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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Charleston County

J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

ANTHONY D. WILDER,

APPELLANT

\_\_\_\_\_  
FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to exclude DNA evidence regarding appellant's pants, State's Exhibit 98, since the chain of custody and the sloppy handling of the evidence showed an extremely strong chance the DNA evidence was contaminated, and therefore that it was unreliable pursuant to Rule 702, SCRE?

## STATEMENT OF THE CASE

Appellant was indicted by the Charleston County Grand Jury -- along with Keive Milik Smith and Leo Corderrel Gadsden -- for the offenses of murder, two counts of kidnapping, burglary in the first degree and assault and battery with intent to kill (ABIK). All counts arose from a single incident. R. 862-877.

Their joint cases were called to trial on May 2008 before the Honorable J. Derham Cole and a jury. Nathan Stuart Williams and Julie Cardillo were the solicitors.

Lionel S. Lofton and V. Lynn Lofton represented appellant. W. Tracy Brown and Mark Andrew Redmond represented co-defendant Smith. Rodney Duane Davis and Cody Groebar represented co-defendant Gadsden. R. 1.

At the conclusion of the trial on May 9, 2008 the jury found all three defendants guilty on each count. R. 836, l. 3 – 837, l. 14. Judge Cole sentenced each co-defendant to life imprisonment for murder, life imprisonment for burglary in the first degree, twenty years imprisonment for ABIK and thirty years imprisonment for kidnapping. R. 857, l. 1 – 860, l. 22. However, Judge Cole correctly did not sentence appellant for kidnapping since he had sentenced him for murder. R. 860, ll. 18 – 22.

This appeal follows.

## ARGUMENT

The court erred by allowing the state to introduce DNA evidence regarding appellant's pants, State's Exhibit 98, and the attendant evidence regarding those pants since the extraordinarily sloppy manner of collection of the blood evidence made it totally unreliable given the great possibility it was contaminated with the decedent's blood. The evidence should have been excluded pursuant to Rule 702, SCRE because it was totally unreliable, and obviously extraordinarily prejudicial. Further, there is not a rational reason to exclude blood alcohol or drug evidence based on sloppy incompetent gathering and handing of that evidence and treating DNA blood evidence as almost solely a "weight" issue to argue to the jury.

### **Relevant Facts**

Patricia N. Green testified that her two adult children had received large settlements from a lawsuit against South Carolina Electric and Gas for an accident that occurred when they were children. They each maintained large trust funds. The import of Green's testimony was that people in Lincolnton, South Carolina -- where they lived -- knew of the trust funds and their regular access to money. R. 20, l. 2 – 21, l. 19.

Ms. Green had a drug habit. Her drug dealer was Jamie Williams. She owed Williams ten dollars for an earlier purchase of crack cocaine. Williams later testified Green telephoned him and told him to come by her house on the afternoon of August 31, 2006 to collect the ten dollars. R. 21, l. 18 – 22, l. 9; R. 52 l. 9 – 53, l. 7.

Green testified that she was taking a nap that afternoon when she heard "the dogs barking in the yard." She looked out the window and saw a man "pacing back and forth with a black hat on . . ." Green thought it was her grandson or one of her relatives outside,

thought nothing of it, and she tried to go back to sleep. However the dogs barking became much more aggressive, she came to the conclusion a stranger was involved, and she went downstairs to investigate. Before she got to the front door to investigate “he [one of the three to five would be robbers] kicked the door in.” R. 21, l. 20 – 22, l. 25.

Green identified appellant as the “stocky” man wearing the “Marvin Gay hat” that first entered her house that day. R. 25, l. 9 – 26, l. 20. However, as seen below, there were problems with Green’s seeming certainty at trial about what occurred, and the identify of those involved.

Green admitted she told the police in her statement following the incident that five men entered her house that day. “Three people went upstairs and two was downstairs with me. The blood was still coming. That why I kept trying to wipe my eyes, the blood out of my eyes.” Green said she changed her mind to there only being three men involved because that is all who were arrested. R. 58, ll. 3 – 5; R. 66, ll. 4-12.

Green denied on cross-examination that she only identified appellant because his photograph had been on the television all week following the incident and also because his picture was in the newspaper as a suspect in this case. R. 75, l. 18 – 76, l. 9. Green also acknowledged that she originally told defense counsel for a co-defendant that “the mask would fall down” allowing her to identify the men. R. 59, ll. 4- 7. Green also denied on cross examination that she could not even see the man across the street whom she later claimed was appellant because there was tree in front of her window. Green said the pictures introduced by the solicitor did not fairly represent the view from her window. R. 71, l. 6 – 74, l. 1.

Green also said she made a mistake when she told the police that the “other four guys” all wore “black pants.” R. 68, ll. 2-10. In addition, Green said the mask did not cover appellant’s whole face, and that was how she identify him. She maintained “You can see the mask doesn’t cover the whole entire eyes. It’s not beady-eye mask holes. If they’re big holes you can see the eyes, the color of their skin through the eyes and around the mouth.” When questioned about how she could identify appellant from across the street through a mask, Green responded: “When he was across the street when I looked out of my window, he didn’t have the mask hooked on. The hat was rolled up like a Marvin Gay.” R. 71, l. 6 – 77, l. 25. Green testified after she was beaten, a man about 6’4 and skinny tied her up with duct tape. R. 78, l. 8 – 80, l. 19.

Jamie Williams was helping his friend, decedent Sterling Spann, who was a “rapper,” and Williams remembered the two men were trying to raise money “to get a new keyboard.” R. 87, l. 8 – 88, l. 19 Williams also recalled that Green telephoned him that afternoon and told him to come over and get the ten dollars that Green owed him for the crack cocaine. R. 89, l. 16 – 90, l. 20.

Sterling Spann then drove appellant over to Green’s house. Williams saw that Green’s front door was “cracked,” which was unusual. However before Williams could get to the door Williams claimed someone opened it quickly and “put a gun in my face.” R. 90, ll. 2 – 9. Williams saw another man behind the man who put a gun in his face. Williams identified co-defendant Gadsden as the man who pointed the gun in his face. R. 93, l. 17 – 95, l. 7.

Williams said he could not identify the man behind Gadsden. Williams also remembered that Gadsden hit him in the head with the gun and shot him four times.

Williams said Gadsden told a "taller man" to chase after him as Williams tried to escape. R. 103, l. 11 – 106, l. 19. However, Williams was able to run down the street to the nearby fire station for safety despite having been shot by Gadsden. R. 96, l. 7 – 106, l. 7.

Green's neighbor Leroy Daniel testified he heard the shots fired that afternoon. Daniel said he saw two men pulling another man [Spann] out of the car. Spann was shot and killed on the spot. Daniel said he saw the men jump into a Jeep and drive away. R. 137, ll. 2 – 25.

Charleston Police Officer Scott Jackson said he quickly informed dispatch of the nature of the suspect vehicle -- a white Jeep. R. 196, l. 1 – 200 l. 24. Charleston Police Officer Elijah Simpson testified he also immediately spotted the Jeep while he was on patrol following the BOLO. Simpson confirmed that this was the suspect vehicle and he pulled in behind it. Simpson turned on his blue light and siren. R. 206, l. 13 - 207. 25.

Simpson said he chased the Jeep for about three or four minutes down on I-26 while he observed several objects being thrown out of the window during the high speed chase. The objects included masks and gloves. Simpson said that the driver lost control of the Jeep and that it turned over. R 207. 2 – 219. 3. Appellant and the other two co-defendants were taken out of the Jeep, and arrested.

Since Spann was shot and killed, Williams was shot and lived, and Patricia Ann Green was beaten with a gun and bled, the DNA evidence became important as it pertained to victim's blood getting on the suspects. The judge would at appellant's request, later charge the jury that mere presence at the scene of the crime was insufficient to establish guilt. He also instructed the jury that prior knowledge a crime was going to be committed was insufficient to establish guilt. R. 822, l. 11- 824, l. 5.

Charleston County crime scene investigator Brent Roy testified that he took both appellant's and decedent Spann's clothing from the hospital where they both were taken after the shooting, and after the Jeep turned over. Roy said the "usual approach" was "if an item has blood or it is wet in any way, the item is put into a bag, plastic bag, and sealed, initially placed into a paper bag and then sealed again. . . ." R. 325, l. 6 – 326, l. 16.

Defense counsel strongly questioned the manner in which the appellant's and the decedent's clothing was gathered in this case since it raised a great chance the evidence became contaminated.

