a loud bang Didn't know what was going on Came out and said he saw his father with a gun or with a weapon He wasn't sure what kind of weapon it was It was a firearm in his hand " (Tr p 129, lines 3-10, p 133, lines 11-19, p 137, line 13 - p 138, line 13) The trial judge, in reconsidering his initial ruling excluding the evidence stated "I think a good argument could be made that we also have a charge of unlawful conduct toward a child and the child is a victim However, since it is a joint trial with a murder case, the prejudice just concerns me more than the right of confrontation " (Tr p 140, line 24 - p 142, line 2)

At any rate, the issue presented is not preserved for review, but if the Court should consider the issue preserved for review, the issue is without merit If the Court should find the issue preserved, and find error, the admission of testimony could only be harmless in light of the wealth of evidence of guilt

"[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached " *State v Price* 368 S C 494, 500, 629 S E 2d 363, 366 (2006), *citing State*

v Bailey 298 S C 1, 5, 377 S E 2d 581, 584 (1989), *Arnold v State* 309 S C 157, 172, 420 S E 2d 834, 842 (1992) "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed " *Price*, 368 S C at 499, 629 S E 2d at 366, *citing State v Pickens* 320 S C 528, 531, 466 S E 2d 364, 366 (1996) Respondent would first note to take the statement as true would mean the statement tends to prove the murder was the child's fault As such, admissibility of the statement could not have prejudiced appellant At any rate, there is substantial and solid evidence of guilt, not the least of which is appellant's own statement to responding officers that he was the shooter, and his statement relating the location of the gun that fired fatal shot as confirmed by ballistic testing (Tr p 204, lines 1-10, 206, lines 9-13, p 233, lines 9-12, p 331, lines 5-8, p 399, line 22 - p 400, line 8) If error, the admission of the statement could only be harmless However, respondent maintains the issue is not preserved for review, and, further, that the admission was not error

Appellant's argument to the contrary must be rejected

IV

Appellant failed to object to the sentence and no issue is preserved for this Court's review Even so, there is no factual basis for relief in regard to the five year sentence initially imposed for the weapons charge as the trial judge stated the sentence was subsumed within the life sentence imposed for murder

Relevant Facts

At sentencing, the trial judge imposed a ten year sentence for the unlawful conduct toward a child, and a consecutive life for the murder (Tr p 649, lines 9) As to the weapon conviction, the judge sentenced appellant as follows

> the sentence is five years It is to be concurrent to the last imposed sentence which under the law, I think, would be subsumed by that

(Tr p 649, lines 9-13)

Appellant raised no objection to the sentence

Discussion

The controlling statute provides for a mandatory five (5) years sentence except 'where the death penalty or a life sentence without parole is imposed for the violent crime " S C Code Ann § 16-23-490 Appellant argues his sentence on the weapon charge should be vacated (FBOA, p 30) He admits the issue was not raised below but seeks an exception to the rule of issue preservation Id Appellant is not entitled to any relief

As a first matter, the trial judge correctly sentenced appellant in accord with the provisions of the statute Contrary to appellant's assertion on appeal, the sentence was not illegal as the trial judge specifically stated the sentence was subsumed in the life sentence The American Heritage Dictionary, 1355 (3rd ed 1993), defines "subsume" as a verb meaning, "To classify, include, or incorporate in a more comprehensive category or under

a general principal " In sum, the judge did not impose an active sentence Appellant's issue is without merit

As a second matter, there is no objection to the sentence (one would imagine because it is not illegal) Therefore, there is no issue preserved for the Court's review *Dunbar supra* Appellant's reliance on *State v Vick*, 384 S C 189, 201, 682 S E 2d 275, 281 (Ct App 2009), is misplaced for three reasons First, the sentence in *Vick* was incorrect 384 S C at 201, 682 S E 2d at 281 Second, the sentence for kidnapping, not gun possession *Id* Third, the decision in *Vick* is anomaly This Court recognized that such issues would generally not be addressed on appeal 384 S C at 202, 682 S E 2d at 281 ("The State correctly notes that our courts have held a challenge to sentencing must be raised at trial to be preserved for appellate review ") To continue to accept and consider sentencing issues that have not been preserved by proper objection would turn the exception into the rule – a rule which is contrary to state supreme court precedent *See State v Johnston*, 333 S C 459, 461-64, 510 S E 2d 423, 424-25 n 3 (1999)(relaxing procedural bar requirement in exceptional circumstance where real danger appellant would be incarcerated beyond sentence maximum due to sentencing error not preserved for review on direct appeal, but noting "Our holding today is not intended to disrupt our settled rules on issue preservation and PCR applications The facts here are unique and demand an expedited result ")

At any rate, even if the Court should review the sentence here, the sentence is not illegal as the trial judge ordered the sentence was subsumed in the life sentence *Accord State v Owens*, 346 S C 637, 666-67, 552 S E 2d 745, 760 (2001), *overruled on other grounds by State v Gentry*, 363 S C 93, 610 S E 2d 494 (2005)(vacating weapon sentence

where appellant sentenced to death but preserving conviction, noting if resentenced to less than death or life without parole, shall be sentenced to the additional five years) Again, appellant is not entitled to any relief

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed

Respectfully submitted,

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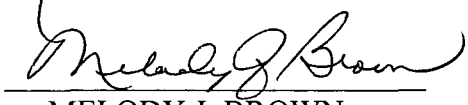
BY 
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August 8, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
G Edward Welmaker, Circuit Court Judge

The State,

Respondent,

vs

Clifford Wylie,

Appellant

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by the Appellant, Respondent proposes the following to be included in the Record on Appeal

(1) The following pages from the Trial Transcript

20-29,
73,
76-84,
102-109,
129,
130
137,
138,
140-142,
163,
165,
173-174,
200-209,
233,
251-253,
259,
266-281,

283,
288,
290-291,
331,
399-400,
425-429,
442,
471,
484-485,
489,
531-533,
548,
583-587,
640,
647-649

(2) November 25, 2009 Order for Evaluation (Criminal Responsibility/Ability to Conform),

(3) November 25, 2009 Order for Evaluation (Competency),

(4) Fax Letter, Dr Musick, Chief Psychologist (as referenced by the parties, Tr pp 77 and 79),

(5) Indictments

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal

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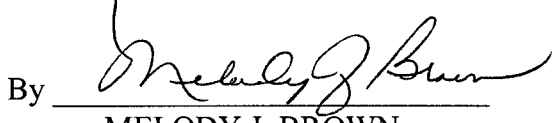
W WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

By 
MELODY J BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

August 8, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
G Edward Welmaker, Circuit Court Judge

The State,

Respondent,

vs

Clifford Wylie,

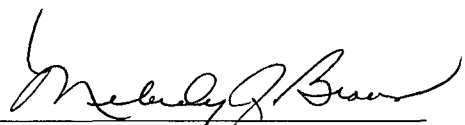
Appellant

PROOF OF SERVICE

I, Melody J Brown, Senior Assistant Attorney General, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record

Breen Richard Stevens, Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

This 8th day of June, 2011



MELODY J BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

August 8, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

Re The State v Clifford Wylie
Appeal from Pickens County

Dear Ms Gee

Enclosed please find the original ***Initial Brief of Respondent and Designation of Matter***, dated August 8, 2011, along with proof of service, in the above-referenced case

Sincerely,

Melody J Brown
Senior Assistant Attorney General

MJB/arb

Enclosures

cc Breen Richard Stevens, Appellate Defender

REMBERT C DENNIS BUILDING POST OFFICE BOX 11549 COLUMBIA SC 29211 1549 TELEPHONE 803 734 3970 FACSIMILE 803 253 6283

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
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July 25, 2011

Senior Assistant Attorney General Melody Brown
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re The State v Wylie, Clifford

Dear Counsel

The following Order has been endorsed on your Motion For Third Extension to Serve and File Respondent's Initial Brief in the above entitled case on appeal

"Granted

John Cannon Few,C J
For the Court

By s/ V Claire Allen
Deputy Clerk

For good cause shown, the request for an extension to serve and file the Initial Brief of Respondent and Designation of Matter on August 8, 2011 is granted Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/lb
cc Appellate Defender Breen Stevens

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

The State of South Carolina,

Respondent,

v

Clifford Wylie,

Appellant

MOTION FOR THIRD EXTENSION OF TIME TO FILE INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

Respondent, the State, moves this Court for an additional thirty (30) day extension of time in which to file the Initial Brief of Respondent and Designation of Matter This is Respondent's third request for an extension of time in which to file the brief In support of the request, undersigned counsel would respectfully show the Court

1 Undersigned counsel for Respondent has been scheduled for a number of state and federal matters in the last thirty (30) days, that include, but are not limited to, the following prepared for and presented argument in the Supreme Court of South Carolina in a non-capital murder direct appeal (*State v Commander*), prepared for and attended an appointment of counsel and scheduling hearing in Anderson County in a capital PCR matter (that will be scheduled again due to the judge's recusal at the hearing) (*Bixby v State*), prepared for and attended an in chambers argument on a proposed order in another capital PCR matter (*Mercer v State*), completed and filed a return and memorandum of law in support of a motion for summary judgment in a federal habeas action

(*Jerome McCrea*), completed and filed a return and memorandum of law in support of motion for summary judgment, and a response in opposition to motion to stay, in another federal habeas action (*William Blom*), prepared and filed a response in opposition to petitioner's motion for summary judgment in another federal habeas action (*Sherwood Adams*), completed and filed a petition for rehearing in this court in another non-capital murder direct appeal (*State v William Henry*), and, has been engaged in discovery review and discovery compliance in another capital post-conviction relief action (*Kenneth Simmons v State*) Additionally, counsel is currently completing the initial brief of respondent in another non-capital murder direct appeal to be filed in this Court today (*State v Jamel Good*), and, a return and memorandum of law in support of motion for summary judgment in another federal habeas action, again, to be filed today (*Dennis Ray Simpson*)

