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S.C. SUPREME COURT

VOLUME II OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

EDWARD MAURICE DUNN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-00194

APPENDIX

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1 you may believe one witness over several witnesses or
2 several witnesses over just one.

3 You may believe a part of testimony of a witness and
4 reject the remaining part of the testimony of the same
5 witness.

6 You may believe the testimony of a witness in its
7 entirety or reject that testimony. You may consider
8 whether any witness has exhibited to you any interest or
9 bias or prejudice or other motive in this case, and you
10 can consider the appearance and manner of the witness
11 while on the witness stand.

12 Now, ordinarily, the Rules of Evidence -- those are
13 the rules that guide our trial presentations -- do not
14 permit witnesses to testify about their opinions or
15 conclusions. An exception to this rule exists for
16 witnesses we call expert witnesses. We had several in
17 this case.

18 A witness who by education and experience has become
19 an expert in some art or science or profession may state
20 an opinion to you as to relevant and material matter in
21 which the witness claims to be the expert and may also
22 state the reasons for his or her opinion.

23 You should consider any expert opinion received in
24 evidence in this case like any other evidence. Give it
25 the weight you think it deserves.

1 If you decide the opinion of an expert witness is not
2 based on sufficient education or if you conclude the
3 reasons given in support of the opinion are not sound or
4 that the opinion is outweighed by other evidence, you may
5 disregard that opinion in its entirety.

6 In other words, an expert witness's testimony is to
7 be given no greater weight than that of another witness
8 simply because the witness is an expert. Further, you're
9 not required to accept an expert's opinion even though
10 it's not contradicted.

11 Now, in this case -- and you will have with you in
12 the jury room a statement allegedly made by the defendant.
13 I admitted it into evidence.

14 Now, because I determined that the statement is
15 admissible, I instruct you that you make the ultimate
16 decision of whether or not the defendant actually made the
17 statement.

18 If the defendant did make the statement, you must
19 determine whether the statement was made by the defendant
20 voluntarily and of his own free will.

21 This means that the statement was not caused by
22 pressure, fear, force, threats, coercion or other
23 intimidation or by hope or a promise of leniency or a
24 reward of any kind.

25 In determining whether the statement was voluntary,

1 you should consider the characteristics of the defendant
2 and the details of the questioning.

3 Some of the factors that is you may consider are the
4 age of the defendant, the defendant's education or lack of
5 education, the defendant's mental ability or capacity, the
6 defendant's IQ or intelligence, the defendant's background
7 and environment, the place and length of the detention
8 where the statement was made and the nature of the
9 questioning, and most importantly, the advice or lack
10 thereof of the defendant's constitutional rights,
11 including but not limited to the right to remain silent;
12 that any statement could be used against him in a court of
13 law, the right to have a lawyer present.

14 If he could not afford a lawyer, a lawyer would be
15 appointed to represent him without any cost and that he
16 could stop making a statement at any time. You must
17 carefully consider all of the surrounding circumstances
18 before you give any weight to the alleged statement.

19 Now, the State, just like every other element in this
20 case, has the burden of proving of beyond a reasonable
21 doubt that the alleged statement was voluntary.

22 If you determine it was, you may give the statement
23 any further consideration that you deem proper. You must
24 decided what weight, if any, should be given to the
25 alleged statement. If you determine the alleged statement

1 was not the free and voluntary statement of the defendant,
2 you should not consider the statement at all.

3 Now, another issue in this case is the identification
4 of the defendant as the person who committed the crime
5 charged.

6 The State has the burden of proving identity beyond a
7 reasonable doubt. You must satisfied beyond a reasonable
8 doubt of the accuracy of the identification of the
9 defendant before you may convict the defendant.

10 Now, in order to establish criminal liability,
11 criminal intent is required. Criminal intent must be
12 proven by the state beyond a reasonable doubt.

13 Criminal intent is always a matter that must be
14 determined by the jury from the circumstances surrounding
15 the situation.

16 Now, there is no way to prove intent to a
17 mathematical certainty. There is no way medical science
18 can dissect a person's brain to determine what the person
19 had in mind, so the law says that criminal intent may be
20 inferred from the circumstances shown to have existed at
21 the time and place. This is how you make a determination
22 of whether or not the element requiring intent was
23 present.

24 It's not necessary to establish intent by direct or
25 positive evidence but intent may be established copy

1 inference the same way as any other fact by taking into
2 consideration the act of the parties and all the facts and
3 circumstances of the case.

4 In other words, criminal intent is a mental state, a
5 conscious wrongdoing. It's up to you to determine what
6 the defendant intended to do based on the circumstances
7 shown to have existed at the time and place of the alleged
8 crime.

9 Criminal intent can arise from action or failure to
10 act. It may arise from negligence or reckless or
11 indifference to duty or to consequences that are
12 considered by the law to be the equivalent of criminal
13 intent.

14 Now, mere presence, mere presence at a scene of a
15 crime is not sufficient to prove one is guilty of the
16 crime.

17 A defendant's presence where a crime is being
18 committed or mere association with a person who commits a
19 crime does not make a defendant an accomplice or an aider
20 or an abettor of the person committing the crime.

21 The burden is on the State to prove every element of
22 the crime charged. If you find after reviewing all of the
23 evidence that the State has proved that the defendant was
24 only present at the scene and that they have not proved
25 beyond a reasonable doubt any other participation in the

1 crime, then you must find the defendant not guilty.

2 The law is that proof of -- is proof of -- at the
3 scene of the crime is not sufficient to find someone
4 guilty.

5 Now, if a crime is committed by two or more people
6 who are acting together in committing a crime, the act of
7 one is the act of all. The attorneys have alluded to that
8 in their closing arguments.

9 A person who joins with another to commit an unlawful
10 act is criminally responsible for everything done by the
11 other person which happens as a probable cause or a
12 natural consequence of the acts done in carrying out the
13 common plan and purpose.

14 For example, two people can be guilty of killing
15 another person when only one person of the two had a gun.
16 There is only one bullet and only one of the two fired the
17 shot that cause the death.

18 If two or more people are acting together assisting
19 each other in committing the offense, the act of one is
20 the act of all or as it is sometimes said, the hand of one
21 is the hand of all.

22 Prior knowledge that a crime is going to be committed
23 without more is not sufficient to make a person guilty of
24 that crime. Mere knowledge that another person is going
25 to commit a crime, even if the defendant is present when

1 the crime is committed is not sufficient to convict the
2 defendant as a principal.

3 Guilt as a principle is shown by the actual or
4 constructive presence at the scene as a result of prior
5 arrangement. Therefore, a finding of a prior arranged
6 plan or common scheme is necessary for a finding of guilt
7 as a principal.

8 The State must prove beyond a reasonable doubt by
9 competent evidence the theory of the hand of one is the
10 hand of all.

11 A principal in a crime is one who either actually
12 commits the crime or who is present aiding or assisting in
13 committing the crime. When a person doesn't act with the
14 presence of another or with the assistance of another, the
15 act is done by both.

16 Where two or more are acting with a common plan or
17 intent are present at the commission of the crime, it does
18 not matter who actually commits the crime. All are
19 guilty. The hand of one is the hand of all.

20 Being present at the commission of the crime means to
21 be sufficiently near to aid and assist in the commission
22 of the crime. However, as I said earlier, mere presence
23 at the scene of a crime is not sufficient to convict one
24 as a principal on the theory of aiding and abetting.

25 Intent is also a necessary element. For there must

1 have been a common design and attempt to commit the crime,
2 and the crime must have been committed pursuant thereto
3 with the person aiding and abetting by some overt act.

4 Intent means intending the result which actually
5 occurs, not accidentally or involuntary. Intent may be
6 shown by acts and conduct of the defendant and other
7 circumstances from which you may naturally and reasonably
8 infer intent. The State must prove these elements beyond
9 a reasonable doubt.

10 Well, now, that's the general law of this state.
11 With regard to the specific charges, I charge you as
12 follows: The defendant is charged with assault with
13 intent to commit first degree criminal sexual conduct.

14 The State must prove beyond a reasonable doubt the
15 defendant committed an assault on the victim with the
16 intent to commit first degree criminal sexual conduct.

17 The first element which the State must prove beyond a
18 reasonable doubt is that the defendant committed an
19 assault. An assault occurred when -- occurs when a person
20 voluntarily -- violently or forcefully attempts to hurt or
21 injure another person and has the present ability to
22 complete the intended injury.

23 An assault is the intentional creation of fear of
24 immediate bodily harm. The second element which the State
25 must prove beyond a reasonable doubt is that the defendant

1 intended to engage in a sexual battery with the victim.

2 Intent means intending the result which actually
3 occurs, not accidentally or involuntary. Intent may be
4 shown, as I said earlier, by acts and conduct of the
5 defendant and other circumstances from which you may
6 naturally and reasonably infer intent.

7 A sexual battery is sexual intercourse or cunnilingus
8 or fellatio or anal intercourse or any intrusion, however
9 slight, of any part of the person's body or any object
10 into the genital or anal openings of another person's body
11 except when that intrusion is accomplished for medically
12 recognized treatment or diagnostic purposes.