Detective Heide Drake testified she collected Spann's clothes. Drake admitted she could not remember whether the clothes were in "a container or not" but she maintained while in a "paper bag" that she folded the "bag over," and gave them to Detective Roy. R. 411, l. 14 – 412, l. 13.

To further add to the confusion Detective Donald Stanley, who picked up the ski mask and gloves that were allegedly thrown out of the Jeep window testified that he was not aware of how appellant's or the co-defendant's clothes were collected. Stanley acknowledged on cross-examination that a law enforcement form indicated their clothes were *taken when they were booked into the jail*. R. 506, ll. 8 – 19.

SLED Agent Patty Ruff made cuttings of the clothes for DNA analysis. R. 536, l. 11 – 537, l. 15. When the solicitor went to introduce the blue jeans which were alleged worn by appellant the day of the incident, defense counsel objected and the objection was sustained. The judge then sent the jury to its room. R. 548, ll. 5 – 22.

Defense counsel Lofton then argued that Investigator Roy was directed to go three different hospitals after the shootings. While appellant was at Trident Hospital Drake had

testified the medical staff removed appellant's clothes and put them in a brown bag. They were not sealed. Drake subsequently turned the bag over to investigator Roy. Trident Hospital also had the decedent Spann's clothes. Spann's clothes were also put in a brown bag. Counsel noted that Spann bled profusely and there was a very strong chance the DNA evidence in this case was contaminated because of the way it was handled. R. 549, l. 1 – 559, l. 17. Defense counsel argued the evidence was not sufficiently reliable to be admitted until Rule 702, SCRE. R. 559, l. 3 – 565, l. 4.

Defense counsel continued to argue with the trial court that this evidence was not sufficiently reliable to be admissible. He argued that appellant's own DNA was not even found on pants that allegedly were his own pants. R. 565, ll. 5 – 10.

The judge said he did not see any evidence Spann and appellant's clothes were intermingled and he therefore ruled that the DNA evidence was not contaminated. He overruled counsel's objection and ruled appellant's pants, State's Exhibit 98, would be admitted into evidence. Defense counsel repeated his objection when the evidence was admitted. R. 565, l. 9 – 572, l. 20.

SLED DNA analyst Lily Gallman later admitted that appellant's DNA was not found on his jeans but that co-defendant's Smith's DNA was found on the pants that allegedly were taken from appellant on the night of the shooting. R. 614, l. 8 – 615, l. 3. Gallman said that decedent Spann's DNA was also found on those pants. R. 598, l. 25 – 599, l. 11.

Defense counsel renewed his motion regarding the contamination of the evidence and chain of custody problems at the close of the state's case. Both motions were again denied. R. 714, ll. 5 – 19.

## Discussion

In State v. Ramsey, 345 S.C. 607, 615 550 S.E.2d 294, 298 (2001) our Supreme Court held that if evidence was so tainted that it is totally unreliable it should be excluded. The Court in Ramsey also held that pursuant to Rule 702, SCRE that in order for evidence of this type to be admissible, the trial judge must find the scientific evidence will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable. The court said where it challenges to the expert testimony being unreliable pursuant to Rule 702, SCRE the appellant court reviews the admission of such testimony under an abuse of discretion standard. Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

Here, appellant directly challenged the admissibility of the evidence because the handling of the evidence and the chain of custody made the evidence totally unreliable given the strong likelihood the evidence was contaminated.<sup>1</sup> DNA evidence is so highly prejudicial it almost guarantees a conviction if it is opined to be a “match,” and appellant submits that calls upon the court to have a heightened sense that the evidence is reliable.

Further, our Supreme Court has held such sloppy handling of evidence in other lesser contexts requires its exclusion. See State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) (drug evidence was not admissible given the chain of custody was not complete).

Further in State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) the Supreme Court reversed the trial court’s admission of blood-alcohol evidence when the identity of the person who drew the blood sample or transported to the hospital laboratory was not clear.

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<sup>1</sup> Appellant was not arguing that properly gathered and analyzed DNA evidence was not reliable given the State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) factors. See, State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Moreover, in Raino v. Goodyear Tire and Rubber Company, 309 S.C. 255, 258, 422 S.E.2d 98, 1000 (1992), the Court affirmed the trial court's suppression of blood alcohol evidence since that was proper where the identity of any party handling the blood was unknown regardless of the fact the analyzing laboratory was in close proximity to the trauma where the sample was drawn.

Here, defense counsel correctly argued the evidence should be excluded under Rule 702, SCRE, because the evidence was not scientifically reliable. He pointed out the strange fact that appellant's DNA was not even found on his own pants but that co-defendant's Smith DNA was found on pants that allegedly belonged to him.

Appellant submits to the extent State v. Ramsey can be read that this a purely "weight" matter, and not an admissibly question under Rule 702, SCRE given the reasoning of Oregon v. Lyons, 124 Or.App. 598, 863 S.E.2d 1302 (1993),<sup>2</sup> that case should be revisited. There is not any rational reason appellant can think of to treat sloppily gathered DNA blood evidence any differently from blood alcohol or drug evidence where the chain cannot be completed or the chance of contamination of that evidence appears substantial. Appellant should be granted a new trial since the decedent's DNA -- a match -- was said to be found on his pants where the evidence showed a very strong chance of contamination and therefore that this critical evidence guaranteeing his conviction was totally unreliable.

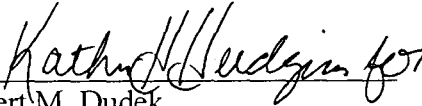
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<sup>2</sup> Further, Oregon v. Lyons was an early attack on DNA evidence with the arguments being that it was too complex for the jury, that scientists and laboratories had a vested interest in it being found reliable, and that its probative value was outweighed by its unduly prejudicial effect. This case involves the gathering of appellant's (allegedly) and the decedent's bloody clothing in such manner that it presented an intolerable risk of contamination given the extraordinary power of evidence of a DNA match.

CONCLUSION

By reason foregoing argument, appellant's conviction should be reversed, and his case remanded to the Charleston County Court of General Sessions Court for a new trial.

Respectfully submitted,

  
\_\_\_\_\_  
Robert M. Dudek  
Acting Chief Appellate Defender


ATTORNEY FOR APPELLANT

This 19th day of January, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 19, 2010

  
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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Charleston County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

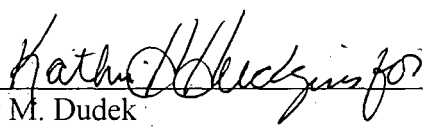
V.

ANTHONY D. WILDER,

APPELLANT


CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Anthony Mabry, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 19th day of January, 2009.

  
Robert M. Dudek  
Acting Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 19th day of January, 2010.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 1, 2019

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

**Appeal from Charleston County  
J. Derham Cole, Circuit Court Judge**

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SC Court of Appeals

**THE STATE,**

Respondent

v.

**ANTHONY D. WILDER,**

Appellant

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**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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**Appeal from Charleston County  
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**THE STATE,**

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Appellant

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**FINAL BRIEF OF RESPONDENT**

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## **APPELLANT'S STATEMENT OF ISSUE ON APPEAL**

Whether the court erred by refusing to exclude DNA evidence regarding Appellant's pants, State's Exhibit 98, since the chain of custody and the sloppy handling of the evidence showed an extremely strong chance the DNA evidence was contaminated, and therefore that it was unreliable pursuant to Rule 702, SCRE?

## **RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in admitting DNA evidence from Wilder's pants when the possibility of alleged cross-contamination during the collection of the evidence went to the weight of the evidence and not its admissibility, and in any event does not affect the admissibility of the DNA testimony under Rule 702 S.C.R.E. as Wilder alleges, and even assuming *arguendo* some error in the admission of the evidence, was its admission harmless in light of the overwhelming evidence of Wilder's guilt?

## RESPONDENT'S STATEMENT OF THE CASE

On August 31, 2006, Sterling Spann,<sup>1</sup> a local Lincolnton, S.C. rap musician, was murdered in his hometown after a home invasion. Very shortly thereafter, Appellant, Anthony D. Wilder ("Wilder"), was arrested for the murder and related charges. The charges arose out of the aforementioned home invasion, the murder and attempted murder that followed, and the pursuit and arrest of Wilder and his two co-defendants Kiev Malik Smith ("Smith") and Leo Gadsen ("Gadsen").