2 Due to her heavy case load, undersigned counsel for Respondent has not been able to complete the initial brief in this appeal

3 Further, pursuant to the March 18, 2009 Order of the Supreme Court of South Carolina, moving counsel's immediate supervisor has reviewed the motion, and agrees the extension request is warranted based on the foregoing

THEREFORE, undersigned counsel for Respondent respectfully requests an additional extension of thirty (30) days to complete the Initial Brief of Respondent and Designation of Matter

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

MELODY J BROWN
Senior Assistant Attorney General

BY _____
MELODY J BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

July 8, 2011
Columbia, South Carolina

I have reviewed and approved this request

_____
DONALD J ZELENKA
Assistant Deputy Attorney General

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By _____
~~(Clerk)~~ (Deputy Clerk)

FILED
7/22/11

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

The State of South Carolina,

Respondent,

v

Clifford Wylie,

Appellant

PROOF OF SERVICE

I, Melody J Brown, certify that I have served Respondent's *Third Motion for an Extension of Time* on counsel for Appellant, by depositing one copy of same in the United States mail, postage prepaid, to counsel for appellant, addressed as follows

Breen Richard Stevens, Appellate Defender
South Carolina Office of Indigent Defense
PO Box 11589
Columbia, South Carolina 29211-1589

This 8th day of July, 2011

MELODY J BROWN
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

July 8, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re The State v Clifford Wylie
Appeal from Pickens County

Dear Ms Gee

Enclosed please find the original and six (6) copies of the Respondent's *Motion for Third Extension of Time to file Initial brief of Respondent and Designation of Matter* dated July 8, 2011, together with a *Proof of Service* in the above-referenced matter

Thank you for your assistance in this matter Please call this office if you need any additional information

Sincerely,

Melody J Brown
Senior Assistant Attorney General

MJB/arb

Enclosures

cc Breen Richard Stevens, Appellate Defender

REMBERT C DENNIS BUILDING POST OFFICE BOX 11549 COLUMBIA SC 29211 1549 TELEPHONE 803 734 3970 FACSIMILE 803 253 6283

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
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July 1, 2011

Senior Assistant Attorney General Melody Brown
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re The State v Wylie, Clifford

Dear Counsel

The following Order has been endorsed on your Motion For Second Extension of Time to File Initial Brief of Respondent and Designation of Matter in the above entitled case on appeal

"Granted

John Cannon Few,C J
For the Court

By s/ V Claire Allen
Deputy Clerk

For good cause shown, the request for an extension to serve and file the Initial Brief of Respondent and Designation of Matter on July 8, 2011 is granted Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys

Very truly yours,

CLERK

TAG/lb
cc Appellate Defender Breen Stevens

2nd ext. Due 7/8/11

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

The State of South Carolina,

Respondent,

v

Clifford Wylie,

Appellant

MOTION FOR SECOND EXTENSION OF TIME TO FILE INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

Respondent, the State, moves this Court for an additional thirty (30) day extension of time in which to file the Initial Brief of Respondent and Designation of Matter This is Respondent's second request for an extension of time in which to file the brief In support of the request, undersigned counsel would respectfully show the Court

1 Undersigned counsel for Respondent has been scheduled for a number of state and federal matters in the last thirty (30) days, that include, but are not limited to, the following prepared for and presented oral argument in the Supreme Court of South Carolina in a four-issue capital case on direct appeal (*William Dickerson*), prepared for and presented argument in a three-issue non-capital murder direct appeal in the South Carolina Court of Appeals (*Aurelio Ottey*), completed and filed a return to application for post-conviction relief in a capital case and is preparing for appointment of counsel and scheduling hearing for the post-conviction relief action to be held Friday, June 10, 2011 in Anderson County (*Steven Bixby*), has been engaged in discovery review and discovery compliance in another capital post-conviction relief action (*Kenneth Simmons*), is currently preparing an Initial

Brief of Respondent due to be filed within the period requested herein in this Court (*Jamel Good*), and, has completed and filed an initial brief of respondent in a two issue non-capital murder direct appeal in the South Carolina Court of Appeals (*Derek Maner*)

2 Due to her heavy case load, undersigned counsel for Respondent has not been able, in a timely fashion, to complete the initial brief in this appeal

THEREFORE, undersigned counsel for Respondent respectfully requests an additional extension of thirty (30) days to complete the Initial Brief of Respondent and Designation of Matter

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

MELODY J BROWN
Senior Assistant Attorney General

BY _____
MELODY J BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

June 8, 2011
Columbia, South Carolina

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By V. Claire Allen
~~(Clerk)~~ (Deputy Clerk)

FILED

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

The State of South Carolina,

Respondent,

v

Clifford Wylie,

Appellant

PROOF OF SERVICE

I, Melody J Brown, certify that I have served Respondent's Motion for a Second Extension of Time on counsel for Appellant, by depositing one copy of same in the United States mail, postage prepaid, to counsel for appellant, addressed as follows

Breen Richard Stevens, Esquire
South Carolina Office of Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 8th day of June, 2011

MELODY J BROWN
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

June 8, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re The State v Clifford Wylie
Appeal from Pickens County

Dear Ms Gee

Enclosed please find the original and six (6) copies of the Respondents' *Motion for Second Extension of Time to file Initial brief of Respondent and Designation of Matter* dated June 8, 2011, together with a *Proof of Service* in the above-referenced matter

Thank you for your assistance in this matter Please call this office if you need any additional information

Sincerely,

Melody J Brown
Senior Assistant Attorney General

MJB/arb

cc Breen Richard Stevens, Appellate Defender

The South Carolina Court of Appeals

The State, Respondent

v

Clifford A Wylie, Appellant

The Honorable G Edward Welmaker
Pickens County
Trial Court Case No 2009-GS-39-00413
2009-GS-39-01406
2009-GS-39-01407

ORDER

The request for an extension to serve and file the Initial Brief of Respondent and Designation of Matter on June 8, 2011 is granted Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

JOHN CANNON FEW, CHIEF JUDGE

BY V. Clare Allen, Deputy
CLERK

Columbia, South Carolina
cc Appellate Defender Breen Stevens
Senior Assistant Attorney General Melody Brown

FILED
5/18/11

ALAN WILSON
ATTORNEY GENERAL

1st ext
Due 6/8/11

May 9, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re The State v Clifford Wylie
Appeal from Pickens County

Dear Ms Gee

The Initial Brief of Respondent in the above-entitled action is due to be filed and served today, May 9, 2011 Due to my heavy caseload, I will not be able to complete the Initial Brief in a timely fashion For this reason, I respectfully request an extension of thirty (30) days within which to file the Initial Brief

By copy of this letter I am informing opposing counsel of this request I hank you for your consideration

Sincerely,

Melody J Brown
Senior Assistant Attorney General

/MJB

cc Breen Richard Stevens, Appellate Defender

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

INITIAL BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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Cases

Statutes

Rules

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STATEMENT OF ISSUES ON APPEAL

I Whether it was error to deny a continuance seeking to allow the court ordered mental health examination reports regarding Wylie's competency and criminal responsibility to be furnished by the Department of Mental Health before trial?

II Whether Wylie's Sixth Amendment Confrontation Clause right was violated when the autopsy report prepared by the doctor performing the autopsy was used in the testimony of a different doctor at trial?

III Whether the psychologist's testimony regarding statements of the Child was impermissible hearsay, and violated Wylie's Sixth Amendment Confrontation Clause right, when the Child was an available witness but uncalled by the State?

IV Whether the trial court imposed an illegal sentence upon Wylie by sentencing him to five (5) years for the charge of possession of a weapon during the commission of a violent crime when he was already sentenced to LWOP for the charge of murder?

STATEMENT OF THE CASE

On September 15, 2009, the Pickens County Grand Jury indicted Clifford Austin Wylie for the offenses of unlawful conduct towards a child, murder, and possession of a weapon during the commission of a violent crime On January 15, 19, and 20, 2010, Wylie, represented by John DeJong, proceeded to trial before the Honorable G Edward Welmaker and a jury Representing the State were Judith Munson, and Jenny Hamaker The jury found Wylie guilty of all three charges, and the trial court sentenced Wylie to ten (10) years imprisonment for unlawful conduct towards a child, life imprisonment without possibility of parole (LWOP) for murder, to run consecutively to the sentence for unlawful conduct towards a child, and five (5) years imprisonment for possession of a weapon during the commission of a violent crime to run concurrent with the sentence for murder

STATEMENT OF THE FACTS

Shortly after 9 00 p m on February 13, 2009, Clifford Wylie was arrested in his home for the murder of his wife (Wife) (Tr p 198, ln 2, p 205, ln 8-13) Wylie's son (Child) was in the next room inside the home when the single shot was fired into the shoulder of Wife (Tr p 207, ln 6-17, p 269, ln 6-7)

An autopsy of Wife was conducted the next day by Dr Michael Ward, Pickens County Chief Medical Examiner (Tr p 268, ln 9-11) Also present at the autopsy was Officer James Maw, evidence custodian for the Clemson Police Department (Tr p 259, ln 5-13)

At a pretrial conference on November 25, 2009, Judge Welmaker signed orders to have Wylie evaluated by the South Carolina Department of Mental Health (DMH) regarding issues of competency to stand trial, and criminal responsibility at the time of the alleged incident (Tr p 76, ln 9-12, App 1 and 2) Wylie was later evaluated by Dr Cross at DMH (Tr p 76, ln 20-21, p 77, ln 13-14) Further, on November 30, 2009, Wylie served the State with his notice of intent to use insanity as his defense (Tr p 76, ln 14-15)