13 What is first degree burglary? The defendant is
14 charged with first degree burglary. The State must prove
15 beyond a reasonable doubt that the defendant entered a
16 dwelling without consent.

17 A dwelling is any building or portion of a building
18 in which a person ordinarily sleeps. In order to prove
19 the defendant entered the dwelling, the State does not
20 have to show that the defendant's entire body entered the
21 dwelling. The smallest entry is sufficient.

22 It may be any part of the body, such as a hand or a
23 foot or even any instrument. In addition, the State does
24 not have to prove that force was used to gain entry. If a
25 person enters the building by using deception or trick or

1 misrepresentation to get consent to enter, this is an
2 entry without consent.

3 Next, the State must prove beyond a reasonable doubt
4 the defendant intended to commit a crime, either a felony
5 or a misdemeanor at the time of the entry.

6 The mere entry into a building without consent is not
7 burglary. If the intent to commit a crime is formed after
8 the entry, it's not a burglary.

9 On the other hand, if the defendant intended to
10 commit a crime at the time of the entry, it is a burglary,
11 even if the intent was abandoned after that entry. It
12 does not matter that the intended crime was not completed.

13 Intent may be shown by acts and conduct of the
14 defendant and any other circumstances from which you may
15 naturally and reasonably infer intent.

16 Finally, the State must prove beyond a reasonable
17 doubt that when entering or while in the building or while
18 fleeing, the defendant or an accomplice was armed with a
19 deadly weapon.

20 A deadly weapon is any article, instrument or
21 substance which is likely to cause death or great bodily
22 harm.

23 Whether the instrument has been used as a deadly
24 weapon depends on the facts and circumstances of each
25 case. Second, when entering -- while in the dwelling or

1 when fleeing, the defendant or an accomplice caused
2 physical injury to anyone not participating in the crime;
3 three, while -- three, while entering -- while in the
4 dwelling or when fleeing, the defendant or an accomplice
5 used or threatened to use a dangerous object, and four,
6 when entering -- while in the dwelling or when fleeing,
7 the defendant or an accomplice displayed what was or
8 appeared to be a knife or a pistol, a revolver or shotgun
9 or any other firearm or -- and this is this fifth prong,
10 that the defendant entered or remained in the dwelling in
11 the nighttime.

12 Nighttime is the period between sunset and sunrise
13 during which there is not enough daylight to recognize a
14 person's face.

15 What is armed robbery? Armed robbery: The defendant
16 is charged with armed robbery. In order to prove this
17 offense, the State must prove beyond a reasonable doubt
18 the defendant took personal property from a person or
19 presence of another person.

20 Property is in the presence of a person if it is
21 within the person's reach or inspection or observation or
22 control, so that the person could, if not overcome with
23 violence -- with violence or prevented by fear, keep
24 possession of their own property.

25 The State must prove beyond a reasonable doubt the

1 defendant carried the property away intending to
2 permanently deprive the owner of the property and to keep
3 the property for the defendant's own use.

4 The slightest removal of the property or the complete
5 possession of the property, even for an instance by the
6 defendant is sufficient to show a taking and carrying away
7 of the property.

8 The taking and carrying away of the property must
9 have been done by violence or by putting the owner of the
10 property in fear of violence.

11 Finally, the State must prove beyond a reasonable
12 doubt the defendant was armed with a deadly weapon during
13 the robbery.

14 A deadly weapon is any article, instrument or
15 substance which is likely to cause death or great bodily
16 harm.

17 And fourth, the defendant is also charged with
18 kidnapping. The State must prove beyond a reasonable
19 doubt the defendant knowingly and unlawfully seized,
20 confined or kidnapped another person without authority of
21 law.

22 To do a thing unlawfully is to do it willfully
23 against the law. Knowingly means with knowledge that's
24 clear, not accidental. Seized means to take hold of
25 suddenly or forcibly, or to confine means to be limit,

1 restrict or enclose within bounds or imprison or shut or
2 keep in.

3 Kidnap is to remove a person against his will by
4 unlawful force or by fraud. Now, the State does not have
5 to prove the defendant did all of these things.

6 Instead, if you find beyond a reasonable doubt that
7 the defendant did any of these things, you may find the
8 defendant guilty of kidnapping.

9 Something done without the authority of law is
10 something which the law does not sanction, permit, allow
11 or condone or provide justification for.

12 Kidnapping does not have to be for any personal or
13 monetary gain or for any illegal person. That may be for
14 any reason whosoever.

15 Now, ladies and gentlemen, I want to emphasize this
16 final instruction. I instruct you and emphasize the fact
17 that the defendant did not testify in this case is not a
18 factor to be considered by you in any way in your
19 deliberations and in your consideration of the question of
20 the guilt or innocence of a defendant. It must not be
21 considered by you in any manner whatsoever.

22 As I said at the beginning of this trial, the
23 defendant has a constitutional right to remain silent, and
24 the assertion of this right must not be considered by you
25 in your deliberations. I repeat: Under your oath, you

1 are to draw no conclusion whatsoever from the fact the
2 defendant in this case did not testify. The fact that
3 this defendant did not testify should not even be
4 discussed in the jury room.

5 The burden of proof, as I stated to you, is on the
6 State. The defendant is not required to prove his
7 innocence. The burden of proof remains on the State to
8 prove guilt beyond a reasonable doubt.

9 Now, during your deliberations, you must not
10 communicate with or provide any information to anyone
11 outside the jury room by any means about this case.

12 You're not going to be able to use reference
13 material, a dictionary, an encyclopedia or a Bible or any
14 internet resources. If you learn any juror is violating
15 this instruction, you are to report it to me immediately.

16 Now, nothing I may have said or done during the
17 course of this trial has been in any way intended to
18 express or suggest a view of the evidence or an opinion as
19 to the facts, the weight of the evidence or the
20 credibility of witnesses.

21 If any of my actions or words have seemed to so
22 indicate, you should disregard such and form your own
23 opinions as to these matters.

24 I am required to declare the law as I've done through
25 these instructions to help and guide you to a just and

1 lawful verdict.

2 Whether some of these instructions will apply will
3 depend on what you find to be the facts in this case. The
4 fact that I instructed on various subjects in this case
5 must not be taken by you as indicating an opinion of this
6 court as to what you should find to be the facts or to
7 be -- facts to be or what your verdict should be.

8 Now, Mr. Foreman, obviously, there are two possible
9 verdict forms for each charge which you may find: Guilty
10 or not guilty. There's no significance to the order in
11 which I state these possible verdicts.

12 It's simply that one must be stated first. All 12 of
13 you must agree on each verdict. Your verdict cannot be
14 based on sympathy, passion, prejudice, emotion or any
15 other consideration not in evidence in this case.

16 Mr. Foreman, you will take with you to the jury room
17 all four indictments. On the back are what we call the
18 face of the indictment. The bottom left-hand corner is
19 place for your verdict.

20 As you reach a verdict on each of the indictments,
21 please enter the words "not guilty" or "guilty", sign your
22 name and date today's date the verdict form.

23 As I say, you are to consider all four -- all four --
24 the verdict does not have to be consistent with each
25 other. They don't all have to be one way or all the other

1 one. They are independent, as I said earlier, independent
2 verdicts on these verdicts forms.

3 Once you have received -- agreed on a verdict on each
4 of these forms, please knock on the jury room door, and we
5 will -- inform the bailiff, and we will receive your
6 verdict.

7 Now, I'm going to ask you to return to your jury room
8 but do not begin your deliberations immediately until
9 you're told by the clerk or the bailiff to do so. That
10 basically will be when you receive these verdict forms. I
11 mean, the indictments, and you'll receive all the
12 evidence.

13 If you want to play again either the 9-1-1 tape or
14 the phone call that was played for you that took place in
15 the captain -- Major Smith's office, the phone call to the
16 mother -- I'm not sure how you're going to do that but
17 just let us know. We'll make sure you can hear it again,
18 if you wish to hear it again.

19 All right. Ladies and gentlemen, I think that will
20 conclude my instruction to you. I'll ask you to return to
21 the jury room. Just relax for a few minutes because it's
22 going to be a few minutes before we gather up all the
23 evidence and bring it to you, so do not begin your
24 deliberations until you receive all the evidence.

25 Thank you very much.

1 (WHEREUPON, the jury left open court at approximately
2 3:22 p.m.)

3 THE COURT: Any exceptions with the charge from the
4 State?

5 MS. FENT: No, Your Honor.

6 THE COURT: From the defense?

7 MR. O'NEIL: No, Your Honor.

8 THE COURT: Thank you very much. Let's collect the
9 evidence, make sure the jury has all of the evidence.

10 MS. FENT: We have an office laptop that doesn't have
11 any documents or anything, information on it, and we can
12 turn off the internet access. That's what we've done
13 before, if they wanted to use it to play the CDs. I'll go
14 get that.