Wilder was subsequently indicted by the Charleston County Grand Jury for numerous charges including murder (2008-GS-10-2383), burglary first (1<sup>st</sup>) degree (2008-GS-10-2385), kidnapping (2008-GS-10-2384), ABWIK (2008-GS-10-2386), and another count of kidnapping (2008-GS-10-2390). Wilder was represented by Lionel S. Lofton, Esq. and V. Lynn Lofton, Esq. The State was represented by Assistant Solicitors Nathan Stuart Williams and Julie Cardillo. The State proceeded to trial on the above mentioned indictments.

Wilder was tried before the Honorable J. Derham Cole, Circuit Court Judge, and a jury from May 5-May 9, 2008. On May 9, 2008, the jury found Wilder guilty on all charges.<sup>2</sup> Judge Cole sentenced Wilder to life for murder, life for burglary in the first (1<sup>st</sup>) degree consecutive to the murder sentence, thirty (30) years for one kidnapping to be run concurrent, and twenty (20) years for ABWIK to be run consecutive to the life sentence for burglary. Wilder was not sentenced on the other kidnapping indictment. (Spann kidnapping). (See Tr. p. 989, ll. 3-6).<sup>3</sup> This appeal followed.

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<sup>1</sup>The victim in this case is not the same Sterling Spann who was a former death row inmate.

<sup>2</sup>Wilder was tried jointly with his co-defendants Smith and Gadsen. The jury also found Smith and Gadsen guilty on all charges. They received the same sentences as Wilder.

<sup>3</sup>Pursuant to S.C. Code Ann. Section 16-3-910.

## RESPONDENT'S STATEMENT OF FACTS

On August 31, 2006, appellant Wilder and his co-defendants, Smith and Gadsen, drove to Lincolnton, S.C. in a white Jeep rented by Wilder. Upon arriving in Lincolnton, the three drove up and down a dead end street and eventually parked the white Jeep. Around 6:00 p.m., while daylight, the three co-defendants approached on foot Patricia Green's two story home, which was located near the dead end street where the three had parked the Jeep. Wilder, Smith, and Gadsen were each armed with pistols. ( R. 11-17, 19-43, 152-55, 205-223, 265, 273-74, 295-97, 298-99, 312-13, 322-23, 327-29, 359-360, 373-74, 418-424, 482-491, 507, 511-12, 620-23, Tr. pp. 108-114, 116-140, 250-253, 303-321, 363, 371-372, 393-395, 396-397, 410-411, 423-424, 428-430, 467-468, 481-482, 526-532, 602-611, 627, 631-632, 740-743). Upon reaching the home, Wilder kicked in Patricia Green's front door. ( R. 19-34, Tr. pp. 116-131). Wilder, now wearing a mask and gloves, entered the residence and began to pistol whip Patricia Green who had come down her stairs to see why her dogs were barking aggressively.<sup>4</sup> ( R. 19-34, Tr. pp. 116-131). Wilder demanded Patricia tell him where "everything" was. ( R. 27, 32, Tr. p. 124, 129). Wilder then called out for Smith and Gadsen to enter the home. ( R. 32, Tr. p. 129). Smith and Gadsen then entered Patricia's home also wearing disguises over their faces and wearing gloves. ( R. 32, Tr. p. 129).<sup>5</sup>

Smith immediately went upstairs to search for whatever the three perpetrators were looking for, and Gadsen searched the kitchen area of the home, which was downstairs. ( R. 32-35, 67, 238, Tr. p. 129-132, 164, 336). While they searched, Wilder continued to pistol whip Patricia. Patricia

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<sup>4</sup> Patricia recognized Wilder because she had seen him across the street from her home without a mask covering his face the first time her dogs barked. ( R. 21-26, Tr. pp. 118-123).

<sup>5</sup> Patricia was able to recognize Gadsen because his disguise, a bandana, kept falling off while he was inside her home. ( R. 21-26, 39-41, Tr. pp. 118-123, 136-138 ).

bled profusely even into her eyes. ( R. 32, Tr. p. 129). Wilder eventually dragged Patricia from the staircase, where the beating began, to the living room floor. ( R. 35, Tr. p. 132). Wilder then stuck his gun in Patricia's mouth and threatened to shoot her. ( R. 35, Tr. p. 132). Wilder told Patricia that he would like to "blow her brains out." ( R. 63, Tr. p. 160). Patricia choked or gagged from the gun being forced into her mouth and eventually threw up. ( R. 63, Tr. p. 160).

When Gadsen returned from the kitchen area, Wilder ordered him to "get the tape." ( R. 35, 37, Tr. p. 132, 134). Gadsen went outside the house and retrieved a role of duct tape. After Gadsen re-entered the home, Wilder used the tape to bind Patricia. ( R. 37, 39, Tr. pp. 134, 136). Patricia's hands and feet were bound, and duct tape was placed over her mouth. ( R. 37-38, Tr. pp. 134-135). While this was occurring, Smith was still upstairs searching the bedrooms, and Gadsen was looking through the front window blinds downstairs. While acting as a lookout, Gadsen saw Sterling Spann and James Williams pull into Patricia's driveway in Spann's car. ( R. 47-48, 238, 38, Tr. pp. 144-145, 336, 135).

Gadsen immediately notified Wilder that someone was outside. ( R. 38, Tr. p. 135). Wilder called Smith down from upstairs and told him to take care of the people outside. ( R. 41-43, Tr. p. 138-139). Gadsen and Smith went outside the home while Wilder finished tying up Patricia. ( R. 44, 86-94, Tr. p. 140, 184-192). Wilder dragged Patricia to a corner where she could not be seen and left her there. ( R. 43, Tr. p. 140).

When Smith and Gadsen got outside, Gadsen pointed his gun at James Williams' head.<sup>6</sup> Williams had just gotten out of Sterling Spann's car and was approaching the front door when Gadsen opened the door and confronted him. Smith, who was still masked, was behind Gadsen.

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<sup>6</sup>Williams also positively identified Gadsen at trial. ( R.91-95, Tr. pp. 189-193).

( R. 94, 103, Tr. p. 192, 201). James Williams stepped back about six paces, and Gadsen then hit Williams in the head with the gun Gadsen had previously pointed at Williams. ( R. 96, Tr. p. 194). Williams then saw a third man come out of the house wearing a mask. ( R. 96, 43, Tr. p. 194, 140). This third man was Wilder who had left Patricia Green tied up and followed Smith and Gadsen outside. ( R. 43, Tr. p. 140).

Gadsen then walked up to Sterling Spann's car and shot Spann as Spann was trying to reverse his car. ( R. 41, 43, 86-99, Tr. p. 138, 140, 184-197). Gadsen then walked over to Williams who had fallen. Williams began pleading with Gadsen not to shoot him. ( R. 100, Tr. p. 198). Despite Williams' pleas, Gadsen shot Williams four (4) times in the abdomen. ( R. 100-01, Tr. p. 198-199). After shooting Williams four (4) times, Gadsen continued to pull the trigger, but the gun only clicked. ( R. 101, Tr. p. 199).

Williams got up off the ground and fled on foot. Gadsen told Smith to "go get em," the fleeing Williams. ( R. 102-03, 142-183, Tr. pp. 200-201, 240-281). Smith pursued Williams for a short distance shooting at him. ( R. 102-03, 147, 175-183, Tr. pp. 200-201, 245, 273-281). Smith was wearing red Nike tennis shoes as he pursued Williams. ( R. 175-182, 327, 359-61, 365, Tr. pp. 273-280, 428, 467-469, 473).

Williams ran to the Lincolnville fire department, which was located behind Patricia Green's home, where he collapsed due to his injuries. ( R. 104-05, Tr. pp. 202-203). Firemen on duty at the Lincolnville fire department heard the gunshots and upon investigating found Williams on the ground. A neighbor and possibly Williams reported what had just occurred, and the police and EMS were notified immediately. ( R. 184-87, 104-05, Tr. pp. 282-285, 202-203). Williams lost consciousness. ( R. 104-06, Tr. 202-204). The firemen also immediately notified a Deputy Sheriff

who was inside the fire department/police station. ( R. 184-191, 192-95, Tr. pp. 282-289, 290-293).