However, the mental evaluation reports were never submitted by Dr Cross before Wylie's trial on January 15, 2010 (Tr p 76, ln 19-21) Moreover, Dr Cross was on vacation at the time the State elected to call Wylie's case for trial (Tr p 75, ln 1-5) The only information from DMH was a letter sent via facsimile the day before trial to the State by Dr Musick, Dr Cross' supervisor who was not the evaluating doctor, indicating Wylie was competent (Tr p 76, ln 22 – p 77, ln 1-3)

After hearing arguments by counsel regarding this matter on the first day of trial, the court conducted an impromptu competency hearing without the DMH reports (Tr p 81, ln

8 – p 85, ln 4) The trial court acknowledged it previously ordered Wylie's mental evaluations for both competency and criminal responsibility, and was "somewhat distressed that the Department of Mental Health didn't fulfill its duty," to provide the reports (Tr p 83, ln 19 – p 84, ln 1-3) The trial court concluded as follows "[B]ased on what I have now before me, I don't think there's any issue as to the competency of Mr Wylie as far as standing trial or of his responsibility at the time of the alleged offense" (Tr p 84, ln 12-16) Wylie's motion for continuance based on lack of the court ordered mental evaluation reports was denied (Tr p 84, ln 17 – p 85, ln 4)

During the trial, the State called Dr James Fulcher, Pickens County Deputy Medical Examiner Dr Fulcher neither performed the autopsy on Wife, nor was he present for it (Tr p 274, ln 7-11) The primary resource Dr Fulcher admittedly utilized was the autopsy report prepared by Dr Ward (Tr p 274, ln 12-14) Dr Ward was also on vacation at the time the State elected to call the case for trial and was due back during the week of trial [1] (Tr p 102, ln 18-22) Over Wylie's objection, Dr Fulcher was permitted to testify regarding the cause of Wife's death based primarily upon the autopsy report (Tr p 103, ln 4 – p 104, ln 1-21, p 140, ln 8-10, p 262, ln 15-21)

Psychologist Hope Threadgill was also a witness for the State Before allowing Dr Threadgill to testify, the trial court gave an admonition to the State that "the witness not get into any of the factual allegations about this particular incident" (Tr p 429, ln 9-12) On direct examination, over the objections of Wylie, Dr Threadgill was permitted to testify as to what the Child said to her (Tr p 426, ln 3-24, p 532, ln 6-17, p 586, ln 20 – p 587,

[1] The State indicated to the defense that Dr Ward was expected to be available by either Wednesday or Thursday January 20 or 21 2009 (Tr ln p 102 17 22) The trial occurred from Friday January 15 2009 to Wednesday January 20 2009 (Tr 1)

ln 2) Specifically, the following question and answer was admitted over Wylie's objections

Q And you started to say one of the first things he told you
A One of the first things he said to me is he believed this to be his fault

(Tr p 533, ln 2-5) Additionally, Dr Threadgill later stated the following on cross examination "He was actually in the home He heard the gunshot He heard his parents fighting He heard his mother talk on the phone to the police and say he has a gun Those are facts that I'm getting from the child " (Tr 538, ln 11-15)

The jury returned a verdict of guilty on all three charges (Tr p 640, ln 19) Wylie was sentenced to 10 years for unlawful conduct towards a child, LWOP for murder, to run consecutively to the sentence for unlawful conduct towards a child, and 5 years for possession of a weapon during the commission of a violent crime, to run concurrent with the sentence for murder (Tr p 649, ln 1-10) This appeal follows

ARGUMENT

I The trial court erred by denying a continuance seeking to permit the court ordered mental health examination reports regarding Wylie's competency and criminal responsibility to be furnished by the Department of Mental Health before trial

The trial court abused its discretion[2] by violating Section 44-23-430 of the South Carolina Code (West, Westlaw current through End of 2010 Reg Sess), as well as Wylie's due process right to fair trial, when it denied Wylie's motion for continuance and forced his trial forward without the court ordered mental examination reports regarding his competency at the time of trial, and his criminal responsibility at the time of the incident (Tr p 76-85) Because a defendant's competency to stand trial and his criminal responsibility "are separate mental health issues," each will be addressed separately Monahan v State, 365 S C 130, 133, 616 S E 2d 422, 423 (2005)

A Once the trial court ordered Wylie to submit to a mental examination to determine his competency to stand trial, the plain and unambiguous language of the relevant statutes mandate that the trial court perform a competency hearing "upon receiving the report" from the DMH designated examiners

The trial court's impromptu voir dire of Wylie to determine his competency violated the plain and unambiguous language of Section 44-23-430, as well as Wylie's "right to a fair trial by a due process determination of his competency and fitness to stand trial," because it was conducted well after a mental health examination was ordered, yet without

[2] See State v Patterson 324 S C 5 12 482 S E 2d 760 763 (1997) (A trial judge s refusal of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion) State v Colden 372 S C 428 435 641 S E 2d 912 917 (Ct App 2007) ('An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law)

benefit of the statutorily mandated written report State v Blair, 275 S C 529, 533, 273 S E 2d 536, 538 (1981)

The question of whether it is necessary to order a competency examination is within the discretion of the trial court State v Locklair, 341 S C 352, 364, 535 S E 2d 420, 426 (2000), State v Buchanan, 302 S C 83, 85, 394 S E 2d 1 (Ct App 1990) Pursuant to Section 44-23-410 of the South Carolina Code (West, Westlaw current through End of 2010 Reg Sess), "circuit court judges have the inherent duty to order a competency examination if there is reason to believe that the person charged with the criminal offense is not fit to stand trial "[3] Locklair, 341 S C at 363, 535 S E 2d at 426 (emphasis added)

Once the trial court exercises its discretion to order such an examination, a written report must be made for the court by the designated examiners at DMH S C Code Ann § 44-23-420 (West, Westlaw current through End of 2010 Reg Sess) ("Within ten days of examination , the designated examiners shall make a written report to the court ") As such, the designated examiners are required to prepare a written report for the court regarding the person's competency issues, as well as criminal responsibility issues if so ordered by the court Id Finally, "[u]pon receiving the report of the designated examiners," the court itself is tasked with the duty of setting a hearing date, of which it must notify the

---

[3] Section 44 23 410 provides in pertinent part as follows

(A) Whenever a judge of the circuit court or family court has reason to believe that a person on trial before him charged with the commission of a criminal offense or civil contempt is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity the judge shall

(1) order examination of the person by two examiners designated by the Department of Mental Health

S C Code Ann § 44 23 410 (West Westlaw current through End of 2010 Reg Sess) (emphasis added)

person examined and his counsel S C Code Ann § 44-23-430 (West, Westlaw current through End of 2010 Reg Sess) ("Upon receiving the report of the designated examiners the court shall set a date for and notify the person and his counsel of a hearing on the issue of his fitness to stand trial ") If the accused is deemed fit to stand trial after this hearing, then the trial court shall resume the criminal proceedings Id In short, once the trial court orders a competency evaluation pursuant to Section 44-23-410, the clear and unambiguous language of the statutory scheme indicates that the court may resume criminal proceedings only after the statutorily mandated procedures are completed—which specifically includes receipt of the report from the designated examiners prior to conducting the competency hearing [4]

Additionally, the statutory competency evaluation scheme utilizes the word "shall," indicating the procedures are mandatory See Pittman, 373 S C at 561, 647 S E 2d at 161 This understanding is supported by South Carolina common law In State v Blair, 275 S C 529, 532-33, 273 S E 2d 536, 537-38 (1981), the South Carolina Supreme Court examined the use of this term as it applies to the competency hearing statute After reasoning that "a statutory provision is generally regarded as mandatory where the power or duty to which it relates is for the security or protection of private rights," the Blair Court concluded the statute pertaining to competency hearings "is designed to protect the accused's right to a fair trial by a due process determination of his competency and fitness to stand trial " Id 275 S C at 533, 273 S E 2d at 538 Accordingly, once a trial court exercises its discretion to

[4] All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used State v Pittman 373 S C 527 561 647 S E 2d 144 161 (2007) ' Where the statute s language is plain and unambiguous and conveys a clear and definite meaning the rules of statutory interpretation are not needed and the court has no right to impose another meaning Id Therefore

order an evaluation, the plain and unambiguous language of the statutory scheme provided by the General Assembly mandates the following (1) that the accused be examined, (2) that the designated examiners generate a written report, (3) that, upon receipt of the written report, the court schedule and perform the competency hearing, and (4) that the criminal proceedings against the accused resume if he is found to be competent after the hearing In this way, the accused's right to a fair trial by a due process determination of his competency is protected Id

In the case at bar, one of the orders issued by the trial court on November 25, 2009, was for Wylie to undergo mental evaluations to determine his competency to stand trial (Tr p 76, ln 9-12, App 1) This order reflects the fact that the trial court had reason to believe a competency evaluation was necessary under Section 44-23-410 See, e g , Buchanan, 302 S C at 86, 394 S E 2d at 2 Additionally, the State admitted that it consented to Wylie's court ordered evaluation based on representations that he exhibited paranoia (Tr p 19, ln 25 – p 80, ln 1-4)

However, on the day the State called the case to trial, the court had not yet received the written report from the designated examiners at DMH who performed Wylie's mental examination (Tr p 76, ln 19-21) The only item produced to the trial court regarding the matter was a facsimile sent to the State by a supervisor at DMH ostensibly sent because the examining doctor was on vacation (Tr p 76, ln 22-25 – p 77, ln 1-3) This informal document, signed and sent by a non-treating examiner to the State rather than the court, is not the full written report required by law to be furnished to the trial court prior to the

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under the plain and unambiguous language of the statutes the court must follow the procedures established as intended by the General Assembly

defendant's competency hearing See S C Code Ann § 44-23-410, -420, and -430 (West, Westlaw current through End of 2010 Reg Sess)