15 THE COURT: Ms. Bodman, it's your computer.

16 Stand at ease until we hear from the jury.

17 (WHEREUPON, the jury began their deliberations at
18 3:26 p.m.)

19 (Whereupon, the jury heard the 9-1-1 phone call and
20 the call from made from the sheriff's department at
21 3:59 p.m.)

22 THE COURT: All right. The juror who has childcare
23 issues informed me again that she needs to leave to pick
24 up her child from daycare, and you know, I can let them go
25 another 15 minutes. It's probably not going to -- there's

1 no use in doing that, so I will release them for the
2 evening. I'll give them as much caution as I can.

3 Any objection?

4 MR. O'NEIL: No, Your Honor.

5 MS. FENT: No, sir.

6 THE COURT: All right. Bring the jury.

7 THE BAILIFF: Yes.

8 (WHEREUPON, the jury came into open court at
9 approximately 4:59 p.m.)

10 THE BAILIFF: The jury is seated, Your Honor.

11 THE COURT: Mr. Foreman and ladies and gentlemen of
12 the jury, I understand you're deliberating. As you
13 probably know, one of your fellow jurors has a child care
14 issue and needs to pick up a child from daycare at Fort
15 Jackson. So I'm going to release you for the day.

16 I'm going to ask you to be back -- let me ask you
17 when you'd like to be back. Is nine o'clock okay for
18 everybody? I mean, it's sort of in your hands now. If
19 you want to come back at 9:30, that's okay, but if you get
20 back --

21 THE JUROR: Yeah, nine is good.

22 THE FOREMAN: Nine.

23 THE COURT: Nine. Okay. We'll see you'll at nine
24 o'clock.

25 Now, let me just say this: You got all the evidence.

1 You've heard all the -- everything that's gone on so far.
2 There might be an increased temptation, and I'm not
3 suggesting that anybody would try to do something, discuss
4 -- either find out something about this case or talk with
5 somebody overnight.

6 You can only talk to each other when all 12 of you
7 are present, so I'll urge you in the morning not to start
8 deliberating until all 12 are present.

9 It would be -- it would be improper for just two or
10 three to get together on the phone or on Facebook or
11 whatever and try to -- try to work some things out among
12 themselves without the other members of the group, of the
13 jury being present.

14 I hope you will follow my instructions in that
15 regard. I told you last night about Twitter and Facebook
16 and Google and everything else you can do on the internet
17 these days.

18 Just have a pleasant evening with your families or
19 with your friends or how ever you choose to have a
20 pleasant evening.

21 Get a good night's sleep. Come back in the morning.
22 I'm sure you'll be able to move this right along to a
23 resolution one way or the other. So you're now excused
24 for the evening. We'll see you at nine o'clock in the
25 morning.

1 Thank you very much.

2 (WHEREUPON, the jury left open court at approximately
3 5:02 p.m.)

4 THE COURT: Stand at ease until nine o'clock.

5 (Whereupon, There was an overnight recess and jury
6 deliberations began the following morning).

7 (Whereupon, the jury sent a note at ten o'clock a.m.)

8 THE COURT: Mr. O'Neil and Mr. Matthews, approach the
9 bench, please.

10 Where is Ms. Bodman?

11 MR. MATTHEWS: She is on her way down.

12 THE DEPUTY: Are you going to need the defendant up,
13 Your Honor?

14 THE COURT: I don't know. Jus a minute. I'll show
15 it to Mr. O'Neil.

16 (Pause.)

17 The jury has --- in a note has requested further
18 instruction on the concept of hand of one, hand of all. I
19 suggested to counsel that I, the Court, bring the jury
20 back into the jury room and read the instruction again or
21 send the hand of one, hand of all instruction, written
22 instruction, back to the jury.

23 It's my understanding that the State and the defense
24 consent to sending the written hand of one is the hand of
25 all instruction back to the jury; is that correct?

1 MS. FENT: That is correct.

2 MR. O'NEIL: Yes, sir, Your Honor. May I approach?
3 I just want to make sure I read it and see exactly what...

4 THE COURT: Yes.

5 (Pause.)

6 (WHEREUPON, Court's Exhibit No. 7 was marked for
7 identification only and sent back to the jury.)

8 THE COURT: All right. Do we have a clerk?

9 All right. Counsel, the bailiff informs the court
10 that the jury has reached a verdict. Are you ready to
11 receive the verdict?

12 MS. FENT: Yes, sir, ready.

13 MR. O'NEIL: Yes, Your Honor.

14 THE COURT: All right. Bring the jury, please.

15 THE BAILIFF: Bring the jury.

16 (WHEREUPON, the jury returned to open court with the
17 verdict at 10:48 a.m.)

18 THE BAILIFF: The jury is present, Your Honor.

19 THE COURT: All right. Thank you. Good morning
20 ladies and gentlemen.

21 THE JUROR: Good morning.

22 THE COURT: It's my understanding from the bailiff
23 that the jury has reached a verdict. Mr. Foreman; is that
24 correct?

25 THE FOREMAN: Yes, sir.

1 THE COURT: Will you hand the verdicts to the
2 bailiff, please?

3 (Pause.)

4 All right. Madam clerk, will you publish the
5 verdicts, please?

6 THE CLERK: County of Richland, the State of South
7 Carolina versus Edward Maurice Dunn, Jr., indictment
8 2011-GS-40-3518, assault with intent to commit CSC, first
9 degree: Not guilty. Signed by the foreperson, number
10 305, on May 24th, 2012.

11 The State of South Carolina versus Edward Maurice
12 Dunn on indictment 2011-GS-40-3526, indictment for
13 kidnapping, verdict guilty, signed the foreperson, number
14 305 on May 24th, 2012.

15 The State of South Carolina versus Edward Maurice
16 Dunn on indictment 2011-GS-40-3525, indictment for armed
17 robbery: Verdict guilty, signed by the foreperson, number
18 305, on May 24th, 2012.

19 The State of South Carolina versus Edward Maurice
20 Dunn, indictment 2011-GS-40-3527, indictment for burglary
21 first degree, verdict guilty, signed by the foreperson
22 number 305 on May 24th, 2012.

23 Mr. Foreman, is this your verdict and the verdict of
24 the entire jury?

25 THE FOREMAN: Yes, ma'am.

1 THE CLERK: Thank you.

2 THE COURT: Any desire to poll the jury?

3 MR. O'NEIL: Yes, Your Honor.

4 THE COURT: Please poll the jury.

5 THE CLERK: Ladies and gentlemen of the jury, I'm
6 going to call your number and ask you two questions in
7 regard to your verdict. When I call your number, please
8 respond "yes" or "no" to each question.

9 Number 305, was this your verdict?

10 JUROR: Yes, ma'am.

11 THE CLERK: Is it still your verdict?

12 JUROR: Yes, ma'am.

13 THE CLERK: Number 27, was this your verdict?

14 JUROR: Yes, ma'am.

15 THE CLERK: Is it still your verdict?

16 JUROR: Yes, ma'am.

17 THE CLERK: Number 187, was this your verdict?

18 JUROR: Yes, ma'am.

19 THE CLERK: Is it still your verdict?

20 JUROR: Yes, ma'am.

21 THE CLERK: 299, was this your verdict?

22 JUROR: Yes, ma'am.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes, ma'am.

25 THE CLERK: 61, was this your verdict?

1 JUROR: Yes, ma'am.

2 THE CLERK: Is it still your verdict?

3 JUROR: Yes, ma'am.

4 THE CLERK: Number 36, was this your verdict?

5 JUROR: Yes, ma'am.

6 THE CLERK: Is it still your verdict?

7 JUROR: Yes, ma'am.

8 THE CLERK: 163, was this your verdict?

9 JUROR: Yes, ma'am.

10 THE CLERK: Is it still your verdict?

11 JUROR: Yes.

12 THE CLERK: 91, was this your verdict?

13 JUROR: Yes.

14 THE CLERK: Is it still your verdict?

15 JUROR: Yes.

16 THE CLERK: 201, was this your verdict?

17 JUROR: Yes, ma'am.

18 THE CLERK: Is it still your verdict?

19 JUROR: Yes, ma'am.

20 THE CLERK: 289, was this your verdict?

21 JUROR: Yes.

22 THE CLERK: Is it still your verdict?

23 JUROR: Yes.

24 THE CLERK: 79, was this your verdict?

25 JUROR: Yes, ma'am.

1 THE CLERK: Is it still your verdict?

2 JUROR: Yes.

3 THE CLERK: 191, was this your verdict?

4 JUROR: Yes, ma'am.

5 THE CLERK: Is it still your verdict?

6 JUROR: Yes, ma'am.

7 THE CLERK: The jury has been polled, Your Honor.

8 THE COURT: Thank you very much.

9 All right. Ladies and gentlemen of the jury, thank
10 you very much.

11 Now, the final part of this trial will consist of the
12 sentencing of the defendant. This is not -- we're not
13 quite like Law and Order here in Richland County or any
14 police show programs, things like that that sentence
15 later.