Immediately after Williams fled from Patricia Green's front yard, Sterling Spann was pulled from his car by two of the perpetrators. ( R. 129-31, Tr. pp. 227-229). As previously stated, Wilder, who had left Patricia tied up inside the home, was now outside the home with Gadsen and Smith. ( R. 43, Tr. p. 140). One witness saw Spann trying to get back into his car, but he was prevented from doing so by one of the perpetrators. ( R. 142-174, Tr. pp. 240-272). Witnesses heard Spann pleading with one of the perpetrators not to shoot him again. ( R. 44, 132, Tr. pp. 141, 230). Spann was forced to the ground by two of the perpetrators. One of the perpetrators shot Spann again as he lay on the grass. ( R. 127-174, Tr. pp. 225-272). Another perpetrator was kneeling down or bent over and appeared to be holding Spann down.<sup>7</sup> ( R. 150-51, 130-33, Tr. pp. 248-249, 228-231).

After Spann was shot this last time on the ground, Wilder, Smith, and Gadsen then walked back across the street and down the dead end street to where the white Jeep was parked. ( R. 152-54, 511, Tr. p. 250-252, 631).<sup>8</sup> The three then drove up the dead end street, turned, and left the area of

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<sup>7</sup>The testimony is confusing or conflicting, depending on which neighbor's testimony you read, regarding which perpetrator fired the final shot into the victim Sterling Spann, the perpetrator kneeling down at Spann's feet or the one standing or kneeling near Spann's upper body. ( R. 131-33, 145-154, Tr. p. 229-231, 243-252). It is clear Wilder was one of the two who pulled the victim from the car and threw him on the ground. However it is unclear if Smith or Gadsen was the perpetrator standing over the victim with Wilder at the time of the final shot. (See R. 131-33, 145-154, Tr. pp. 229-231, 243-252). Regardless, it makes no difference because the testimony in the record establishes that the three perpetrators were acting in concert.

<sup>8</sup>John Jones Jr. testified he saw three men walking together from the crime scene. ( R. 142-175, Tr. 240-273). Leroy Daniels testified at trial that he only saw two men walking from the crime scene, however, the record clearly shows *he initially told police* that after the two men held Spann down and shot him a second time, a third man walked up and then three men walked from the crime scene. ( R. 129-136, Tr. pp. 227-234). Patricia Green told Daniels' wife immediately after the incident that there were three men involved in the home invasion and kidnapping. ( R. 141, Tr. pp. 239). Green told police at the hospital she thought five men were involved, however she was complaining of double vision from the beating, and she testified at trial she was sure

the crime scene in the white Jeep. ( R. 136, 152-55, 186, 195-96, 205-223, 511, Tr. pp. 234, 250-253, 284, 293-294, 303-321, 631).

While this was occurring, the Deputy Sheriff inside the fire department/police station radioed dispatch and notified them of the shooting and immediately drove around the corner toward Patricia Green's residence. He was flagged down by a neighbor who gave a description of the getaway vehicle, and the Deputy immediately put that description out over the radio. ( R. 195-200, Tr. pp. 293-298). The description given out was of a small white Jeep. ( R. 200-01, Tr. p. 298-299).<sup>9</sup> Almost immediately, another Deputy asked for confirmation over the radio and then began pursuit of the small white Jeep. ( R. 200-01, Tr. pp. 298-299).

This Deputy, Elijah Simpson, was coming in the opposite direction from that traveled by the getaway vehicle, and after receiving confirmation of the vehicle's description, turned around on the getaway vehicle, which was coming from the direction of the crime scene. Once he caught up with the three perpetrators, Deputy Simpson turned on his blue light and siren. ( R. 195-96, 205-223, Tr. pp. 293-294, 303-321). The perpetrators refused to stop for the blue light and siren. ( R. 205-223, Tr. pp. 303-321).

A high speed chase ensued, at one point, reaching 100 m.p.h. ( R. 205-223, Tr. pp. 303-321). While they were being pursued, the occupants of the getaway vehicle threw incriminating evidence out the passenger window of the Jeep, including masks and gloves. ( R. 205-223, Tr. pp. 303-321).

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there were only three perpetrators. James Williams also testified there were three perpetrators.

<sup>9</sup>The description of the getaway vehicle was actually given to police by another witness, Harold Cooley. ( R. 195, 201, Tr. p. 293, 299). Mr. Cooley did not testify at trial. John Jones, Jr. gave police a similar description of the getaway vehicle. ( R. 142-175, Tr. p. 240-273). Mr. Jones did testify at trial. ( R. 142-175, Tr. p. 240-273). Leroy Daniels, another neighbor, also saw the white Jeep leaving the area. ( R. 163, Tr. p. 234).

While still being followed by police, the three perpetrators eventually wrecked near Charleston, S.C. when they tried to avoid stop sticks put out by the Highway Patrol. This maneuver resulted in the getaway vehicle striking another vehicle. ( R. 205-223, Tr. pp. 303-321). The white Jeep overturned and other items of evidence were thrown out of the vehicle. ( R. 205-223, Tr. pp. 303-321). Police then arrested Wilder, Smith, and Gadsen. ( R. 205-223, 319-328, 373-74, Tr. pp. 303-321, 420-429, 481-82, State's Exhibits 45, 46, 66, 67, 68, 69, 70, 71, 72). Besides Wilder and his two co-defendants, there was no one else in the getaway vehicle. ( R. 205-223, 319-328, 358-361, 373-74, 486-87, Tr. pp. 303-321, 420-429, 466-469, 481-482, 606-607, State's Exhibits 66, 67, 68, 69, 70, 71, 72).

Once the three were removed from the getaway vehicle, other items of incriminating evidence were removed from the vehicle, including a pistol. ( R. 366-68, Tr. pp. 474-476). The pistol contained six (6) fired shell casings and was consistent with a fired bullet taken from the body of the victim Sterling Spann. ( R. 262-64, 293-94, Tr. pp. 360-362, 391-392). Another pistol was also found outside on the ground near the overturned Jeep. ( R. 331-32, 334-35, 268, Tr. pp. 432-433, 435-436, 366). Also found just outside the overturned getaway vehicle was a roll of duct tape similar to the tape used to bind Patricia Green. ( R. 265-66, 357, Tr. pp. 363-364, 465).

When all of the evidence was finally collected, a total of three (3) guns, three (3) masks, and five (5) gloves were recovered.<sup>10</sup> ( R. 295-99, 302, 331-32, 334-35, 268, 373-74, 422-23, 648-49, Tr. pp. 393-397, 400, 432-433, 435-436, 366, 481-482, 530-531, 768-769). Each of the five (5) gloves

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<sup>10</sup>A piece of the end of a blue medical type glove was found inside Patricia Green's home with the duct tape that was removed from her body. ( R. 255-56, Tr. p. 353-354). Patricia testified Wilder was wearing blue medical type gloves.

tested positive for gunshot residue or a component of gunshot residue. ( R. 648-49, Tr. pp. 768-769). Even though Smith was wearing gloves during the crimes, his gunshot residue test was positive for round lead particles, a component of gunshot residue, on his right palm, right back hand, and left back hand. ( R. 646-47, Tr. p. 766-767).

The police also seized the three perpetrators clothes. DNA samples were eventually obtained from Smith, Gadsen, and Wilder.<sup>11</sup> A DNA sample was also obtained from the victim Sterling Spann at autopsy. Forensic DNA testing showed the victim Sterling Spann's blood was found on appellant Wilder's pants. ( R. 329-330, 397, 598-99, Tr. pp. 430-431, 505, 718-719). Co-defendant Smith's DNA was also found on the same pair of pants. ( R. 599, Tr. p. 719). Smith's DNA was also found on one of the masks. ( R. 460-64, 600, Tr. pp. 568-572, 720, ll. 1-12). Another mask recovered by police had appellant Wilder's DNA on it. ( R. 460-64, 601, Tr. pp. 568-572, 721). Additionally, an eyewitness at the crime scene identified Smith's red Nike tennis shoes as the same shoes that were worn by the perpetrator who chased James Williams from Patricia Green's front yard. ( R. 178-79, Tr. pp. 276-277).

Police also obtained DNA from inside the getaway vehicle. ( R. 601, Tr. p. 721). Appellant Wilder's DNA was found on the gearshift of the white Jeep. ( R. 601, Tr. p. 721). Wilder had rented the getaway vehicle in Charleston, S.C. ( R. 619-623, Tr. pp. 739-743).