Moreover, the State openly advocated that the trial go forward without the report from DMH in spite of its previous consent to the court ordered evaluations (Tr p 80, ln 20-25 – p 81, ln 1-7) The State placated the trial court with an erroneous expectation, saying "the report itself will be here, so I don't see that is an issue," yet, in almost the same breath, it opined there was no need to delay the trial because "there is absolutely nothing for this court to examine as to whether or not [Wylie] is competent or that he has psychiatric problems " (Tr p 79, ln 24-25, p 80, ln 24-25 – p 81, ln 1-2) In this way, the State exploited the absence of the DMH written reports by pressuring the court into going forward with Wylie's competency hearing and trial without benefit of the requisite information

Despite the trial court's concern that it "raised the issue about timeliness of a report and was assured that it would be here," and that it was "somewhat distressed that the Department of Mental Health didn't fulfill its duty," it still performed an impromptu competency hearing of Wylie without the written report mandated by law at the urging of the State, and ultimately declared Wylie both competent to stand trial and criminally responsible at the time of the alleged incident (Tr p 83, ln 21-25, p 81, ln 8 – p 83, ln 18, p 84, ln 12-16) Such action was in direct contradiction to the plain and unambiguous language of Section 44-23-430, and in violation of Wylie's "right to a fair trial by a due process determination of his competency and fitness to stand trial " Blair, 275 S C at 533, 273 S E 2d at 538 Accordingly, Wylie requests reversal of his convictions, and a new trial

B Because Wylie's only defense to the charges was insanity, forcing him to trial without benefit of the court ordered DMH report regarding criminal responsibility denied him his right to a fair trial

Wylie was denied sufficient opportunity to develop his only defense, insanity, when the trial court denied his efforts, through a motion for continuance, to obtain the DMH report regarding his criminal responsibility at the time of the incident (Tr p 84, ln 12 – p 85, ln 4) See United States v Walker, 537 F 2d 1192, 1195 (4th Cir 1976)

"The trial judge has the discretion to order a mental health evaluation where the defendant indicates an intent to introduce evidence at trial that he lacked criminal responsibility" Monahan, 365 S C at 133, 616 S E 2d at 424 The trial court's order of November 25, 2009, reflects the fact that Wylie's mental condition may be made an issue at trial—an impression which was confirmed when Wylie filed his notice of intent to use insanity as his defense five days later See, e g , Buchanan, 302 S C at 86, 394 S E 2d at 2

"The test for criminal responsibility relates to the time of the alleged offense, while competency to stand trial relates to the time the defendant is before the court for trial" Monahan, 365 S C at 133, 616 S E 2d at 423 Further, "an inquiry into the possible lack of criminal responsibility at the time of commission of the offense involves a complex evaluation of his total personality at a previous point in time It requires that the expert have a substantial opportunity to observe the defendant and his mental process" Walker, 537 F 2d at 1195 (emphasis added) Accordingly, without the report from the DMH expert who had "a substantial opportunity to observe [Wylie] and his mental process," the trial court lacked an adequate basis to perform such "a complex evaluation of Wylie's total personality

at a previous point in time" for determining whether he was criminally responsible at the time of the incident Id at 1195-96

The United States Court of Appeals for the Fourth Circuit addressed the issue of whether the appellant was afforded sufficient opportunity to develop a defense of lack of criminal responsibility in United States v Walker, 537 F 2d 1192 (4th Cir 1976) In Walker, as here, the appellant sought and received a pretrial court ordered psychiatric examination to determine both competency to stand trial, as well as criminal responsibility at the time of the alleged offense Id at 1193-94 The examination occurred one week before trial, and the report was provided to the court thereafter, however, the report "failed to state any conclusion as to Walker's mental capacity to commit the offense," and was provided to Walker's attorney only a "relatively short time before trial" Id at 1194 The morning of trial, Walker's motion for a continuance was denied, and the case proceeded to trial "where no insanity defense was raised because counsel did not have sufficient information upon which to base such a defense" Id at 1194

The Walker court concluded that the examination report "had not met the requirements of the district court's order that the psychiatrist determine Walker's mental capacity to commit the crime" Id Thus, "Walker's right to a fair trial was violated because his counsel was deprived of an adequate opportunity to determine the existence of a substantial insanity defense" Id Accordingly, the trial "court erred in refusing to grant a continuance for the purpose of permitting the defense the opportunity for further investigation of Walker's mental capacity to commit the offense" Id at 1196

In the present case, as in Walker, the trial court ordered pretrial mental evaluations of Wylie for both competency and criminal responsibility (Tr p 76, ln 9-12) Also, no

mental evaluation report touching the issue of criminal responsibility was provided by the trial date despite the fact that such a report was previously ordered by the court (Tr p 77, ln 13-14) Moreover, even though Wylie filed his notice to use insanity as his defense (tr p 76, ln 14-15), the fact that Wylie did not indicate during the trial that he may have been insane at the time of the offense is "unpersuasive as we cannot speculate on what possible avenues of defense an adequate examination might have revealed " Id

In sum, here, as in Walker, "[t]he procedures followed failed to provide either defense counsel or the court with an adequate basis for determining whether (the defendant) ultimately should be regarded and treated as incorrigibly criminal or desperately ill " Id at 1195-96 (emphasis added) Accordingly, the trial court erred in denying Wylie's motion for continuance, Wylie's right to a fair trial was violated because his counsel was deprived of an adequate opportunity to determine the existence of a substantial insanity defense—without which, as in Walker, he had no meritorious defense and was thus prejudiced by the court's erroneous decision Wylie therefore requests reversal of his convictions, and a new trial granted [5]

[5] Wylie asserts that such relief is appropriate because ultimate acceptance or refusal of an insanity defense is a question for the jury See, e g State v Milian Hernandez 287 S C 183 185 336 S E 2d 476 477 (1985) (stating when evidence of insanity is introduced the presumption that the defendant was sane ' disappears and it is incumbent on the State to present evidence from which the jury could find the defendant sane) Accordingly a new trial is necessary to preserve Wylie s fundamental rights to a fair trial by a jury

II Wylie's Sixth Amendment Confrontation Clause right was violated when the autopsy report produced by Dr Ward was used in the testimony of a different doctor at trial

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him" U S Const amend, VI "The right to confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial" State v Gillian, 360 S C 433, 449, 602 S E 2d 62, 71 (Ct App 2004) "[I]t is a procedural rather than substantive guarantee It commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination" Crawford v Washington, 541 U S 36, 61, 124 S Ct 1354, 1370 (2004) Thus, a witness' testimony against the accused is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination Id 541 at 54, 124 S Ct at 1365-66

Included in the "core class" of testimonial statements covered by the Sixth Amendment are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" Melendez-Diaz v Massachusetts, 129 S Ct 2527, 2531 (2009) Although prior South Carolina jurisprudence specifically excluded autopsy reports from classification as testimonial statements by virtue of their categorization as a business or public record hearsay

exception,[6] recent interpretation of the Confrontation Clause by the United States Supreme Court calls such per se classification of autopsy reports into serious doubt [7]

Over Wylie's objection, Dr Fulcher was permitted to testify regarding the cause of Wife's death based primarily upon the autopsy report prepared by Dr Ward (Tr p 103, ln 4 – p 104, ln 1-21, p 140, ln 8-10, p 262, ln 15-21) Therefore, Wylie's Sixth Amendment rights under the Confrontation Clause were violated and his right to a fair trial prejudiced because (1) Dr Ward's autopsy report should properly be considered testimonial rather than nontestimonial, (2) Dr Fulcher not only relied upon it in formulating his opinion, but also referred to and read from it at trial (tr p 262, ln 13-21, p 268, ln 17 – p 270, ln 1, 24-25, p 277, ln 3-11, p 279, ln 6-11), and (3) this testimony explained how a gunshot to the shoulder killed Ms Wyile due to the internal injuries in her chest—a position relied upon by the State in its closing argument to the jury (tr p 601, ln 5-6, 12-16)

A As clarified by Melendez-Diaz, the autopsy report by Dr Ward should be deemed testimonial in nature

The autopsy report in Wylie's case was created by Dr Ward "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" As such, it is testimonial in nature, regardless of any potential designation as a business or public record document

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[6] See, e g State v Cutro 365 S C 366 378 618 S E 2d 890 896 (2005) (indicating an autopsy report (1) is a public record (2) public records are much like business records and thus (3) it is not testimonial under Crawford) This case law was the primary basis of the State s argument to the trial court for admission of Dr Fulcher s testimony and formed the basis of the court s subsequent ruling (Tr p 106 ln 1 – p 107 ln 4 p 140 ln 6 10) As discussed below this was error

[7] See Melendez Diaz v Massachusetts, 129 S Ct 2527 (2009)

The Melendez-Diaz Court specifically listed autopsies as a forensic test/analysis that cannot be repeated[8] when it stated that "there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test [9] But the Constitution guarantees one way confrontation We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available " Id at 2536 Although there may have been be alternate ways to challenge or verify the results of a forensic test or analysis, which according to the Melendez-Diaz Court includes autopsies, the Constitution guaranteed Wylie the right to challenge the results by confrontation—i e Wylie had the right to subject Dr Ward to the crucible of cross-examination, as the autopsy report was the result of his forensic examination of Wife's remains (Tr p 274, ln 7-11) This right was denied when the trial court permitted Dr Fulcher to testify from Dr Ward's autopsy report

Moreover, the Melendez-Diaz Court clarified the misunderstood relationship between "business-and-official-records hearsay exceptions" and the Confrontation Clause Id at 2539 As stated by the Court, "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial " Id at 2539-40 (emphasis added) In short, just because a document may normally fall within a hearsay exception does not automatically remove it from the inquiry regarding its testimonial nature the court must still examine whether it falls within the "core class" of testimonial statements,