16 I know the federal court system has the luxury of
17 being able to sentence defendants at a later time, but our
18 workload is such a heavy load here in Richland County that
19 sentencing generally takes place right after the jury
20 verdict if it's a guilty verdict.

21 You have -- you are welcome to stay for that. Now,
22 it's going to take about five or ten minutes to get the
23 paperwork ready, and the defendant will be sentenced at
24 that time.

25 As I said, you certainly have the right to sit in and

1 watch that. By the same token, I'm going to dismiss you
2 so you can leave, go back to your family, your business,
3 whatever you have to do.

4 If you choose to leave, the clerk is going to meet
5 with you, get your bandages, work permits, things like
6 that, work excuses. If you choose to leave, I do want to
7 take this opportunity to thank you for your service. I
8 know you deliberated long and hard about this case, and
9 you came up with a verdict.

10 You did what I asked you to do, to come up with a
11 verdict one way or the other. I didn't ask you to find
12 for a conviction or not guilty, but you came up with a
13 verdict and I -- myself, these attorneys, the entire
14 community thanks you for doing that.

15 These matters must be settled in our community, and
16 you are the only way that it gets done. I told the entire
17 jury panel before they left that your service is so
18 important to the judicial system of this county and this
19 state and this nation that your role in this process was
20 written into the constitution of the United States some
21 250 years ago.

22 It's an important role that you serve. I hope you
23 understand that. We don't want to ever go back to trial
24 by battle, a lot of other ways that other countries in
25 this world settle their disputes, so thank you very much.

1 You're now excused.

2 Those -- the bailiffs will -- and the clerk will tell
3 you how to come back in the courtroom if you'd like to do
4 so to witness the sentencing procedure but if you choose
5 not to, good luck to all of you. Thank you very much for
6 your service. Please retire to the jury room.

7 (WHEREUPON, the jury left open court at approximately
8 10:55 a.m.)

9 THE COURT: Any motions?

10 MR. O'NEIL: Yes, Your Honor. At this time, I'd like
11 to renew all of my previous objections and motions. At
12 this time, I'd ask for a new trial specifically as it
13 relates on the grounds of three guilty verdicts and one
14 not guilty verdict, specifically as it relates to the
15 kidnapping charge. That's inconsistent with the not
16 guilty verdict on the assault with intent to commit CSC.

17 Also, I'd like to renew my pretrial motions and
18 objections to the DNA evidence and the review of the
19 evidence from the DNA. Based on all of those motions
20 here, Your Honor, I would ask for a new trial at this
21 point on all three of the guilty verdicts.

22 THE COURT: What is the State's position?

23 MS. FENT: Well, with regard to the kidnapping, it's
24 completely inconsistent with the burglary and the armed
25 robbery and the evidence that was presented.

1 He knew even under the hand of one, hand of all, his
2 own version was that this other person was going into the
3 home with a gun and that the woman was inside, so he was
4 going to be using that weapon to control her. That's
5 kidnapping.

6 Well, I think the jury, based on the evidence, came
7 to a reasonable decision based on the evidence that they
8 heard. I think they were well within their scope of
9 authority to find the breakdown of the verdicts the way
10 they did.

11 They obviously had difficulty with the intent to
12 commit CSC and as a result felt that there was not
13 evidence beyond a reasonable doubt that your client
14 participated in that and they found not guilty.

15 As a matter of fact, if I recall the opening
16 statement in this case was that your client was guilty of
17 burglary and the armed robbery but not guilty of the
18 criminal sexual conduct. That's what the jury did, so I
19 respectfully deny your motions. Be prepared for
20 sentencing in about ten minutes when the paperwork is
21 complete.

22 Let's stand at ease about ten minutes.

23 (WHEREUPON, a short break was taken.)

24 (WHEREUPON, Court's Exhibit No. 8 was marked for
25 identification only.)

1 THE COURT: All right. Solicitor, you may proceed.

2 MS. FENT: Your Honor, at the appropriate time,
3 Ms. Lonsdale would like to address the court.

4 THE COURT: I'll be glad to hear from you whenever
5 you're ready.

6 MS. FENT: Okay. Ms. Lonsdale.

7 THE VICTIM: Your Honor, my name is Indira Lonsdale.
8 I am the victim of the crimes Mr. Dunn is being charged
9 with today.

10 I have lived in my home for 17 years. I chose this
11 house because I thought it had character. I could make it
12 what I wanted it to be, because I thought it was quiet and
13 safe.

14 I've always worked hard to get what I wanted in life,
15 never put myself in debt. Two years ago, I developed a
16 severe gum disease and began to use my teeth.

17 After visiting several dentists who could not help
18 me, I finally found one who could with a higher price. I
19 went back to work again, putting some long hours in to
20 save for the surgery I was to have.

21 Unfortunately, for me I cashed the checks, stored the
22 money in my dresser drawer. Why not? I thought my house
23 was safe.

24 I spent week to week trying to recover from this
25 robbery. Someone had been through my private possessions,

1 violated my home. I was afraid to go out and afraid to
2 stay home, and my money was gone.

3 The following weekend was Memorial weekend. I woke
4 up early Saturday morning. Suddenly, I heard a loud noise
5 in the house and went to investigate.

6 Before I knew what happening -- before I knew what
7 was happening, a man said, "Do what I tell you. Don't
8 make me have to hurt you." He had established terrible
9 fear.

10 He pulled the sash from the robe I was wearing, tied
11 my hands behind me, led me to the bed to rape me. Now, he
12 had established dominance. Now, I had to do everything he
13 told me.

14 All the time my mind was wandering. What was he
15 going to do? Kill me? Where were my pets? Shall I ever
16 forget the fear of that night?

17 He finally left taking all my keys. I ran to the
18 kitchen calling 9-1-1 where they were there in minutes
19 with police dogs but could not find him.

20 I had been hit two weeks in a row. I was totally
21 shattered and afraid for my life. That week I packed my
22 bag, got my pets and went into hiding. I was afraid to
23 stay home in my own home.

24 I was afraid to return until I was told Dunn was in
25 custody. It's been almost a year now. I have changed my

1 locks on the doors. I have lights on at night.

2 I am debt for the first time in my life. The
3 insurance rates on my house have doubled. I have lost my
4 piece of mind.

5 In conclusion, I would like to say to the critics who
6 do not like the DNA database, they should know what it's
7 like to be held hostage for several hours and not know who
8 your assailant is.

9 My thanks to Richland County Sheriff's Office. The
10 investigators searched for hours and took samples that
11 morning, especially Investigator Mauldin worked the
12 neighborhood and made this all happen but not forgetting
13 my thanks to Assistant Solicitor Bodman for all her hard
14 work.

15 Thank you.

16 MS. FENT: Your Honor, he has a juvenile record, if
17 you want to hear that.

18 THE COURT: Put it on the record.

19 MR. O'NEIL: Your Honor, I would just ask that be
20 passed up. I don't think it's appropriate to be stated in
21 open court. That can be made a Court Exhibit, and Your
22 Honor can look at it.

23 THE COURT: That's fine.

24 MS. FENT: Okay.

25 (WHEREUPON, Court's Exhibit No. 9 was marked for

1 identification only.)

2 MS. FENT: I hand up Court's Exhibit 9 which is the
3 defendant's juvenile record.

4 THE COURT: You've see this, Mr. O'Neil?

5 MR. O'NEIL: I have.

6 THE COURT: Well, just without disclosing anything, I
7 think it's fair to say he has an extensive juvenile
8 record.

9 Anything further?

10 MS. FENT: Your Honor, he was 17 when he committed
11 this. He doesn't have any adult convictions. I do have
12 two other pending charges on him, a burg. first and -- a
13 burglary in the first degree and a burglary in the second
14 degree, two separate other burglaries.

15 THE COURT: Two separate?

16 MS. FENT: Two separate other ones that are pending.

17 THE COURT: Did he have -- tell me burglary first,
18 when did that occur?

19 MS. FENT: They both occurred on May 13th of 2011, so
20 between the time that she was first burglarized on
21 May 11th. Excuse me, they were before her first burglary.

22 THE COURT: Okay.

23 MS. FENT: May 13th of 2011.

24 THE COURT: Different locations?

25 MS. FENT: Different homes, different locations.

1 Are you aware of that, Mr. O'Neil?

2 MR. O'NEIL: I am.

3 THE COURT: And one was May 13th.

4 MS. FENT: They were both May 13th.

5 THE COURT: Both may 13th?

6 MS. FENT: Correct.

7 THE COURT: There were two separate burglaries on the
8 same day?

9 MS. FENT: Correct.

10 THE COURT: All right.

11 MS. FENT: And he has admitted to committing those
12 two other burglaries.

13 THE COURT: He has?

14 MS. FENT: Yeah.

15 THE COURT: Or has not?

16 MS. FENT: He has.

17 THE COURT: He has confessed to those?

18 MS. FENT: Yes. He has a codefendant by the name of
19 Lavonne Arrington in those two burglaries from May 13th,
20 2011.

21 Lavonne Arrington has also indicated that he was
22 involved on May 21st of 2011 in burglarizing
23 Ms. Lonsdale's house on May 21st.