EMS was called within seconds of the shooting. ( R. 224-25, Tr. pp. 322-323). Sterling Spann was transported to the hospital by ambulance. ( R. 224-27, Tr. pp. 322-325). On the way to

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<sup>11</sup>While the State did not obtain a DNA standard from the victim Patricia Green after the crimes were committed, it was forensically determined that blood found inside Patricia's home and on a cutting from one of the recovered gloves contained the DNA of the same female donor. ( R. 605-06, Tr. pp. 725-726). There was only one female victim, Patricia Green.

the hospital, Spann died as a result of his gunshot wounds, despite efforts of medical personnel to save his life. ( R. 224-27, 695, Tr. pp. 322-325, 815). James Williams was also transported to the hospital. After emergency surgery, he survived his gunshot wounds; however, half of Williams' bowel or bowels were removed during surgery. ( R. 106, Tr. p. 204). Patricia Green was found inside her home with her hands taped behind her back, her feet taped, and tape over her mouth. ( R. 157-59, Tr. p. 255-257). The tape removed from her body was consistent with the roll of duct tape found near the overturned getaway vehicle. ( R. 623-633, Tr. pp. 743-753). Patricia Green was also transported to the hospital and treated for the injuries she received during the home invasion. ( R. 49-50, 488, Tr. pp. 146-147, 608).

## ARGUMENT

**The trial judge did not err in admitting the DNA evidence from Wilder's pants because the possibility of alleged cross-contamination during the collection of the evidence went to the weight of the evidence and not its admissibility, and in any event does not affect the admissibility of the DNA testimony under Rule 702 S.C.R.E. as Wilder alleges, and even assuming *arguendo* some error in the admission of the evidence, its admission was harmless in light of the overwhelming evidence of Wilder's guilt.**

### *Standard of Review*

In criminal cases, an appellate court sits to review errors of law only. State v. Lee-Grigg, 374 S.C. 388, 398, 649 S.E.2d 41, 46 (Ct. App. 2007) *cert. granted*; State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). The conduct of a criminal trial

is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982); State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006) *cert. pending*.

### ***Standard of Review/the Admission of Evidence***

The admission or exclusion of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). Where an appellant challenges the admissibility of an expert's testimony on the grounds that it is unreliable pursuant to Rule 702 SCRE, the appellate court reviews the admission of such testimony under an abuse of discretion standard. State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), *citing Payton v. Kearsse*, 329 S.C. 51, 495 S.E.2d 205 (1998).

### ***The Evidence at Issue***

As previously discussed, in addition to the other overwhelming evidence of Wilder's guilt, a stain found on Wilder's pants was found to contain the DNA of the murdered victim Sterling Spann. (R. 329-30, 397, 569-572, 598-99, Tr. pp. 430-431, 505, 689-692, 718-719). This evidence was consistent with the testimony of one of the eyewitnesses who saw one of the perpetrators; (1) preventing Spann from getting back into his car after he was initially shot, (2) throwing Spann to the ground, and (3) then kneeling down on Spann before Spann was shot again on the ground. (R. 149-151, Tr. pp. 247, ln. 6 - 249, ln. 25). This DNA match was made by comparing the DNA profile from the stain on Wilder's pants to the DNA profile developed from *a blood sample taken from*

*Spann's body at autopsy.* ( R. 429-30, 586-591, Tr. pp. 537-538, 706-711).<sup>12</sup>

### *The Collection of the Evidence at Issue*

#### *(Spann's Clothes)*

Most of Sterling Spann's clothing was removed from his body at the crime scene by EMS and fire department personnel. ( R. 225, 238, 241, 246-47, 278, Tr. p. 323, ll. 7-19, 336, 339, 344-345, 376, State's Exhibits 6, 7, 10-13, 15-19). Investigator David Owen identified a black shirt and a pair of black sweat pants found in the yard. ( R. 246-47, Tr. p. 344-345). Owen also identified tennis shoes which were also found on the ground near the sweat pants and sweat shirt. (Tr. pp. 338-339). Investigator Owen testified he collected these items. ( R. 245, Tr. p. 343). While an E.M.T. testified Spann may have still been wearing pants when he left the crime scene,<sup>13</sup> the record shows the clothing removed *at the hospital* from the victim Spann was underwear and socks.

( R. 246-47, 240-41, 278, 433, 541, 543, Tr. pp. 344-345, 338-339, 376, 541, 661, 663).

The testimony also established that Investigator Heide Drake collected the clothes Sterling Spann was still wearing when he arrived at the hospital emergency room. ( R. 396, Tr. p. 504). Investigator Drake testified she kept this clothing separate from all other items. ( R. 396, Tr. p. 504). These clothes were bagged separately from appellant Wilder's clothing. ( R. 396, Tr. p. 504). Investigator Drake testified Spann's clothes were bagged before Wilder got to the hospital. ( R. 396,

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<sup>12</sup>According to the record, the clothes Spann was wearing when shot, whether those removed by EMS at the crime scene or those seized at the hospital by police, were not entered into evidence, and there was no testimony they were analyzed by SLED. ( R. 2-7, 543-44, 552-53, 581-615, Tr. pp. 10-15, 663-664, 672-673, 700-735).

<sup>13</sup> R. 246-4E.M.T. Stephen Murray testified he *thought* he and other E.M.T.s cut the victim's pants legs up to his thighs and he *believed* the victim still had his pants on when he left the scene. ( R. 228, Tr. p. 326). However, Murray admitted he did not remember the details of the scene that well. ( R. 225, Tr. p. 323, ll. 10-13).

Tr. p. 504). Investigator Drake testified that the medical staff had removed the clothes Spann was wearing when he arrived at the hospital, and she collected them from his room and placed them inside a paper evidence bag. ( R. 411, Tr. p. 519).<sup>14</sup> Investigator Drake testified she folded this bag over the best she could, and she turned it over to Investigator Roy at the hospital. ( R. 412, Tr. p. 520). When Investigator Drake was asked if Spann's clothing was kept separate from all other items, she stated: "Absolutely." ( R. 396, Tr. p. 504, ln. 6).

Investigator Brent Roy testified he received the clothes of the victim Sterling Spann, taken at the hospital, from Investigator Drake. ( R. 325, Tr. p. 426). Investigator Roy testified he seized the clothing of all persons and kept all clothing separate, transported the items to the Sheriff's Office, and put the items into evidence. ( R. 330, Tr. p. 431, ll. 12-16).<sup>15</sup>

#### *The Collection of Wilder's Clothing*

Investigator Heide Drake testified that Wilder came into the hospital after Spann and was escorted by Deputy Matt Uther. ( R. 396, Tr. p. 504). Once Wilder was stabilized, Investigator Drake collected Wilder's clothing. ( R. 396, Tr. p. 504). She physically observed the medical staff remove Wilder's clothing and immediately took custody of them. ( R. 397, Tr. p. 505).<sup>16</sup> Detective

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<sup>14</sup>While Drake testified she recalled the clothes having blood on them, she did not remember if they were wet, and there is no testimony any of the blood got on her hands or was transferred to Wilder's clothing. ( R. 393-413, Tr. 501-521).

<sup>15</sup>Investigator Roy testified he received *Smith's* clothing at a different hospital already bagged by Deputy Jacobik. ( R. 323, Tr. p. 424). Jacobik saw medical staff remove *Smith's* clothing, and there is testimony the clothes were initially placed in a plastic bag and then into a paper bag. (See R. 363-65, Tr. pp. 471-473). Investigator Roy testified he received *Wilder's* clothing from Investigator Drake already bagged. ( R. 324, Tr. p. 425).

<sup>16</sup>The State did not introduce into evidence Spann's clothing collected at the hospital. The State only introduced *Wilder's* clothing which Detective Drake actually witnessed being removed and helped collect. (See R. 2-7, Tr. pp. 10-15, State's Exhibit 98).

Drake testified the removal of Wilder's clothing and its bagging was a joint effort by she and the medical personnel treating Wilder. ( R. 403, Tr. p. 511). Detective Drake testified she took custody of Wilder's clothes and they were placed in bags. ( R. 398, Tr. p. 505). Detective Drake testified she turned Wilder's clothes over to Investigator Roy in a bag at the hospital. ( R. 399, Tr. p. 507). Detective Drake testified Spann's clothes and Wilder's clothes were in different bags. ( R. 412-13, Tr. p. 520-521). She also testified the bag containing Wilder's clothing was not tampered with and it was not mixed with anything. ( R. 399, Tr. p. 507).