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[8] Id at 2536 n 5

[9] An autopsy performed by a forensic pathologist like other forensic tests/analyses 'requires the exercise of judgment and presents a risk of error that might be explored on cross examination Id at 2537 As a result

which necessarily includes statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial "[10] Id at 2531

In the case at bar, Dr Ward's autopsy report squarely fits within this "core class" of testimonial statements barred by Crawford Dr Ward conducted the autopsy of Wife on February 14, 2009 (Tr 268, ln 9-11) Dr Ward was not by accompanied by the Deputy Medical Examiner during the autopsy, but by law enforcement, it was attended and witnessed by Officer James Maw, the evidence custodian for the Clemson City Police Department, indicating law enforcement had a direct interest in the results of the autopsy—one which involved a gunshot resulting in death (Tr p 259, ln 1-13) Additionally, a simple visual inspection of the body would reveal that it had a gunshot wound in the back of the shoulder that was readily identified even by Officer Maw—a non-doctor (Tr p 259, ln 19-21) Therefore, there can be no doubt that Dr Ward was aware his report "would be available for use at a later trial " Crawford, 541 U S at 52

Further, the fact that in homicides Dr Ward had another doctor review his report after he completed it also indicates his awareness that the report is likely to be used at trial (Tr p 263, ln 4-6), it marks a formality characteristic of documents to be introduced in court United States v Williams, 740 F Supp 2d 4, 7 (D D C 2010) (citing Melendez-

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'there is little reason to believe that confrontation will be useless in testing analysts honesty proficiency and methodology—the features that are commonly the focus in the cross examination of experts Id at 2538

[10] The United States Supreme Court s subsequent clarification between hearsay exceptions and the Confrontation Clause coupled with the Court s interpretation of autopsies as forensic analyses effectively overrules prior South Carolina jurisprudence interpreting and applying the Confrontation Clause to autopsy reports See, e g State v Cutro 365 S C 366 618 S E 2d 890 (2005) Simply stated it is a misapplication of law to automatically classify an autopsy report as a nontestimonial document solely by virtue of its categorization as a traditional hearsay exception

Diaz, 129 S Ct at 2543) Accordingly, the autopsy report completed by Dr Ward qualifies as a testimonial statement under Crawford and Melendez-Diaz, regardless of any categorization as a business document or public record hearsay exception, because it was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" Melendez-Diaz, 129 S Ct at 2531

B The testimonial nature of the autopsy report is not changed by qualifying a different witness as an expert, therefore, Wylie's Sixth Amendment Confrontation Clause right was violated when Dr Fulcher testified from the autopsy report

Although Dr Fulcher was qualified as an expert witness under Rule 702, SCRE, his repeated references to and recitation of statements in the autopsy report effectively provided an end run around Crawford in the guise of expert opinion

"[T]he question when applying Crawford to expert testimony is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay" United States v Ayala, 601 F 3d 256, 275 (4th Cir 2010) (internal quotations omitted) Therefore, although a statement barred by Crawford may not itself be introduced into evidence, an expert may use such evidence to formulate his own opinions pursuant to Rule 703, SCRE, "as long he is applying his training and experience to the sources before him and reaching an independent judgment," however "[a]llowing a witness to simply parrot out-of-court statements directly to the jury in the guise of expert opinion

would provide an end run around Crawford " United States v Johnson, 587 F 3d 625, 635 (4th Cir 2009) [11]

In the present case, although Dr Fulcher was qualified as an expert pursuant to Rule 702, SCRCE, he nonetheless parroted portions of Dr Ward's report Not only did Dr Fulcher make direct reference to Dr Ward's autopsy report, but he also read directly from the document in answering questions throughout his testimony on both direct and cross-examination after his testimony was ruled admissible (Tr p 262, ln 13-21, p 268, ln 17 – p 270, ln 1, p 277, ln 3-11, p 279, ln 6-11)

Dr Fulcher's impermissible references and recitations extended even to descriptions of photos from Dr Ward's autopsy, for example, when asked whether he could see anything in a picture from the autopsy report regarding the gunshot wound, Dr Fulcher replied, "I do I see an abrasion collar here, which my partner has, uh, described " (Tr p 270, ln 24-25) He then continued to describe the wound Additionally, even though Dr Fulcher previously indicated he used photos from Dr Ward's autopsy and from the crime scene in formulating his opinion (tr p 268, ln 17-19), he affirmed on cross-examination that what he was going on was basically Dr Ward's report (tr p 274, ln 12-14)

In sum, Dr Fulcher acted as a mere conduit for Dr Ward's autopsy report—a document that was testimonial in nature, this parroting of out-of-court statements extended to descriptions of autopsy photographs as well, and constituted an end run around Crawford Accordingly, Wylie's Sixth Amendment Confrontation Clause right was violated

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[11] Other jurisdictions have applied the same or similar test when confronted with the issue of a medical expert at trial relying upon an autopsy report produced by a different doctor See, e g Williams 740 F Supp 2d at 9 10 Commonwealth v Mercado 922 N E 2d 140 151 (Mass 2010) Commonwealth v Avila, 912 N E 2d 1014 1029 (Mass 2009), State v Walkup 290 S W 3d 764 767 (Mo Ct App 2009) State v Bell 274 S W 3d 592, 595 (Mo Ct App 2009)

C The violation of Wylie's Sixth Amendment Confrontation Clause right was not harmless beyond a reasonable doubt, as it could reasonably have affected the result of trial

Dr Fulcher's testimony explained the cause of death to the jury, and was relied upon by the State in its closing argument As such, the error could have reasonably affected the result of the trial, and cannot be deemed harmless beyond a reasonable doubt

When a violation of the defendant's Sixth Amendment right to confront the witness occurs, "the appellate court 'must determine whether the error was harmless beyond a reasonable doubt '" State v Mitchell, 378 S C 305, 316, 662 S E 2d 493, 499 (Ct App 2008) (quoting State v Davis, 371 S C 170, 181, 638 S E 2d 57, 63 (2006)) Harmless beyond a reasonable doubt means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt " State v Gillian, 360 S C 433, 455, 602 S E 2d 62, 74 (Ct App 2004) Thus, error is harmless "where it could not reasonably have affected the result of the trial " Id

In Wylie's case, Dr Fulcher's testimony essentially explained how a person ostensibly shot in the shoulder—not a vital organ—died due to the specific internal injuries detailed in Dr Ward's autopsy report His testimony was important enough to obtain Wylie's conviction that the State specifically mentioned it in its closing argument to the jury (Tr p 601, ln 12-16) Therefore, the error could reasonably have affected the result of the trial, the error was not harmless beyond a reasonable doubt Accordingly, Wylie requests reversal of his convictions, and a new trial granted

III Psychologist Hope Threadgill's recitation of the Child's statements was both impermissible hearsay and a violation of the Confrontation Clause when the Child was an available witness, yet not called by the State

Psychologist[12] Hope Threadgill's testimony regarding the Child's statements to her violated the rules governing hearsay, as well as the Sixth Amendment Confrontation Clause Moreover, the substance of these statements was devastating as to the charges of both unlawful conduct toward a child, and murder As such, the statements were not only impermissible, but they were also prejudicial and reasonably affected the result of the trial

A Admission of Dr Threadgill's testimony regarding the Child's statements was improper hearsay

The trial court abused its discretion by permitting the Child's psychologist to make several impermissible hearsay statements in her testimony [13] "'Hearsay' is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted" Rule 801(c), SCRE Generally, hearsay is inadmissible Rule 802, SCRE

The State directly and intentionally elicited the Child's statements from Dr Threadgill despite giving assurances it would not Out of the presence of the jury, the State said the following to both the trial court and defense counsel "I intend to ask [Dr Threadgill] what her qualifications are I intend to offer her to the Court as an expert in the field of post-traumatic stress disorder, I intend to ask her what that is and in her opinion,

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[12] Dr Threadgill is a non medical doctor qualified as a post traumatic stress disorder expert at trial (Tr 523 ln 24 – p 524 ln 1 p 526 ln 19 21)

does [the Child] have it? And that's it." (Tr p 428, ln 8-13) However, these assurances rang hollow when, on direct examination, the following colloquy between the State and Dr Threadgill occurred after the court overruled Wylie's objection

> Q - Okay, and you started to say one of the first things [the Child] told you
>
> A - One of the first things he said to me is he believed this to be his fault
>
> [The State] Nothing further at this time, Your Honor

(Tr p 532, ln 6-17, p 533, ln 2-7) This hearsay statement was offered to prove the truth of the matter asserted, without it, the State would have had to rely upon mere observations made by Dr Threadgill to meet the element of mental harm to the Child rather than a forbidden statement which, only if taken as true, would help prove the offense As such, the statement, "he believed this to be his fault" was offered to prove just that, that the Child believed the shooting of his mother was his fault

Additionally, Dr Threadgill continued to produce hearsay statements of the Child after the trial court overruled Wylie's original objections For example, despite the trial court's prior admonition to the State "to instruct the witness not to get into any of the factual allegations about the incident" (tr p 429, ln 9-12), Dr Threadgill responded as follows on cross-examination

> Q - Okay Now, you have this [criterion] as set forth in the DSM [Diagnostic Statistical Manual] that using that

[13] State v Garner 389 S C 61 65 697 S E 2d 615 617 (Ct App 2010) ("Evidentiary rulings are within the sound discretion of the trial court and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant)

> [criterion] to meet [criterion] is basically subjective with a person looking at the person and that [criterion]
>
> A - It would not be subjective if there are facts that are present And what we're looking at is that there were facts present [The Child] was actually in the home He heard gunshots He heard his parents fighting He heard his mother talk on the phone to the police and say he has a gun Those are the facts that I'm getting from the child