24 THE COURT: All right.

25 MR. O'NEIL: Your Honor, I would object to the court

1 considering that. Mr. Dunn has not been charging with
2 that burglary, and he denies his involvement with that
3 burglary.

4 THE COURT: All right. Okay. Well, I understand
5 that, but the fact he has been charged in multiple
6 burglaries is something the court needs to take into
7 consideration in sentencing.

8 MS. FENT: Your Honor, we ask that at such a young
9 age, at the age of 17, to be committing such a heinous,
10 brutal crime at that age, he needs to get a sentence that
11 will assure that he does not get back on our streets. Our
12 citizens need to be safe from this person.

13 THE COURT: All right, sir.

14 Mr. O'Neil.

15 MR. O'NEIL: Thank you, Your Honor. May it please
16 the Court. May I approach?

17 THE COURT: Absolutely.

18 MS. FENT: What I'm happening Your Honor is just a
19 couple of letters that were compiled by Edward's parents.
20 Two of the letters belong to his parents and two other --
21 the other letters are letters in support, people in the
22 community, family members.

23 Edward was -- case was set for a plea on all of these
24 charges about a month ago. You notice on one of the
25 letters, it's addressed to Judge Lee, because we were

1 scheduled to plead to not only these charges but the two
2 other burglaries that Solicitor Bodman spoke of.

3 We was -- had plea date set on all of these pending
4 charges.

5 THE COURT: What happened?

6 MR. O'NEIL: Part of our negotiations kind of fell
7 through at that point, and we kind of ended up here today.

8 THE COURT: Okay.

9 MS. FENT: Your Honor, I won't -- I won't say what it
10 was that happened, but that -- we had no negotiations and
11 nothing fell apart.

12 THE COURT: All right. Well, it never happened.

13 MR. O'NEIL: Yes, Your Honor. Agreed. He never --
14 he never entered that plea on that day.

15 THE COURT: All right.

16 MR. O'NEIL: But the three charges he was convicted
17 of today, Your Honor, he has always told me he wanted to
18 plead guilty to those charges and the two other charges
19 that are still pending.

20 THE COURT: All burglaries, basically all burglaries.

21 MR. O'NEIL: Yes, Your Honor.

22 THE COURT: Basically all burglaries.

23 MR. O'NEIL: Yes, Your Honor. He has never waived in
24 those assertions. He has -- he has given statements on
25 those two other burglaries.

1 He has given a statement, as Your Honor knows in this
2 case, to the charges that he essentially were convicted
3 of.

4 As Solicitor Bodman stated, he was 17 when this
5 occurred. He's been in jail at this point since June 2nd
6 of 2011. He's now 18 years old, Your Honor.

7 He only went to the 10th grade there at school, Your
8 Honor. He does have family support, but his mother and
9 father have been very involved in this case. His mother
10 and father are here in the courtroom. I know his father,
11 at least, and his mother may want to address the court at
12 the appropriate time.

13 I will address one portion of what Solicitor Bodman
14 said. I think in looking at the Supreme Court case laws,
15 specifically in the Roper case and the Graham versus
16 Florida case, specifically in Graham versus Florida states
17 that when individuals commit crimes, non-homicide crimes
18 when they are under the age of 18, then it would violate
19 their US -- constitution, 8th amendment cruel and unusual
20 punishment to give them life without parole sentences.

21 The meaningful equivalent of life without parole,
22 essentially, would also, I think, violate the 8th
23 amendment of both the federal and South Carolina
24 constitution, Your Honor. What that talks about is that
25 juveniles are -- in the Graham case, juvenile are

1 different.

2 People like Edward are 17 years old when things
3 happened. They're not fully developed. On spectrum of
4 culpability, they're lower than adults.

5 They don't qualify or should not qualify for the
6 second most serious, you know, sentence we have. That
7 would be a life without parole sentence.

8 What I'm asking this court to do is to do as --
9 what's mandated by Graham versus Florida and give Edward a
10 sentence that would give him a meaningful opportunity at
11 parole and release based on him showing that he has
12 matured and that he is rehabilitated.

13 I understand that the minimum sentence that the court
14 can give out in the burglary first would be 15 years.
15 Edwards realizes that's 85 percent time. He have also
16 knows that it's a constitutional strike against him.

17 Whatever sentence Your Honor gives him, he is going
18 to have to do community supervision, at least a two-year
19 period after that after he is released.

20 So I think all those kind of measures would be in
21 place after he have would be released. The only other
22 legal issue I need to address is that the assault with
23 intent to commit CSC carried a mandatory sex offender
24 registry. I think the kidnapping charge he was convicted
25 of would require a finding on Your Honor's part that it

1 was sexual in nature in order for him to be placed on the
2 registry.

3 I would ask that Edward not be placed on the sex
4 offender registry based on the not guilty verdict on the
5 assault with intent to commit CSC, Your Honor.

6 I don't think there's anything else in his past that
7 indicates a need for him to be placed on the sexual
8 offender registry.

9 Those letters are in support of Edward and please
10 grant his parents an opportunity to speak on his behalf,
11 as well. I know Edward wants to address the court. I
12 know his father wants to say something.

13 THE COURT: Yes, sir. I'll be glad to hear from you.

14 THE FATHER: How you doing? My name is Edward Dunn,
15 Jr. I mean my name is Edward Dunn, Sr., and I just want
16 to start off by saying if my son hadn't done it already,
17 we'd like to apologize to Ms. Lonsdale for any part that
18 my son might have played in what went on with her.

19 Regardless to what Ms. Branham wants to say, my son
20 is not a monster. He is actually a good kid. If there's
21 any weakness my son has, it would be peer pressure.

22 If you look at his juvenile record, everything
23 involves him with somebody else, and also I'd like to tell
24 my son that I apologize to him because I feel, as his
25 father, I might have failed him.

1 There's a lot of things I'm sure I could have did or
2 should have did that would not have us in this position
3 right now, but he is loved by me and everybody in this
4 family.

5 I just ask you, Your Honor, not to institutionalize
6 my son because he is only 18, and I think he still has a
7 chance to become a model citizen in the community, but if
8 you institutionalize him, put him in for so many years,
9 that once he gets out, all he knows is jail, then all he's
10 going to do is find his way back to jail.

11 So I don't want to take up all the Court's time,
12 because I'm sure everybody is ready to get this over with
13 now. But just if you can have some mercy on him at this
14 young age, his family would appreciate it.

15 THE COURT: All right. Thank you very much,
16 Mr. Dunn.

17 MR. O'NEIL: I don't know whether his mother wants to
18 say anything. I don't think she wants to say anything,
19 but there is a letter from her included in that.

20 THE COURT: I see it.

21 MR. O'NEIL: In that stack of papers I gave Your
22 Honor.

23 THE COURT: Yes, sir, I see it.

24 MR. O'NEIL: I also have -- I don't know if Your
25 Honor wants to consider it, but I also have the

1 psychological evaluations that was done on Edward in his
2 last juvenile conviction. The date of that evaluation is
3 March 25th, 2010. I do have that evaluation if you wish
4 to consider that.

5 THE COURT: You want me to consider it?

6 MR. O'NEIL: Yes, sir.

7 THE COURT: Hand it up.

8 MS. FENT: Do you have a copy of that?

9 MR. O'NEIL: I do not. Do you want to see it?

10 (Pause.)

11 MS. FENT: This is multiple pages, Your Honor. Can
12 we run, go make a copy of it? Can we make a copy of it?

13 THE COURT: Do what?

14 MS. FENT: It has multiple pages of it. I was just
15 asking if we could run, go make a copy of it.

16 THE COURT: Well, you can after I have look at it.

17 MS. FENT: Okay.

18 THE COURT: All I really want to see is the
19 conclusion.

20 So he has done the 2010. You can do what you want to
21 do with it. I mean, I perused it. I'm pretty much aware
22 of it.

23 MR. O'NEIL: And, Your Honor, lastly, Edward wants to
24 address the court.

25 THE COURT: Mr. Dunn, I'll be glad to hear from you.

1 THE DEFENDANT: Well, Your Honor, I would just like
2 to apologize on my behalf to Ms. Lonsdale and her family.
3 I would like to apologize to my family. I would like to
4 apologize to you and everyone else here today, and I would
5 just ask for you -- can you please show me any kind of
6 mercy on my sentencing today?

7 That's it, Your Honor.

8 THE COURT: Anything further?

9 MS. FENT: Yes, Your Honor. I apologize.
10 Investigator Mauldin would like to address the court.

11 THE COURT: All right. Yes, sir.

12 INVESTIGATOR: Your Honor, Josh Mauldin with the
13 Richland County Sheriff's Department. I've been a police
14 officer for about ten years, an investigator for six of
15 those.

16 I've never had a problem addressing the court, but I
17 do find some difficulty doing so today. One of the two
18 groups that I, as a police officer, and my -- my fellow
19 police officers feel responsible for are senior citizens
20 and our children.