Investigator Brent Roy testified that he received Wilder's clothing from Detective Drake, and the clothing was in bags and sealed. ( R. 324, 330, Tr. p. 425, 431). Investigator Roy testified Wilder's clothing was in a sealed paper bag. ( R. 325, Tr. p. 426). Investigator Roy testified the bag containing Wilder's clothing was sealed by being folded down and stapled. ( R. 341-42, Tr. pp. 442-443). Investigator Roy identified at trial the bag Wilder's clothes were in. ( R. 341, Tr. p. 442, State's Exhibit 98). Investigator Roy testified he never opened the sealed and stapled bag containing Wilder's clothing. ( R. 342, Tr. p. 443). Investigator Roy testified the clothing of Smith, Wilder, and Spann he obtained from other people; he seized, kept all clothing separate, transported the items to the Sheriff's Office, and put the items into evidence. ( R. 330, Tr. p. 431, ll. 12-16).

#### ***Spann's blood standard***

A blood sample was collected at autopsy from the victim Sterling Spann by Investigator Kathy Kjellman. ( R. 429-30, Tr. p. 537-538). This blood sample was used by DNA expert Lilly Gallman to develop a DNA profile of the victim Sterling Spann. ( R. 588-89, 598-99, Tr. pp. 708-709, 718-719). It was this profile that was used to make a DNA comparison and match to a stain found on Wilder's pants. ( R. 588-89, 598-99, Tr. pp. 708-709, 718-719). Wilder does not contest

the collection of the blood sample from Spann at autopsy which was used to develop the DNA profile of the victim. (See Brief of Appellant)(See also R. 429-431, Tr. pp. 537-539). Nor does Wilder object to the admissibility of this particular evidence. (See Brief of Appellant)(See also R. 429-431, Tr. pp. 537-539).

### *Issue Raised on Appeal*

Wilder argues on appeal the DNA evidence or testimony regarding his pants should not have been admitted because his clothes and the victim's clothes were "sloppily gathered" resulting in a great danger of cross-contamination and therefore unreliable under Rule 702 SCRE. (See Brief of Appellant, p. 12). He argues his clothes and the victim's clothes were seized at the same hospital, placed in separate brown bags which were not plastic, and were allegedly not sealed. (See Brief of Appellant, pp. 9-10). He argues the blood from the victim's clothes could have seeped from one bag to the other or there could have been cross-contamination during the collection process. (See Brief of Appellant, pp. 9-10, 13). Wilder cites several cases, analogizing these cases to the cross-contamination issue he raises in his brief. (See Brief of Appellant pp. 11-12, referencing State v. Sweet, 374 S.C. 1, 647 S.E.2d 202, 205 (2007)(drug evidence was not admissible given the chain of custody was not complete), State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992)(reversing trial court's admission of blood alcohol evidence when the identity of the person who drew the blood sample or transported it to the hospital laboratory was not clear), Raino v. Goodyear Tire and Rubber Company, 309 S.C. 255, 258, 422 S.E.2d 98, 100 (1992)(affirming trial court's suppression of blood alcohol evidence since that was proper where the identity of any party handling the blood was unknown regardless of the fact the analyzing laboratory was in close proximity to the trauma where the sample was drawn)). In his brief, Wilder argues that there is not

any rational reason he can think of to treat allegedly “sloppily gathered DNA blood evidence” any differently from blood alcohol or drug evidence where the chain of custody cannot be completed or the chance of contamination of that evidence appears substantial. (See Brief of Appellant, p. 12, ll. 13-15). Wilder states the issue in this case is the “gathering of appellant’s (allegedly) and decedent’s bloody clothing in such a manner that it presented an intolerable risk of contamination..” (See Brief of Appellant, p. 12, n. 2). He argues, therefore, the evidence should have been excluded under Rule 702, SCRE.

### *Analysis*

Wilder’s contention on appeal, that he should be given a new trial because this evidence was “sloppily gathered” by police and therefore unreliable under Rule 702 SCRE, is without merit. First, Wilder’s contention that the evidence should have been excluded under Rule 702 is completely misplaced. Rule 702 SCRE deals with the admissibility of the science of DNA testing. Our Supreme Court rejected Wilder’s contention in State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001). In Ramsey, the Court first noted that like appellant here, Ramsey did not challenge the procedure of DNA testing used by the expert. Ramsey did not demonstrate the procedure used by SLED was unreliable, much less so unreliable as to warrant exclusion. Second, the Court noted the testimony concerning DNA evidence complied with the requirements set forth in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The Court held: “Any evidence concerning contamination, therefore went to the weight of the testimony, not its admissibility.” Ramsey. 345 at 616. The Court finally noted that the mixture of DNA evidence is not a basis for the exclusion of the DNA testing. Id., referencing Oregon v. Lyons, 124 Or. App. 598, 863 P.2d 1303 (1993)(finding the potential for DNA contamination presents an “open field” for cross examination at trial, but does not indicate the PCR

method of DNA testing is inappropriate for forensic use).

Under the Rule 702 analysis used by the Court in Ramsey, Wilder has not shown that possible cross-contamination indicates *the method of DNA testing used in this case* is inappropriate for forensic use. *DNA testing* whether PCR or STR is scientifically reliable. See Ramsey; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990). Wilder does not contend otherwise.<sup>17</sup> As a result, Wilder's contention on appeal is misplaced, and his appeal must be dismissed with prejudice.

Furthermore, in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2005), *reversed on other grounds Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727 (2006)(reversed on issue of 3rd party guilt evidence), our Supreme Court held: "[T]he fact the forensic evidence may have been compromised by the unprofessional manner in which the evidence was collected goes to the weight of the evidence, not its admissibility." State v. Holmes, 361 S.C. at 343, fn 8, *citing State v. Carter*, 344 S.C. 419, 544 S.E.2d 835, (2001); State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997). Given Wilder's assertion on appeal, this appeal must be dismissed with prejudice. State v. Holmes.

In fact, Wilder cannot overcome the holding of the case he cites as controlling authority in his brief, State v. Ramsey, *supra*. In Ramsey, the defendant contended the evidence admitted at trial should have been excluded because of the possibility of cross-contamination of DNA evidence. Ramsey maintained blood on a boot could have been contaminated by the way police handled the evidence, while the police testified they were careful and complied with procedures. The Ramsey

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<sup>17</sup>Wilder does not even argue the DNA testing used in this case, STR, was scientifically unreliable under the factors enunciated in Council and State v. Jones, 273 S.C. 723, 259 S.E.120 (1979). See also State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009)(setting forth the factors enunciated in Council and Jones, *supra*).

Court stated: "We find these issues relate to the weight of the evidence." Id. at 615. Therefore, this appeal must be dismissed.

Furthermore, there is no testimony in this case that there was cross-contamination during the collection process, only the possibility of cross-contamination. Such matters are peculiarly within the province of the jury regarding the weight to be given to the evidence and are the subject of cross-examination and argument to the jury. State v. Holmes; State v. Ramsey.<sup>18</sup> While Ramsey and Ford also hold that evidence may be so tainted that it is unreliable and should be excluded, there is no testimony in this case that this occurred during the gathering or collection process.

The jury was fully aware of the collection process of the victim's and Wilder's clothing, who seized them, what type of containers they were in, who they were turned over to at the hospital, in what condition, and how they were transported to the Sheriff's Office. In fact, Wilder argued the possibility of cross-contamination of this evidence to the jury in his closing argument. (R. 791-94, Tr. pp. 922-925). As the Court held in Ramsey, whether there was a possibility of cross-contamination was clearly a matter of what weight the jury would give to the evidence. Wilder's

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<sup>18</sup>Judge Cole pointed out on the record that the bags the evidence was collected in were present in the courtroom, and the witnesses identified the bags, and there was no indication there was contamination from one bag to the other. (R. 552-54, Tr. pp. 672-674). Judge Cole stated it would be speculation to say Wilder's clothes were contaminated by Spann's. (R. 553-54, Tr. pp. 673-674). Judge Cole stated there was no indication that Spann's clothing and Wilder's clothing were intermingled. (R. 554, Tr. p. 674). Wilder argued the bag containing his clothing was not his bag or something was added to it because there allegedly was an additional white plastic inside it. (R. 552, Tr. p. 672). However, this was cleared up in subsequent testimony by S.L.E.D. forensic evidence technician Patti Ruff. Ms. Ruff explained and the record shows there was no white plastic bag but white tissue paper added and initialed by Ms. Ruff. (See R. 562-63, 564, 567-68, Tr. pp. 682-683, 684, 687-688). There is no merit to Wilder's argument on appeal.

appeal must be dismissed.<sup>19</sup>

### *Harmless Error*

Even assuming *arguendo* the trial judge erred in admitting the DNA evidence regarding Wilder's pants, the admission of the evidence was harmless given the overwhelming evidence of Wilder's guilt. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." Pagan, 369 S.C. at 212, 631 S.E.2d at 267 (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002).