(Tr p 538, ln 11-15) These are precisely the types of prejudicial statements the trial court cautioned against Yet, once the trial court permitted Dr Threadgill to use the Child's hearsay statements over Wylie's objections made both preliminarily and during direct examination, the fetters were improperly removed and she blatantly asserted the hearsay statements going directly to the factual allegations of the incident Moreover, Dr Threadgill's testimony validated the concern expressed by Wylie's trial counsel "it is a somewhat veiled attempt of getting the minor child to testify via this psychologist as to the allegation of the murder," without having opportunity to cross-examine the Child (Tr p 426, ln 7-11) Such testimony was improper, inflammatory, and impermissible

Not only was admission of these statements error, but it was also highly prejudicial to Wylie's case "Whenever hearsay which has some probative value as to a material fact is erroneously admitted into evidence, prejudice is presumed" Orangeburg County Dept of Soc Servs v Schlins, 291 S C 477, 479, 354 S E 2d 388, 390 (1987) As indicated above, the hearsay statements in question were probative to prove material facts going to the elements of the offenses for which Wylie was charged As such, prejudice is presumed

Additionally, the State's reliance upon the Child's statements through Dr Threadgill to prove its case is made abundantly clear by its closing argument "An eight-year old kid's

mother dies Who does he want besides his mother? His father His father is the one that killed his mother You heard the therapist He thinks it's his fault How much more unlawful can the conduct be of this man towards his eight-year old son?" (Tr p 605, ln 5-9) (emphasis added) Thus, the error permitting the Child's hearsay statements prejudiced Wylie and likely affected the outcome of the trial Wylie therefore requests his convictions be reversed, and a new trial granted

B Dr Threadgill's recitation of the Child's statements violated Wylie's rights under Crawford

Dr Threadgill's testimony as to the Child's out-of-court statements also violates Wylie's Sixth Amendment rights under the Confrontation Clause "A witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had prior opportunity for cross-examination" Melendez-Diaz, 129 S Ct at 2531 (citing Crawford, 541 U S at 54) A declarant is a witness within the meaning of the Sixth Amendment if he bears testimony against the defendant Crawford, 541 U S at 51

First, the statements were testimonial in that they "were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial" Crawford, 541 U S at 52 This much is evident based upon the facts surrounding the Child's statements in this case, which include the following (1) the Child began making the statements to Dr Threadgill within a month of the incident and his father's arrest (Tr p 529, ln 16), (2) the Child was the only other person, besides his parents, at the Wylie residence when the incident occurred (Tr p 207, ln 6-17), (3) the

Child's therapy sessions stemmed directly from his personal experience and observations at the incident (Tr p 529, ln 9-13, p 531, ln 14-15), (4) the statements by the Child to Dr Threadgill directly addressed the events of the incident (Tr p 533, ln 4-5, p 538, ln 11-15), and (5) the State was clearly aware of these statements made by the Child, and utilized the therapist as a key witness in the case Therefore, the statements were testimonial because they "were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial" Crawford, 541 U S at 52

Second, the Child was available as a witness, yet the State chose not to call him (Tr 428, ln 1-2), see Rule 804(a)(1)-(5), SCRE (listing the five limited circumstances where a witness is unavailable) Finally, Wylie had no prior opportunity to cross-examine the Child regarding his statements (Tr p 426, ln 7-11) Thus, permitting Dr Threadgill to act as a conduit for the Child's statements was error, as the statements constituted inadmissible testimonial evidence Johnson, 587 F 3d at 635 (cautioning trial courts "to recognize the risk that a particular expert might become nothing more than a mere transmitter of testimonial hearsay and exercise their discretion in a manner to avoid such abuses")

Moreover, the error in admitting the statements was not harmless beyond a reasonable doubt Mitchell, 378 S C at 316, 662 S E 2d at 499 As previously indicated, the State specifically referred to Dr Threadgill's testimony regarding the Child's statements in its closing argument Additionally, the Child's statements, transmitted by Dr Threadgill, provided impactful evidence of what occurred at the Wylie residence as experienced from the perspective of a victim who was inside the home (Tr p 538, ln 11-15) Therefore, the

error was not harmless beyond a reasonable doubt because it could reasonably have affected the result of the trial Gillian, 360 S C at 455, 602 S E 2d at 74 Accordingly, Wylie requests reversal of his convictions, and a new trial granted

IV The trial court imposed an illegal sentence upon Wylie by sentencing him to five (5) years for the charge of possession of a weapon during the commission of a violent crime when he was already sentenced to LWOP for the charge of murder

The five year sentence for possession of a weapon during the commission of a violent crime is statutorily impermissible pursuant to Section 16-23-490(A) of the South Carolina Code when, as here, LWOP is imposed for the underlying violent crime [14]

Although the Court does not normally address illegal sentencing issues unless counsel timely objects, South Carolina courts have, in the past, "summarily vacated" concurrent sentences that are precluded by statute See State v Vick, 384 S C 189, 202-03, 682 S E 2d 275, 281 (Ct App 2009) (vacating concurrent sentence of kidnapping, when it was statutorily precluded, in the interest of judicial economy) Wylie submits that, as in Vick, it is likewise in the interest of judicial economy to vacate his concurrent sentence for possession of a weapon during the commission of a violent crime, as it is statutorily impermissible pursuant to Section 16-23-490(A)

At the sentencing phase of Wylie's trial, the court imposed LWOP upon Wile for the violent crime of murder (Tr p 649, ln 5-8) Immediately after, the trial court sentenced Wylie to five years imprisonment for the offense of possession of a weapon during the commission of a violent crime (Tr p 649, ln 9-13) Although the court structured this sentence to run concurrently with the sentence for murder, it was nonetheless impermissible

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[14] Section 16 23 490(A) provides as follows

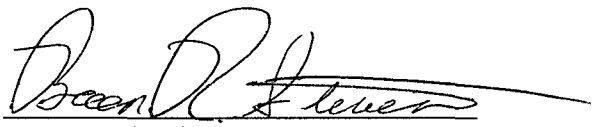
If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1 60, he must be imprisoned five years, in addition to the punishment provided for the principal crime This five year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime S C Code Ann § 16 23 490(A) (West Westlaw current through End of 2010 Reg Sess) (emphasis added)

pursuant to Section 16-23-490(A) ("This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime") (emphasis added) Accordingly, Wylie respectfully requests his five year sentence for possession of a weapon during the commission of a violent crime to be vacated in the interest of judicial economy

CONCLUSION

For the foregoing reasons, Clifford Wylie respectfully requests this Court to reverse his convictions, and grant a new trial

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of March, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal

(1) Order for Competency to Stand Trial Evaluation Pursuant to State v Blair (signed Nov 25, 2009),
(2) Order for Criminal Responsibility and Capacity to Conform Evaluation (M'Naughten) (signed Nov 25, 2009),
(3) True-billed indictments,
(4) Trial Transcript pages 1, 71-110, 140-146, 152-313, 315-371, 379-419, 421-431, 436-521, 523-587, 598-618, 634, 639-640, and 647-649

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

March 25th, 2011

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V

CLIFFORD WYLIE,

APPELLANT

CERTIFICATE OF SERVICE

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 Donald J Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, and upon Clifford Wylie, #338937, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of March, 2011

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2011

(L S.)
Notary Public for South Carolina

My Commission Expires December 4 2017

The South Carolina Court of Appeals

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February 23, 2011

Appellate Defender Breen Stevens
South Carolina Commission on Indigent Defense
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Re The State v Wylie, Clifford

Dear Counsel

The following Order has been endorsed on your Petition For Extension of Time in Which to File the Initial Brief of Appellant and Designation of Matter in the above entitled case on appeal

"Granted

John Cannon Few,C J
For the Court

By s/ V Claire Allen
Deputy Clerk

For good cause shown, the request for an extension to serve and file the Initial Brief of Appellant and Designation of Matter on March 25, 2011 is granted Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys

Very truly yours,
V. Claire Allen, Deputy
CLERK

TAG/lb
cc Assistant Deputy Attorney General Salley W Elliott

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G Edward Welmaker, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V

CLIFFORD WYLIE,

APPELLANT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER OUT OF TIME

Counsel for Clifford Wylie respectfully requests an additional extension of thirty days, in which to file the Initial Brief of Appellant and Designation of Matter in this case out of time This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009 This is a fifth request for an extension of time in this case

In support of this request, counsel shows

(1) The initial brief of appellant and designation of matter were due to be served and filed February 14, 2011

(2) This case was previously assigned to Joseph L Savitz, III, who has retired On February 7, 2011 this case was reassigned to Attorney Breen R Stevens Counsel began his employment with Appellate Defense today, February 16, 2011 Counsel now respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time

(3) Counsel respectfully asks this Court for an additional 30 day extension of time to file the initial brief of appellant and designation of matter out of time Counsel understands that the Court has granted previous counsel four extensions in this case, and will strive to limit the number of extensions requested

(4) Counsel makes this request in good faith and not for purpose of delay

(5) As indicated by his consent below, counsel for the Attorney General's office graciously consents to or does not oppose this request

WHEREFORE, the undersigned counsel would respectfully request an extension of thirty days in which to file the initial brief of appellant and designation of matter in this case based upon the above exigent circumstances Counsel requests that time limits for filing the brief be held in abeyance pending a ruling on this motion

Respectfully submitted,

Breen R Stevens
Appellate Defender

Robert M Dudek
Chief Appellate Defender

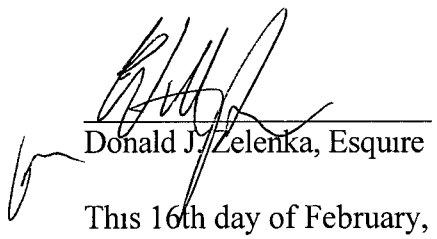
T Patton Adams, IV
Executive Director or
J Hugh Ryan, III
General Counsel