21 I feel that I have failed Ms. Lonsdale and the
22 Richland County Sheriff's Department failed Ms. Lonsdale
23 on May 28th when we could not be there to prevent this
24 from happening to her.

25 I can't help but feeling, although the jury found Mr.

1 Dunn guilty on three of the counts, that I have still
2 failed her today by not presenting a good enough case for
3 Ms. Bodman to present to the jury that would convince them
4 beyond a reasonable doubt that Mr. Dunn was, in fact, the
5 one that sexually assaulted Ms. Lonsdale.

6 All I would ask is that -- let me say this first:
7 This is hands down, one of the worst and most disturbing
8 cases that I've worked as a law enforcement officer.

9 We try to keep ourselves detached and not take a
10 personal interest in cases. We're more effective police
11 officers this way, but one cannot help but feel a sense of
12 just dread and awfulness at the circumstances.

13 I can't fathom what it's like for a 74-year-old woman
14 to be in her home and have someone come inside with a gun,
15 hold her hostage, undress her, and sexually assault her.
16 It's just awful to me.

17 I would ask that you deliver an appropriate sentence,
18 one that will address these issues. I do believe that
19 Mr. Dunn is an imminent danger to the community.

20 These are awful crimes. In my experience, criminal
21 behavior progresses, it doesn't go the other way. That's
22 all I have to say.

23 MS. FENT: If I could just address the sex offender
24 registry issue regarding kidnapping, if you look at the
25 sex offender statute and the offenses that mandate sex

1 offender registry, they're not all crimes that involve
2 penetration. For example, voyeurism is in there.

3 THE COURT: Correct.

4 MS. FENT: We are confident in the evidence that we
5 presented that he is the one that sexually assaulted
6 Ms. Lonsdale, but even if you look at the case in the
7 light of how the defendant presented it, his own admission
8 is that he goes in. He watches this happen.

9 He is watching a 74-year-old lady get sexually
10 assaulted, and he is excited about it. He is excited
11 about it and masturbates while he was watching this brutal
12 sexual assault, and then he goes back outside and watches
13 as a look out for ten more minutes.

14 That is sex offender. That is the person that we
15 need to be protecting our society from. Even if you
16 believe his awful story, he needs to be on the registry,
17 and we ask that you make him, make him register or you
18 don't except him from it. The kidnapping is an automatic
19 registry. You would have to make a finding that he
20 doesn't have to.

21 THE COURT: Let me just read you the statutory
22 language for inclusion on the sex offender -- those
23 eligible crimes: Kidnapping of a person 18 years of age
24 or older except when the court makes a finding on the
25 record that the offense did not include a criminal sexual

1 offense, or an attempted criminal sexual offense.

2 In section 12 in response to Ms. Bodman, included are
3 peeping -- to additional peeping Tom, voyeurism or
4 aggravated voyeurism, as I think that's the State's
5 position for inclusion.

6 MS. FENT: I was just using voyeurism as an example
7 that -- for the acts.

8 THE COURT: You're using that as a basis for
9 inclusion.

10 MS. FENT: Correct. The crimes don't have to involve
11 penetration. The very last, very last, subsection or
12 section of the sex offender registry statute says "or for
13 any offense that the court finds," so it could be any
14 crime at all and you make a finding that the person should
15 register.

16 THE COURT: If -- it says, "if good cause is shown by
17 the solicitor".

18 MS. FENT: Correct. Yeah, and I believe the facts in
19 this case do show good cause, so it's the kidnapping, as
20 well as that last subsection provides Your Honor ample
21 reasons to require him to register.

22 THE COURT: Do you have any response to that?

23 MR. O'NEIL: My only response would be, Your Honor,
24 as it relates to -- including the voyeurism, if they're
25 contemplating the actual conviction of voyeurism, there

1 would be no conviction of voyeurism.

2 So Your Honor would have to only consider the charges
3 he was convicted of and see if those are the charges were
4 of a nature that would -- in Your Honor's discretion would
5 require some sort of sexual registry.

6 SENTENCING:

7 THE COURT: All right, sir.

8 Mr. Dunn, after hearing the evidence in this case, I
9 find your actions -- whether I accept your version of the
10 facts or the State's version of the facts -- to be
11 particularly heinous and egregious when it comes to
12 dealing with elderly people.

13 I've taken into consideration your record, which is
14 not good. You've been in trouble since you were 13.
15 You've been in and out of trouble, all many times for
16 breaking into houses and robbing people, both here and in
17 Spartanburg County.

18 Just gone way down the wrong road, sir. I have no --
19 I don't have a lot of options when it comes to the
20 punishment.

21 Mr. Edward Maurice Dunn, Jr., the sentence of the
22 Court on all charges: That you be committed to the State
23 Department of Corrections for a period of 30 years.
24 You're given credit for time served June 2nd, 2011.

25 I'm going to order that your name be placed on the

1 sexual offender registry at such time that you are
2 repleaded from the Department of Corrections. Good luck
3 to you, sir.

4 MR. O'NEIL: Your Honor, just for the record, I do
5 have a written motion as relates to Mr. Dunn's sentence.
6 I'll make that a court order.

7 THE COURT: Yes, sir.

8 MR. O'NEIL: I would object and say that a 30-year
9 sentence on Mr. Dunn is in violation of the 8th amendment
10 of the US and State Constitution.

11 THE COURT: Well, you certainly can take that up with
12 an appellate court, but as far as the trial court is
13 concerned, it's considerably less than a life sentence.
14 It's an 85 percent sentence, which even reduces the amount
15 of time that he would be required to spend in the
16 Department of Corrections.

17 So that's my thinking, and you're certainly welcome
18 to take that up with an appellate court.

19 (WHEREUPON, Court's Exhibit No. 10 was marked for
20 identification only.)

21 (Whereupon, the proceedings were concluded.)
22
23
24
25

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on 21st - 24th of May, 2012.

November 5, 2012

Karen Ambrozich

Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Richland County

NOV 18 2013

G. Thomas Cooper, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

During its July 2011, term, a Richland County grand jury indicted Edward Maurice Dunn, Jr. ("Dunn") for armed robbery, kidnapping, first-degree burglary, and assault with intent to commit first-degree criminal sexual conduct. Prior to trial, appellant filed a motion to suppress DNA evidence and any evidence deriving from use of his DNA. R.343. On May 21 – 24, 2012, appellant was tried before the Honorable G. Thomas Cooper, Jr. and a jury. R. 1. Margaret Fent-Bodman and Foster Matthews represented the State. R. 1. Victor Li and Deon O'Neil represented appellant. R. 1. The jury convicted appellant of kidnapping, armed robbery, and first-degree burglary. R. 330, ll. 11 – 22. The jury acquitted appellant of assault with intent to commit first-degree criminal sexual conduct. R. 330, ll. 6 – 10. Judge Cooper sentenced appellant to thirty years' imprisonment on all charges. R. 333, ll. 21 – 24. On May 29, 2012, appellant filed and served a notice of appeal. This appeal follows.

ARGUMENT

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

Relevant Facts

The Richland County Sheriff's Department ("Sheriff") keeps its own DNA database. R. 9, ll. 23 – 25. Dunn was a suspect in an unrelated burglary committed September 20, 2010, which was a year before the incident giving rise to the charges for which Dunn was tried in this case. R. 8, ll. 14 – 16. The Sheriff obtained Dunn's DNA profile in connection with the 2010 burglary. R. 8, ll. 17 – 24. The Sheriff obtained Dunn's DNA pursuant to his consent. R. 74, ll. 2 – 5. Dunn signed the Sheriff's consent form. R. 74, ll. 9 – 15; R. 341. The Sheriff told Dunn they needed a sample of his DNA to compare it to the DNA samples they obtained from the 2010 burglary. R. 78, ll. 12 – 15. Dunn was told by the Sheriff that giving his sample could "possibly help him" in that case. R. 82, ll. 5 – 10. Dunn's DNA profile did not match the samples from the 2010 burglary. R. 79, ll. 8 – 14.

The Sheriff admitted that no one told Dunn that his profile would be placed in the Sheriff's own database (or any other database). R. 78, ll. 16 – 21. Dunn's DNA profile was, in fact, placed in the Sheriff's own in-house database. R. 79, ll. 20 – 25. At the time Dunn signed the Sheriff's consent form and gave his DNA, he was sixteen years old. R. 80, ll. 1 – 2.

Dunn moved to suppress this DNA evidence and any evidence flowing from it and the court held a pretrial hearing on this motion. R. 343. Dunn testified at the pretrial hearing. Dunn testified that no one told him that his DNA profile would be entered and maintained in the Sheriff's DNA lab. R. 84, ll. 6 – 9. Had the Sheriff told Dunn they were going to store his DNA, he would not have given it to them. R. 84, ll. 13 – 15. The Sheriff specifically told Dunn that he was going to use the swab to compare it to the 2010 burglary. R. 86, ll. 21 – 24. Dunn testified that the only reason he gave them his DNA was to compare it to the samples obtained from the scene of the 2010 burglary. R. 87, ll. 8 – 14. Dunn also testified that the only reason he gave the police a statement concerning his involvement in the instant crimes was because they told him they had a DNA match. R. 87, ll. 21 – 24. The State did not present any evidence as to whether Dunn was ever charged in connection with the 2010 burglary.