In making a determination regarding harmless error, this Court will look at the entire record. State v. Miller, 367 S.C. 329, 626 S.E.2d 328 (2006). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460

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<sup>19</sup>Wilder also argues the collection of the evidence is unreliable because Wilder's own DNA was not found on his pants and Smith's DNA was found on Wilder's pants. Wilder ignores the facts that his own DNA was found on other clothing that belonged to him, and Smith was with him during the crimes, flight from the scene, and wreck. ( R. 600-601, Tr. pp. 720, ln. 16-721, ln. 4). Smith was also injured in the accident. ( R. 361, Tr. p. 469). Wilder also ignores the fact that while Smith's clothing was ultimately turned over to Inv. Roy, the clothing was collected at a different hospital, by a different investigator. ( R. 363-65, Tr. pp. 471-473). This investigator saw medical staff remove Smith's clothing, and there is testimony the clothes were initially placed in a plastic bag and then into a paper bag. ( R. 363-65, Tr. pp. 471-473). Wilder also contends the collection of the evidence is unreliable because one detective, Stanley, testified he was not aware how Wilder's and his co-defendant's clothing was collected, and Stanley acknowledged on cross-examination that a law enforcement form indicated their clothes were taken when they were booked into the jail. (See Brief of Appellant, p. 9). However, Stanley was not the investigator who seized the clothes, and he further testified the chain of custody log (State's Exhibit 116) showed that nothing was taken from the three defendants when they were booked into the county jail. (See R. 508-09, Tr. pp. 628-629). Stanley also testified the only thing the three co-defendant's could have had on if their clothes were removed earlier was jail or hospital clothes. This appeal has no merit.

S.E.2d 368 (1995). The evidence against Wilder was overwhelming.<sup>20</sup> Guilt was conclusively proven, and no other rational conclusion could have been reached.

*The Evidence against Wilder*

Patricia Green positively identified Wilder as the man who kicked in her front door, pistol whipped her, tied her up with duct tape, stuck a gun into her mouth, dragged her to a corner, and directed the other two perpetrators what to do. ( R. 21-26, Tr. pp. 118-123). Wilder did not object to her in-court identification.

Instead, he attempted to attack the credibility of her identification of him, however, this was unsuccessful. Patricia Green testified that she saw Wilder outside her home, at approximately 6:00 p.m. on August 31<sup>st</sup>, while it was still daylight. ( R. 21-26, Tr. pp. 118-123). Wilder was standing directly across the street from her house, and her view of him was not obstructed by a tree located beside her house. ( R. 21-26, 75, Tr. pp. 118-123, 172). Wilder did not have a mask over his face when she saw him across the street from her house just minutes or seconds before the crimes were committed. When Wilder kicked in her door and assaulted her wearing a mask and gloves, he was wearing the exact same clothing she had seen him wearing when he was across the street from her house pacing back and forth. ( R. 22-34, Tr. pp. 119-131). Patricia Green was in close proximity to Wilder the entire time he remained in her home. From the time he assaulted her on her stairs, until the time he dragged her to a corner of the living room so she would not be seen, she was able to closely observe him, including his skin color, his physical build or stature, and clothing.

Wilder also fit the general description of one of the three perpetrators as testified to by three

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<sup>20</sup>Wilder did not testify or introduce any testimony. Nor did his co-defendants.

witnesses.<sup>21</sup> Patricia Green described Wilder as having brown skin, chunky or stocky, “you know, big.” ( R. 25, Tr. p. 122). From across the street he looked “short and stocky” to her. ( R. 74, Tr. p. 171). James Williams described the last man who came out the front door as shorter than the other two and chubby. ( R. 97, Tr. p. 194). James Jones Jr., one of the neighbors, described a man holding the victim Sterling Spann down with his knee as heavy set and shorter than the perpetrator who chased James Williams around the house. ( R. 145-153, Tr. p. 243-251).

Additionally, the vehicle used by the three perpetrators to get near the crime scene and to flee from the crime scene after committing these horrific crimes was identified by several witnesses. ( R. 136-37, 153-55, Tr. pp. 234-235, 251-253). It was described as a white Jeep type vehicle. ( R. 153-55, 195-96, 201, Tr. pp. 251-253, 293-294, 299). One eye witness stated it had a tire on the back marking it as a Jeep. ( R. 153-55, Tr. pp. 251-253). One witness who lived near Patricia Green saw the vehicle driving up and down her dead end street three or four times shortly before these crimes were committed. ( R. 11-19, Tr. pp. 108-116). The vehicle was seen by several witnesses leaving the crime scene after these crimes were committed. ( R. 136-37, 155-56, 195-96, 201, Tr. pp. 234-235, 253-254, 293-294, 299). Wilder rented this vehicle. ( R. 619-623, Tr. pp. 739-743).

A description of the vehicle was put out immediately after the commission of these horrible

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<sup>21</sup>Photographs were taken of each of the three co-defendants after their arrest. ( R. 321-329, Tr. p. 422-430, State’s Exhibits 66, 67, 68). Wilder had braids, Gadsen had dreadlocks, and Smith had short hair. ( R. 34-37, 40-41, 94, 329, Tr. pp. 131-134, 137-138, 192, 430, State’s Exhibits 66, 67, 68, 69, 72). Respondent would point out to the Court, as the Solicitor pointed out the jury, by the time of the trial, Wilder had removed his braids, Gadsen had removed his dreadlocks, and Smith had grown dreadlocks. ( R. 94, 715-17, Tr. 192, 840-842). The defendants were present during the trial, and the trial judge and jury could obviously view them, their builds and complexions, and see their change in appearance from the time of the crime to trial. (See R. 8, 9, 10, 26, 40, 94, 835-861, Tr. pp. 24, 25, 26, 123, 137, 192, 966-992).

crimes. ( R. 195-201, Tr. pp. 293-299). The vehicle was immediately recognized and pursued by a police officer who saw it coming from the direction of the crime scene almost immediately after the crimes were committed. ( R. 195-96, 200-01, 205-223, Tr. pp. 293-294, 298-299, 303-321). The getaway vehicle did not stop when signaled to do so by the police officer, but attempted to evade capture. ( R. 205-223, Tr. pp. 303-321). A high speed chase ensued reaching the speed of 100 m.p.h. ( R. 205-223, Tr. pp. 303-321). While attempting to evade capture, the occupants threw incriminating evidence out the window of the getaway vehicle, including a mask and gloves. ( R. 205-223, Tr. pp. 303-321). Wilder's DNA was found on the gear shift of this vehicle. ( R. 601, Tr.p. 721); Wilder, Smith, and Gadsen were apprehended in this vehicle. ( R. 205-223, 319-328, 358-361, 373-74, 486-87, Tr. pp. 303-321, 420-429, 466-469, 481-482, 606-607, State's Exhibits 66, 67, 68, 69, 70, 71, 72). As previously stated, Wilder rented this vehicle. ( R. 619-623, Tr. pp. 739-743). No one else was in the vehicle but the three perpetrators.

Furthermore, evidence in and around the wrecked getaway vehicle linked Wilder and his two confederates to the home invasion and murder. Masks and gloves were found on the interstate or in and around the white Jeep rented by Wilder. ( R. 295-99, 302, 331-32, 334-35, 268, 373-74, Tr. pp. 393-397, 400, 432-433, 435-436, 366, 481-482). A .380 semi-automatic pistol was found outside the vehicle. ( R. 331-32, 334-35, 268, Tr. pp. 432-433, 435-436, 366). Patricia Green described the gun that was stuck in her mouth as a semi-automatic pistol. Another pistol, identified as being at the crime scene by James Williams, was found in the floorboard of the vehicle Wilder rented. ( R. 366-67, Tr. pp. 474-476). Duct tape consistent with that used to bind Patricia Green was found outside the wrecked Jeep. ( R. 265-66, 357, Tr. pp. 363-364, 465)