I do not object

FILED
2/23/11

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By V. Claire Allen
~~(Clerk)~~ (Deputy Clerk)



Donald J. Zelenka, Esquire

This 16th day of February, 2011

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

January 14, 2011

Chief Appellate Defender Robert M Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re The State v Wylie, Clifford

Dear Counsel

The following Order has been endorsed on your Motion For an Extension to File Initial Brief of Appellant and Designation of Matter in the above entitled case on appeal

"Granted

John Cannon Few,C J
For the Court

By s/ Tanya A Gee
Clerk

For good cause shown, the request for an extension to serve and file the Initial Brief of Appellant and Designation of Matter on February 14, 2011 is granted Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/lb
cc Assistant Deputy Attorney General Salley W Elliott

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G Edward Welmaker, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V

CLIFFORD WYLIE,

APPELLANT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Clifford Wylie respectfully requests an additional extension of thirty days, in which to file the Initial Brief of Appellant and Designation of Matter in this case This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009 This is a third request for an extension of time in this case In support of this request, counsel shows

In support of this request, counsel shows

(1) The initial brief of appellant and designation of matter are due to be served and filed today, January 7, 2011

(2) This case was previously assigned to Joseph L Savitz, III, who has retired Chief Appellate Defender Robert M Dudek is currently in the process of reassigning this case and

respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time

(3) On January 4, 2011, counsel had oral arguments in the murder case of State v Jack Parker and the capital case of State v Jeffrey Motts in the Supreme Court Counsel filed the petition for rehearing in State v Darrell Burgess with this Court yesterday, December 30, 2010 Counsel filed the petition for writ of certiorari to the Court of Appeals and accompanying appendix in the Supreme Court in State v Roger Parker the day before, Wednesday, December 29, 2010 Counsel filed the initial reply brief in State v Jimmy McKerley with this Court on Wednesday, December 22, 2010 Counsel also filed the brief of petitioner in Roy Tennant v State with the Supreme Court that same day, December 22, 2010 Counsel filed the initial brief of appellant and designation of matter with this Court in the murder case of State v Kendrick Taylor on December 17, 2010 Counsel filed the petition for writ of certiorari to the Court of Appeals in State v Brandon Johnson with the Supreme Court on December 9, 2010 Counsel filed the petitions for writ of certiorari in the Supreme Court to the Court of Appeals and accompanying appendices in the murder case of State v Darian Robinson and the murder case of State v Cameron Brown which ended in a verdict of voluntary manslaughter on, December 6, 2010 with the Supreme Court Counsel filed the petition for writ of certiorari to the Court of Appeals and accompanying appendix in the Supreme Court in the murder case of State v Perry Strickland on Friday, December 3, 2010

(4) Counsel respectfully asks this Court for an additional 30 day extension of time to file the initial brief of appellant and designation of matter Counsel understands that the Court has granted two previous extensions in this case, and is striving to limit the number of extensions requested

(5) Counsel makes this request in good faith and not for purpose of delay

(6) As indicated by his consent below, counsel for the Attorney General's office graciously consents to or does not oppose this request

WHEREFORE, the undersigned counsel would respectfully request an extension of thirty days, until February 7, 2011, in which to file the initial brief of appellant and designation of matter in this case based upon the above exigent circumstances Counsel requests that time limits for filing the brief be held in abeyance pending a ruling on this motion

Respectfully submitted,

Robert M Dudek
Chief Appellate Defender

T Patton Adams, IV
Executive Director or
J Hugh Ryan, III
General Counsel

I do not object

Donald J Zelenka, Esquire

This 7th day of January, 2011

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT
By _____
(Clerk) (Deputy Clerk)

FILED
1/14/11

The South Carolina Court of Appeals

The State, Respondent

v

Clifford A Wylie, Appellant

The Honorable G Edward Welmaker
Pickens County
Trial Court Case No 2009-GS-39-00413
2009-GS-39-01406
2009-GS-39-01407

ORDER

For good cause shown, the request for an extension to serve and file the Initial Brief of Appellant and Designation of Matter on January 7, 2011 is granted Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc Appellate Defender Joseph L Savitz, III
Assistant Deputy Attorney General Salley W Elliott

FILED
12/14/10

Bellamy, Latrea

From COA Extensions
Sent Thursday December 09 2010 4 57 PM
To Bellamy Latrea
Subject FW Clifford Wylie

1st ext. Due 1/7/2011

From Peggy D Simons [mailto dsimons@sccid sc gov]
Sent Wednesday, December 08, 2010 12 36 PM
To COA Extensions
Cc aglbrawley@ag state sc us, Zelenka, Don
Subject Clifford Wylie

December 8, 2010

The Honorable Tanya Gee
Clerk's Office
SC Court of Appeals

Re The State v Clifford Wylie

Dear Ms Gee

The Initial Brief of Appellant and Designation of Matter in the above-referenced case are due to be served and filed with the Court December 8, 2010 The Court has granted one previous extension Counsel for Mr Wylie respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time In the past 30 days, counsel filed the petition for rehearing in the case of *State v Larry Horton* had an oral argument in the Supreme Court in the case of *State v Reginald Lattimore* filed the petition for rehearing in the case of *State v Theodore Wills*, the initial brief of appellant and designation of matter in the case of *State v Brian Sturgeon* filed the initial brief of appellant and designation of matter in the case of *State v Jonathan Campbell* filed the petition for writ of certiorari and appendix in the case of *Stanley Eppenger v State* filed the initial brief of appellant and designation of matter in the cases of *State v Patrick Rice* filed the initial brief of appellant and designation of matter in the case *of State v Leon Jones,* filed the petition for writ of certiorari and appendix to the Court of Appeals in the case of *State v Zachary Fowler* filed the petition for writ of certiorari and appendix in the case of *Gregory Mouzon v State* filed the petition for writ of certiorari and appendix in the case of *William Grimes v State* filed the initial brief of appellant and designation of matter in the case of *State v Curtis Nealey* filed the petition for writ of certiorari and appendix in the capital PCR case of *John Woods v State* and counsel attended and testified in the post-conviction relief hearing in the case of *Charles Shuler v State* in Richland County

Counsel has not had time to complete the initial brief and designation of matter in this case Therefore, I am requesting a thirty day extension until January 7, 2010 in which to serve and file this brief

By copy of this e-mail, I am informing Donald J Zelenka of this request

Thank you for your consideration in this matter

Sincerely,

Joseph L Savitz, III
Senior Appellate Defender

The South Carolina Court of Appeals

The State, Respondent

v

Clifford A Wylie, Appellant

The Honorable G Edward Welmaker
Pickens County
Trial Court Case No 2009-GS-39-00413
2009-GS-39-01406
2009-GS-39-01407

ORDER

The request for an extension to serve and file the Initial Brief of Appellant and Designation of Matter on December 8, 2010 is granted Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc Senior Appellate Defender Joseph L Savitz, III
Assistant Deputy Attorney General Salley W Elliott

FILED
11/30/10

Bellamy, Latrea

From COA Extensions
Sent Friday November 12 2010 8 33 AM
To Bellamy Latrea
Subject FW Clifford Wylie

1st ext.
Due 12/8/2010

From Peggy D Simons [mailto dsimons@sccid sc gov]
Sent Monday, November 08, 2010 11 39 AM
To COA Extensions
Cc Zelenka, Don, aglbrawley@ag state sc us, Joseph L Savitz III, Sharon A Graham
Subject Clifford Wylie

Clerk's Office
South Carolina Court of Appeals

Re The State v Clifford Wylie

Dear Ms Gee

The Initial Brief of Appellant and Designation of Matter in the above case are due to be served and filed with the Court November 8, 2010 However, due to my heavy work-load, I am requesting a thirty day extension until December 8, 2010 in which to serve and file this brief

By copy of this email, I am informing Donald J Zelenka, Esquire, of my request

Sincerely

Joseph L Savitz III
Senior Appellate Defender

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

September 8, 2010

The Honorable Tanya A Gee
Clerk, S C Court of Appeals
PO Box 11629
Columbia, SC 29211

Dear Ms Gee

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side

The State v Clifford Wylie 9/8/2010

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me

Thank you for your assistance in this matter

Sincerely,

Sharon A Graham

Sharon A Graham
Administrative Coordinator

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

September 2, 2010

Chief Appellate Defender Robert M Dudek
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re The State v Wylie, Clifford

Dear Counsel

Please provide the Court with the status of the transcript within ten (10) days of the date of this letter

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/lb

cc Assistant Deputy Attorney General Salley W Elliott

SCCID

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

RECEIVED
JUL 28 2010
SC Court of Appeals

July 28, 2010

Ms Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia South Carolina 29201-3739

Dear Ms Allen

The transcript listed below was requested by this office Pursuant to Rule 207(a)(2), SCACR, the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same

Court Reporter	Due Date	Case Name
Ms Danette Hanks	7/10/10	Clifford Wylie

Trial Date January 20 2010

I would appreciate your confirming in writing as to the status of the above-referenced transcript If you should have any questions, please do not hesitate to contact me

Sincerely

Sharon A Graham

Sharon A Graham
Administrative Coordinator

cc S C Court of Appeals
Attorney General's Office

RECEIVED
MAY 14 2010
SC Court of Appeals

The Supreme Court of South Carolina

TITLE OF CASE	(State ((((V ((((Clifford Wylie ((	2009GS39413

Notice

Upon request and for good cause shown, S Hanks, Court Reporter, is hereby granted an extension up to and including June 10, 2010 to prepare and deliver the Transcript of Record in the above case

Desiree Allen
Court Services Manager
South Carolina Court Administration

Columbia, South Carolina
05/12/2010

cc Sharon Graham, Division of Appellate Defense
Office of Attorney General
S Hanks

The Supreme Court of South Carolina

TITLE OF CASE

(State
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(V 2009GS39413
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(
(Clifford Wylie
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(