The DNA consent form used by the Sheriff had no warning that the Sheriff was free to use his profile for any purpose whatsoever. R. 89, ll. 12 – 23; R. 341. The Sheriff's form did not notify Dunn that his DNA would be maintained in the Sheriff's own database or any other database. R. 89, l. 12 – 123, l. 11; R. 341.

The only way the Sheriff connected Dunn with the charges in this case was because seminal fluid was located at this crime scene. R. 18, ll. 1 – 5. The Sheriff sequenced the DNA from the crime scene and matched it to Dunn's profile in the Sheriff's database. R. 18, ll. 1 – 5; R. 233, l. 8 – 234, l. 4. After making the DNA match, the Sheriff arrested Dunn. R. 17, ll. 4 – 19. Immediately after his arrest, the Sheriff told Dunn about the DNA match and gave Dunn his Miranda warnings. R. 17, l. 20 – 18, l. 8.

Only after his arrest and being confronted with the DNA evidence did Dunn give a statement implicating himself. R. 19, l. 13 – 20, l. 9. Dunn told the police that a man named “Shorty” asked him to participate in the burglary of a woman’s house. R. 19, ll. 13 – 21. Dunn was the lookout. R. 19, ll. 22 – 24. Shorty called Dunn into the house. R. 19, ll. 22 – 24. Dunn saw Shorty having sexual intercourse with a woman. R. 19, l. 25 – 20, l. 4. Dunn told the police “that he became excited by that act and that he masturbated, ejaculated and then used a rag that was on the floor to wipe himself.” R. 20, ll. 1 – 4. The seminal fluid from this rag was used to obtain a DNA profile and compared to the DNA profile given by Dunn in connection with the 2010 robbery.

Dunn filed a pretrial motion to suppress this DNA evidence. R. 343. In the pretrial motion, Dunn alleged that the retention of his DNA sample violated the Federal and South Carolina constitutions. R. 343. Dunn also argued in the motion and before the court that the retention of his DNA sample exceeded the scope of any alleged consent. R. 88, ll. 7 – 97, l. 9; R. 103, l. 69 – 115, l. 12. Dunn further argued that any other evidence in the case was fruit of the poisonous tree and should be suppressed. R. 88, ll. 7 – 97, l. 9; R. 103, l. 69 – 115, l. 12. Stating that he would leave this issue “for another court to decide,” Judge Cooper denied the suppression motion and ruled that the DNA results were admissible.¹ R. 114, ll. 11–21.

¹ This was a final ruling. During the defense’s opening statement, Dunn was forced by this ruling to admit to the jury that he was present at the scene and that he was guilty of burglary and armed robbery. R. 125, l. 1 – 126, l. 5. He denied the sexual assault and the jury acquitted him of it. Dunn also made contemporaneous objections to the admission of the 2010 DNA profile. R. 200, ll. 16 – 22; R. 219, ll. 12 – 24; R. 339, ll. 1 – 6.

Discussion

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

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

The State's case relied solely on the taking of Dunn's DNA for an unrelated robbery in 2010. The solicitor admitted this in his opening statement. R. 120, ll. 8 – 12. This taking of Dunn's DNA was done solely by consent, so it should be analyzed under contract principles and not those used to validate taking of DNA by warrant, pursuant to arrest, or any other such procedure. Dunn's consideration for the contract was the giving of his DNA to test and exculpate him from a burglary. The Sheriff's consideration was the promise to test his DNA to compare it to DNA collected *at that crime*.

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

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

Dunn Never Ratified the Contract as an Adult

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

person under the age of eighteen. S.C. Code Ann. § 63-1-40(1). Contracts made before the age of majority are not deemed ratified unless done so in writing. S.C. Code Ann. § 63-5-310. At no point did the State present any evidence that Dunn ratified the contract taking his DNA in 2010. To the contrary, when Dunn discovered that his DNA had been kept, he asked that it be suppressed. R. 341; R. 341. Therefore, Dunn voided the contract and Sheriff was not in legal possession of his DNA.

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

The Sheriff is Maintaining an Illegal Database

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

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

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

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

The Attorney General agrees with this conclusion. See Attorney General Op. dated April 7, 2011, 2011 WL 1740752. The Attorney General stated, “Reviewing the language and purposes of the Act, there appears very little doubt the Legislature intended SLED, as the chief investigative agency in South Carolina, to implement and administer the collection of DNA samples.” Id. “Given that the Legislature expressly empowered SLED to administer the collection of DNA samples, it is the opinion of this office that a

DNA collection program outside the parameters of the Act would be inconsistent with the legislative intent for uniformity in this area and is impliedly preempted.” Id.

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

Furthermore, retention of Dunn’s DNA profile was an express violation of the State DNA Database Act. The act makes SLED responsible for the expungement of citizens’ profiles from the database. S.C. Code Ann. 23-3-660. If the charges against a person are nolle prossed, then their DNA record and profile must be expunged. S.C. Code Ann. § 23-3-660(A)(1)(a). Court’s Exhibit 9 is a copy of Dunn’s juvenile record. (Court’s Ex. 9). It only shows one burglary charge, dated September 20, 2010. (Court’s Ex. 9). Dunn’s DNA consent form is dated September 21, 2010. R. 341. This burglary charge was nolle prossed. (Court’s Ex. 9). Therefore, Dunn’s DNA profile should have been expunged.

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

This conclusion is further bolstered by the South Carolina Constitution's express right of privacy. S.C. Const. Art. I, § 10. The Sheriff's creation of its own DNA database is an "unreasonable invasion" of Dunn's privacy. Id. It is therefore not only in contravention of the State DNA Database Act, but also the state constitution. The Fourth Amendment of the federal constitution also compels this result. See United States v. Davis, 690 F.3d 226 (4th Cir. 2012). In Davis, the Fourth Circuit found that retention of an individual's DNA profile in Maryland's database violated the Fourth Amendment. Id. at 250.

Nor does the United States Supreme Court's recent decision in Maryland v. King, ___ U. S. ___ 133 S.Ct. 1958 (2013) compel a different result. King, a 5-4 decision, merely upheld Maryland's state law authorizing the collection of arrested persons' DNA for identification purposes. Here, there is no evidence that Dunn's DNA was collected pursuant to any booking procedure or for identification purposes. The only evidence in the record is that Dunn signed a consent form for the Sheriff to collect his DNA. Therefore, King is inapplicable.

In any event, this Court should decline to adopt any of the King majority's reasoning on state law grounds. Justice Scalia, in a scathing dissent, eviscerated the majority's basis for its ruling. Justice Scalia said the majority's ruling departed from longstanding Fourth Amendment precedent that required some measure of individualized suspicion for an invasive search. Id. at 1981-82 Certainly the South Carolina Constitution's right to privacy would lead our appellate courts to agree with Justice Scalia and restrict the collection and retention of South Carolinians' DNA. See State v. Koivu, 272 P.3d 483, 488-89 (Id. 2012) (rejecting application of the good faith exception

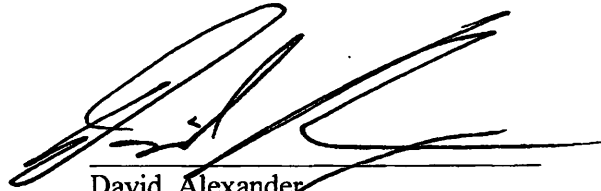
to the exclusionary rule and noting that Idaho's state courts had a duty to protect their citizens from violations of their citizens' constitutional rights at the hands of federal officers).

Therefore, the retention of Dunn's DNA was illegal because it exceeded the scope of his consent, was taken when he was a juvenile, did not comport with the State DNA Database Act, and his profile was kept in an illegal database. Furthermore, the South Carolina Constitution's right to privacy compels a narrow construction of the government's rights to take and store citizens' DNA. These reasons require this Court to reverse the trial judge's ruling on Dunn's suppression motion. As any other evidence collected in this case began with the use of Dunn's illegally maintained DNA profile, it is the fruit of the poisonous tree and must also be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

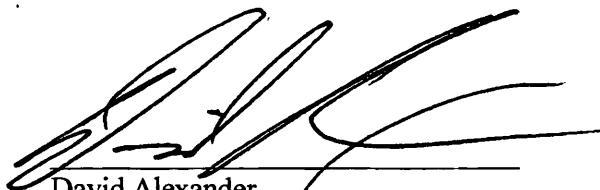
ATTORNEY FOR APPELLANT

This 18th day of November, 2013.

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."

November 18th, 2008



David Alexander
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STATE OF SOUTH CAROLINA
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Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

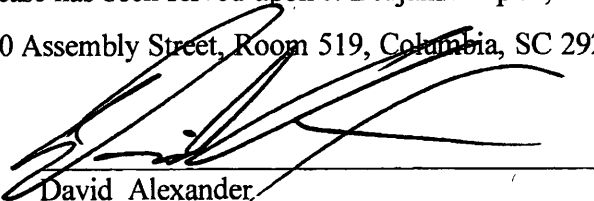
EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

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. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 18th day of November, 2013.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2013.