Additionally, Wilder was found in the same vehicle with another individual positively

identified as having been involved in the crime. Wilder was arrested with Leo Gadsen, who both Patricia Green and James Williams positively identified as being one of the perpetrators of the burglary, kidnapping, murder, and ABWIK. ( R. 21-26, 39-41, 91-95, Tr. pp. 118-123, 136-138, 189-193 ). Patricia Green testified Gadsen was the man who was the second perpetrator in her front door, the person who acted as a lookout while in the house, and who followed Smith out the front door to deal with James Williams and Sterling Spann. James Williams positively identified Gadsen as the first man out the front door, and the man who stuck a gun in his face, pistol whipped him, and shot Sterling Spann as he attempted to reverse his car. James Williams also positively identified Gadsen as the man who shot him four times in the abdomen and continued to try to shoot him after Gadsen's gun ran out of ammunition. Wilder was arrested with Gadsen and a third individual, in the same vehicle, just minutes after the commission of these crimes by *three perpetrators*. No one else was in the getaway vehicle.<sup>22</sup>

Additionally, Wilder was found in the same vehicle, just minutes after the crimes, with another individual, Smith, whose distinctive tennis shoes were identified by an eyewitness as being the same tennis shoes worn by the man who chased James Williams from Patricia Green's yard after Williams was shot by Gadsen. ( R. 178-79, Tr. pp. 276-277). Smith also fit the general description of one of the perpetrators. James Williams identified the second man who came out of the house as taller than the third man he saw come out of the house and about the same height as the first man, Gadsen, who came out the front door, maybe an inch taller. ( R. 94, 96, Tr. pp. 192, 194). Patricia

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<sup>22</sup>Gadsen also fit the general description of one of the perpetrators. Patricia Green identified the second perpetrator, who she identified as Gadsen, as having dark skin and having dreadlocks. ( R. 35, Tr. p. 132). James Williams identified the man who shot Spann in his car and who shot him four (4) times, who he identified as Gadsen, as about an inch under six (6) ft., skinny, and also as having dreadlocks. ( R. 92-93, Tr. pp. 190-191).

Green described the third man who came in her house, the man who went upstairs, as tall or taller with dark skin. ( R. 42, 53, Tr. pp. 139, 150). John Jones, Jr. described the man who chased James Williams from Patricia Green's yard shooting at Williams as "a taller fellow," tall and slender. ( R. 146, 148-49, Tr. pp. 244, 246-247). Additionally, Smith's hands contained a component of gunshot residue. His gunshot residue test was positive for round lead particles, a component of gunshot residue, on his right palm, right back hand, and left back hand. ( R. 646-47, Tr. p. 766-767). Furthermore, Smith's DNA was found on one of the masks recovered by police. ( R. 460-64, 600, Tr. pp. 568-572, 720, ll. 1-12).

Finally, other forensic evidence, which Wilder has not contended was possibly tainted, linked Wilder to the crime scene and murder. One of the gloves thrown from the getaway vehicle rented by Wilder contained the same female DNA as that found in Patricia Green's home after her kidnapping and assault. ( R. 605-06, Tr. pp. 725-726). It is clear from all of the evidence in this case that this DNA found inside the home and on one of the gloves discarded from the white Jeep was Patricia Green's DNA. There was no other female victim in this case.

Five separate gloves were recovered by police. Each of these gloves contained gunshot residue or components of gunshot residue. ( R. 648-49, Tr. pp. 768-769).

A pistol, a .38 caliber revolver, was found in the passenger seat floorboard of the getaway vehicle. ( R. 366-68, Tr. pp. 474-476 State's Exhibits 45 & 46). This pistol contained nothing but fired shell casings in its circular chamber. ( R. 263-65, Tr. pp. 360-362). This pistol was found in the floor board next to co-defendant Smith's foot. (State's Exhibits 45 & 46, R. 373-74, 178-79, Tr. pp. 481-482, 276-277). The victim James Williams identified this gun as one he saw at the crime scene during the shootings. ( R. 106-08, Tr. pp. 204-206). Another witness stated this gun looked

just like the gun used at the crime scene. ( R. 160, Tr. p. 258). A third pistol was found discarded in the path of the defendants' initial flight from the scene. ( R. 378-385, 301, Tr. p. 486-493, 399). This pistol, a 357 revolver, was also consistent with the bullets taken from Sterling Spann's body and his car.<sup>23</sup> ( R. 671-72, Tr. pp. 791-792). The gun found in the floor board of the getaway vehicle containing six (6) empty shell casings is also consistent with the testimony of James Williams, that Gadsen shot Spann in the car and then shot him until the gun would not fire anymore. Ballistics testing also showed this gun was also consistent with a bullet taken from the victim Sterling Spann's body.<sup>24</sup> The duct tape found outside the overturned Jeep was also consistent with the tape used to bind Patricia Green. Finally, appellant Wilder's DNA was found on one of the masks recovered by police. ( R. 460-64, 601, Tr. pp. 568-572, 721). This mask was not recovered at the hospital where Wilder's clothes were collected.

The evidence was extremely strong and Wilder's guilt was conclusively proven without regard to the DNA evidence on Wilder's pants. "[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." Pagan, 369 S.C. at 212, 631 S.E. 2d at 267 (quoting State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)); State v. Adams, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003). In this case, no other rational conclusion could have been reached by the

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<sup>23</sup>James Williams testified the gun that Gadsen put in his face was a 357 revolver. ( R. 92, Tr. p. 190). However, Williams identified the .38 caliber revolver found in the getaway vehicle's floorboard as being involved in the shooting. ( R. 107, Tr. p. 205).

<sup>24</sup>Due to the limited number of lands and grooves on the fired bullets and/or jackets, the firearms examiner could not make a positive identification regarding which gun, the 38 or 357 fired each bullet. He opined that either gun could have fired anyone of the submitted bullets or another gun with similar rifling characteristics. ( R. 671-72, Tr. pp. 791-792).

jury given the overwhelming evidence of Wilder's guilt.

The jury knew *Wilder* was guilty without resort to the DNA evidence on his pants. Wilder was identified by Patricia Green as one of the perpetrators of the burglary, kidnappings, assault and murder. Wilder's description fits that of one of the perpetrators involved in the home invasion and murder. Wilder rented the vehicle used in the home invasion and murder. Wilder was apprehended in the vehicle used in the home invasion and murder, just minutes after the crimes were committed. Wilder and his confederates engaged in a high speed chase with police reaching the speed of 100 m.p.h. and while fleeing from police attempted to discard incriminating evidence linking them to the home invasion and murder. Wilder was arrested with two other individuals either identified as being at the scene or linked to the scene by clothing they were arrested wearing. Further, Wilder's DNA was found on one of the masks recovered by police.

"There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted." State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000). There was abundant evidence in the record Wilder was guilty of murder, burglary, kidnapping, ABWIK, and attempted armed robbery. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) (admission of hearsay testimony harmless given abundant evidence in the record from which jury could have found the appellant guilty). "Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial." State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) (instructing that error in admission of evidence is

harmless where it is cumulative to other evidence which was properly admitted); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006). *See also* State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (Ct. App. 2006)(holding error in admission of some DNA evidence was harmless given other properly admitted DNA evidence and additional evidence of defendant's guilt), *referencing* State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996)("[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed."), *other citations omitted*. The admission of the DNA evidence regarding Wilder's pants, even if erroneous, was harmless given the other overwhelming evidence of Wilder's guilt.

### CONCLUSION

The trial judge did not err in admitting the DNA evidence under Rule 702 SCRE, because the possibility of cross-contamination during collection process went to the weight of the evidence not its admissibility, and Rule 702 SCRE deals with the admissibility of the science not the evidence itself. Even assuming *arguendo* that the trial judge erred in the admission of the this evidence, the error was harmless given the overwhelming evidence of Wilder's guilt. Wilder's appeal must be dismissed.

Respectfully submitted,

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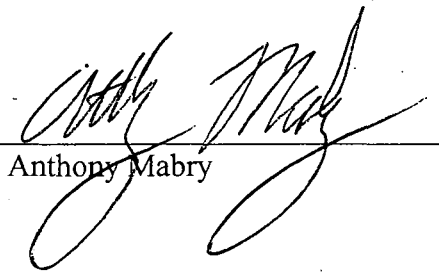
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January 15, 2010

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Charleston County  
J. Derham Cole, Circuit Court Judge

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THE STATE,

Respondent,

V.

ANTHONY D. WILDER,

Appellant

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CERTIFICATE OF COMPLIANCE

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”



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ANTHONY MABRY  
ATTORNEY FOR RESPONDENT

January 15, 2010

**CERTIFICATE OF SERVICE**

I, **Anthony Mabry**, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing two (2) copies in the United States mail to Robert M. Dudek, Acting Chief Attorney, S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211 this 15<sup>th</sup> day of January, 2010.



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