RECEIVED
MAY 18 2010
SC Court of Appeals

Notice

Upon request and for good cause shown, S Hanks, Court Reporter, is hereby granted an extension up to and including June 10, 2010 to prepare and deliver the Transcript of Record in the above case

Desiree Allen
Court Services Manager
South Carolina Court Administration

Columbia, South Carolina
05/14/2010

cc Sharon Graham, Division of Appellate Defense
Office of Attorney General
S Hanks

SCCID

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

May 3, 2010

Ms Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia South Carolina 29201-3739

Dear Ms Allen

The transcript listed below was requested by this office Pursuant to Rule 207(a)(2), SCACR, the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same

Court Reporter	Due Date	Case Name
Ms Danette Hanks	4/12/10	Clifford Wylie

Trial Date January 20 2010

I would appreciate your confirming in writing as to the status of the above-referenced transcript If you should have any questions, please do not hesitate to contact me

Sincerely

Sharon A Graham

Sharon A Graham
Administrative Coordinator

cc: S C Court of Appeals
Attorney General's Office

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211

1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201

TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

April 29, 2010

Chief Appellate Defender Robert M Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re The State v Wylie, Clifford

Dear Counsel

Please provide the Court with the status of the transcript within ten (10) days of the date of this letter

Very truly yours,

V Claire Allen, Deputy

CLERK

TAG/lb
cc Assistant Deputy Attorney General Salley W Elliott

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

February 10 2010

Ms Danette Hanks
Circuit Court Reporter
P O Box 2493
Anderson, SC 29622

Dear Ms Hanks

Our office has been requested to perfect the appeal arising out of

The State v Clifford Wylie Case # 09-GS 39-413 1406 1407

County Pickens Date of Trial January 20, 2010

Presiding Judge G Edward Welmaker

It is my understanding that you were the court reporter at this time That being the case, I request that you send this office the original trial transcript along with your bill If you send a copy to this office, please bill us accordingly To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments We have found that even if there are no objections, we need to review both opening and closing arguments for appeal

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred In addition if the Attorney General's Office has already requested an original transcript, please notify us

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter If you have any questions, or problems, please contact me

Thank you for your kind cooperation in this matter

Sincerely,

Sharon A Graham
Administrative Coordinator

cc S C Court of Appeals
Attorney General's Office

The South Carolina Court of Appeals

TANYA GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

February 9, 2010

Clifford Wylie #338937
Kirkland Correctional Institution
4344 Broad River Road
Columbia, SC 29210

Re The State v Wylie, Clifford

Dear Mr Wylie

This will acknowledge receipt of your Notice of Appeal received on February 3, 2010

Please be advised a timely notice of appeal has already been filed on your behalf by Attorney John DeJong on January 25, 2010

Very truly yours,

CLERK

TAG/lb

cc Chief Appellate Defender Robert M Dudek
Assistant Deputy Attorney General Salley W Elliott

IN THE SUPREME COURT
In The Supreme Court

RECEIVED
FEB 03 2010
SC Court of Appeals

APPEAL FROM PICKENS
Court Of General Session

Circuit Court Judge

Edward Welmaker

Case No

09-GS-3900413

STATE OF SOUTH CAROLINA
VS

Clifford Wylie 338937

NOTICE OF APPEAL

Clifford Wylie appeals his conviction and sentence in this case The sentence was imposed by the (Honorable) Edward Welmaker on Date 1-20 10

S/ Clifford Wylie

Sworn to and Subscribed before me
This 29 day of Jan 2010

Notary Public for South Carolina
My Commission Expire on My Commission Expires November 8, 2017

IN THE STATE OF South Carolina
In The Supreme Court

APPEAL FROM Pickens
Court of General Session

Circuit Court Judge
Edward Welmaker

Case No
09 GS 3900413

STATE of South Carolina
vs
Clifford Wylie 338937

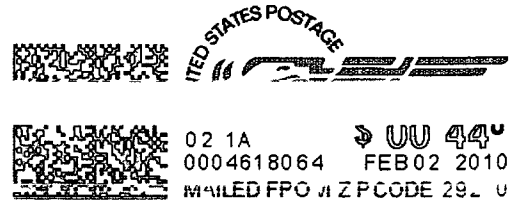
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on HENRY McMaster 1-29-10, Attorney General, by depositing a copy of it in the United States mail, postage prepaid, on (date) addressed to him at P O Box 11549 Columbia SC 29211

s/ Clifford Wylie

Sworn to and Subscribed before me
this 29 day of Jan 2010
Notary Public for South Carolina
My Commission Expires on My Commission Expires November 8, 2017

CLIFFORD WYLIE SCDC# 338937
F-3 ROOM 257
KIRKLAND CORRECTIONAL INSTITUTION
4344 BROAD RIVER ROAD
COLUMBIA, S.C 29210



THE S.C COURT OF APPEALS
P.O BOX 11629
COLUMBIA, SC. 29211

KCI MAILROOM
FEB 02 2010

LEGAL
MAIL
ONLY

29211/1629

The South Carolina Court of Appeals

TANYA GEE
ACTING CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11689
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX (803) 734-1839
WWW.SCCOURTS.ORG

February 1, 2010

John W DeJong, Esquire
214 E Main St Ste B240
Pickens SC 29671

Re The State v Wylie, Clifford

Dear Mr DeJong

We have received your Notice of Appeal in the case noted above This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court For all filings please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address

Please be advised that pursuant to Rule 602, SCACR and the order of the Chief Justice dated December 12 1997 if you expect the Office of Indigent Defense to pursue this appeal you must provide that office with all information required to proceed with this appeal failing which, this office will consider you counsel of record

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street Columbia, S C 29201 Thank you for your attention to this Failure to file in the proper court may result in the dismissal of your appeal

PLEASE BE ADVISED that pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within thirty (30) days of the proof of service of the Notice of Appeal and you must provide this Court opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript You are reminded of the notification requirements of Rule 207(a)(5), SCACR also, please advise the Court in writing upon receipt of the transcript

NOTE If you bel ~ this case has been improperly filed in Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

1) any final judgment from the circuit court which includes a sentence of death,

2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,

3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance

4) any final judgment from the circuit court involving the authorization issuance, or proposed issuance of general obligation debt, revenue, institutional industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,

5) any final judgment from the circuit court pertaining to elections and election procedure,

6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,

7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33 -

Very truly yours,

V. Claire Allen, Deputy Clerk

Tanya A Gee
ACTING CLERK

TAG/lb

cc Senior Appellate Defender Joseph L Savitz, III
Assistant Deputy Attorney General Salley W Elliott

The South Carolina Court of Appeals

TANYA GEE
ACTING CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11689
COLUMBIA SOUTH CAROLINA 29211

1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201

TELEPHONE (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

February 1, 2010

John W DeJong, Esquire
214 E Main St, Ste B240
Pickens SC 29671

Re The State v Wylie, Clifford
Case No 201015187

Dear Mr DeJong

This office has received your Notice of Appeal in the above matter It has been assigned the Case Tracking Number that appears above Please use this number on all future correspondence relating to this matter

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties This office will not review filings for redaction or to determine if materials should be sealed

Very truly yours,

V Claire Allen, Deputy Clerk
ACTING CLERK

TAG/lb
cc Senior Appellate Defender Joseph L Savitz III
Assistant Deputy Attorney General Salley W Elliott

POS - 01/21/2010
PM - 01/21/2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2010 JAN 21 A 11 30

RECEIVED

JAN 25 2010

SC Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions

G Edward Welmaker, Circuit Court Judge

Case No 2009-GS-39- 413, 1406, 1407

The State, Respondent,

v

Clifford Austin Wylie, Appellant

NOTICE OF APPEAL

Clifford Austin Wylie appeals his conviction and sentence in this case The Appellant was convicted on January 20, 2010 and sentence was imposed by the Honorable G Edward Welmaker on , January 20, 2010

January 21, 2010

John W DeJong
Public Defender for Pickens County
214 East Main St , B-240
Pickens, SC 29671
(864) 898-5577
Attorney for Appellant

Other Counsel of Record
Judy Munson, Esq
Jenny Hammaker, Esq
Assistant Solicitors
Thirteenth Judicial Circuit
214 East Main Street, Rm 120
Pickens, SC 29671
(864) 869-5906

Service accepted of the within Notice of Intention to Appeal and copy retained this 21st day of January 2010

Judy Munson Jenny Hamaker
Assistant Solicitor
Pickens County

PICKENS COUNTY PUBLIC DEFENDER
214 EAST MAIN STREET, B240
PICKENS, SC 29671

PHONE (864) 898 5577
FAX (864) 898 5579

RECEIVED
JAN 25 2010
SC Court of Appeals

January 21, 2010

The Honorable Kenneth A Richstad
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE State vs Clifford Austin Wylie
Indictment No 2009-GS-39- 413, 1406, 1407

Dear Mr Richstad

Enclosed for filing is the following

1 Three (3) originals of Notice of Appeal with Acceptance of Service on bottom of each

Please return to me a clocked copy of the Notice of Intent to Appeal in the self-addressed stamped envelope enclosed for that purpose

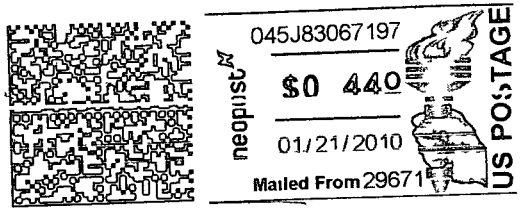
Thanking you in advance for your kind attention to this matter, I am

Sincerely yours,

John W. DeJong
Public Defender
Pickens County

Enclosures

John W DeJong
Public Defender
Pickens County
214 East Main St B-240
Pickens SC 29671



The Honorable Kenneth A Richstad
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