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

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2012-212242

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THE STATE, ...RESPONDENT

v.

EDWARD M. DUNN, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Appellant's argument that the trial court erred in refusing to suppress all evidence flowing from the retention and use of his DNA profile to match seminal fluid discovered at the crime scene is preserved for appellate review because the specific grounds argued on appeal were neither raised to nor ruled upon by the trial court, and even if preserved, whether the evidence was properly admitted because Appellant's expectation of privacy in his saliva sample and the DNA contained therein was extinguished when he voluntarily consented to give the sample to State authorities without any limitation on the scope of his consent?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County grand jury for assault with intent to commit criminal sexual conduct (CSC) in the first degree (2011-GS-40-3518), armed robbery (2011-GS-40-3525), kidnapping (2011-GS-40-3526), and burglary in the first degree (2011-GS-40-3527). He was represented by Victor Li and Deon O'Neil, Esquires. (R.p.1). On May 21-24, 2012, Appellant proceeded to trial by jury pursuant to which he was acquitted of assault with intent to commit first-degree CSC but was found guilty of the remaining charges. He was sentenced by the Honorable G. Thomas Cooper, Jr., to three concurrent terms of thirty (30) years' imprisonment for armed robbery, kidnapping, and first-degree burglary. (R.p.333, line 6-p.334, line 3). Appellant timely filed a notice of intent to appeal his convictions and sentences and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

Sometime between 2 a.m. and 3 a.m. on May 28, 2011, seventy-four year old Indira Lonsdale (Victim) was in her sitting room drinking coffee and listening to music when a male intruder entered her home, came from behind, grabbed her by the shoulders, and ordered her to do what he said or he would kill her. The man led Victim to her bedroom, removed the sash from her bathrobe, which was the only article of clothing she was wearing, used the sash to tie her hands behind her back, and told her to bend over the bed. Victim could see a gun in the man's hand. The man then unzipped his pants, put his penis between Victim's legs and, without penetrating her, thrust several times until he ejaculated. Next he made Victim put a pair of her own underwear over her head before leading her to the bathroom. The man gave her a washcloth and told her: "wash yourself good." Victim wiped the ejaculate from her vaginal area, after which the man rinsed the washcloth in the sink and told her to wash again. She wiped herself again and left the used washrag in the sink. The intruder then led Victim to her bedroom and made her lay face down on the floor while he went through her dresser drawers looking for money. In fear that she would be shot if the intruder was not able to find any money, she told him she had \$120 in her wallet and told him where to find it. He then asked Victim for her car keys and left the house. Victim got up, ran to the phone, and called 9-1-1. When she was later interviewed by the police, Victim described the intruder as a young, small built, black male with a northern accent and curly hair that hung over the side of his face. (R.p.137, line 12-p.151, line 19; p.167, line 5-p.168, line 25).

The Richland County Sheriff's Department collected the washcloth from Victim's sink and developed a DNA profile from seminal fluid detected and extracted from the cloth. (R.p.192, line 12-p.196, line 18; p.223, line 5-p.225, line 21; p.231, line 3-p.233,

line 14). Appellant's DNA profile was already on file with the Sheriff's Department as a result of his providing a sample in September of 2010, in an unrelated matter. (R.p.198, line 1-p.200, line 15). Although the washcloth contained a mixture of DNA, the major contributor of that DNA was matched within a reasonable degree of scientific certainty to be seminal fluid from Appellant. Indeed, the frequency of seeing the contributor's profile in the African-American population was approximately one in 140 quintillion. (R.p.233, line 12-p.234, line 14; p.250, line 13-p.251, line 16). Based on the DNA match, warrants were obtained for Appellant's arrest.

After Appellant was arrested he was told his DNA was found on the washcloth discovered in Victim's house. Appellant then gave an oral statement admitting his participation in the burglary but denying participation in the attempted sexual assault. He gave an alternative explanation for the presence of his semen on the washcloth. (R.p.255, line 19-p.267, line 21). Appellant subsequently gave a written statement repeating his explanation. In those statements he claimed he was outside serving as a lookout while a co-defendant named "Shorty" was inside committing the burglary. Appellant said after about fifteen or twenty minutes he walked into the house and discovered Shorty in Victim's bed: "fucking her from the back." Appellant said: "I got a little excited, so I started to jack off. I used the towel to clean up. I saw it on the ground. I went back outside by the gate and kept watching." (R.p.268, line 13-p.279, line 21; (SROA p.1-3). Appellant gave a similar story in a telephone call to his mother from the jail. (R.p.292, line 11-p.293, line 10).

Motion to Suppress

Prior to trial, Appellant made a motion “to suppress the DNA profile that was used for comparison in this case.” He articulated two grounds. First Appellant claimed he did not voluntarily consent to giving the DNA sample. Second he claimed even-if the consent was voluntary, the use of the DNA sample in the subsequent criminal investigation was outside the scope of his consent. Appellant argued that since the DNA match should be suppressed, all other evidence obtained as a result of that match would be fruit of the poisonous tree, and should also be suppressed. He handed up a written motion in support of the argument which was marked as Court’s Exhibit No. 2. (R.p.11, line 8-p.12, line 6). The State responded by providing the trial court with a copy of State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). (R.p.12, lines 9-18). In the written motion Appellant first asserted “that under the totality of circumstances his consent was not voluntary.” He argued his decision to give the DNA was “coerced and involuntary” because he was 16 years old and, even though he was accompanied by his parents, felt coerced to comply with law enforcement and signed the consent form because he was under arrest and not free to leave. Next Appellant asserted “that law enforcement exceeded the scope of any alleged consent by retaining his DNA in their in house database.” Relying on State v. Forrester¹ and State v. Mattison,² Appellant argued he never consented to having his DNA stored in the Richland County in house crime lab, did not know the lab even existed, and that his consent was only given for the September 20, 2011, burglary being investigated at the time he gave the DNA sample. Finally, Appellant asserted “all evidence derived from the illegal retention and comparison of his

¹ 343 S.C. 637, 541 S.E.2d 837 (2001).

² 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

DNA profile should be excluded as fruit of the poisonous tree.” He argued that since the only probable cause for his arrest came from the DNA match obtained through “the illegally retained DNA profile,” all written and recorded statements to law enforcement following the arrest should also be suppressed. Appellant never argued the issue of his consent should be analyzed under contract principles and never mentioned the word “contract” in his written motion. He also did not argue the Richland County database itself was illegal. (R.p.343).

Suppression Hearing

The trial court conducted a suppression hearing on Appellant’s motion. The State called Deputy John Carwell of the Richland County Sheriff’s Department to the stand. Carwell testified he worked in the burglary unit in September of 2010 and was in charge of a particular burglary that brought him into contact with Appellant. On September 21, 2010, the day after that burglary, he obtained a “petition” for Appellant and had Appellant brought to headquarters.³ Carwell read a DNA consent form to Appellant, after which Appellant signed the form and provided a swab from his mouth as a DNA sample. Carwell testified he did not make any promises to Appellant about what would happen if he provided the DNA sample and did not threaten or coerce him into giving consent. Carwell did not give Appellant any kind of qualifications about how the DNA sample would be used, kept, or maintained, or what it would be compared against. He testified Appellant understood what was being asked of him in providing the DNA sample and did not appear to be under the influence of any drugs or alcohol. (R.p.71, line 19-p.76, line 17).

³ Although Carwell did not elaborate on this testimony, the State presumes he was referring to a juvenile delinquency petition alleging Appellant had participated in a non-violent second degree burglary in 2010, an event which is reflected on his juvenile legal history. (Filed separately with the Court).

On cross-examination Carwell acknowledged he asked Appellant to give a sample of his DNA to compare it against DNA from the scene of a particular burglary and never mentioned it would be put in the Richland County DNA database. Carwell recognized Appellant was 16 years old when he gave consent but explained that regardless of the age of a suspect there was no requirement or internal policy to get parents involved before seeking consent for a DNA sample. He further explained that when a crime victim provides a DNA sample, his or her profile is not stored in the Richland County DNA lab.⁴ (R.p.78, line 1-p.81, line 11). On re-direct, Carwell testified he made no promises about what the Sheriff's Department would do with Appellant's DNA profile after the conclusion of the investigation or that they would destroy the DNA profile if it did not match anything in the 2010 burglary investigation. (R.p.82, lines 3-23). Indeed, on re-cross Carwell testified the point of seeking Appellant's DNA was to compare it to items from the 2010 burglary AND to enter it into the database. (R.p.83, lines 1-7).

Next, Appellant testified on his own behalf. He said that when he gave the DNA sample in 2010, Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA. Appellant testified if they had told him they were going to store his DNA, he would not have given the sample. In regard to the current case, he testified that if the police had not told him they had a DNA match, he would not have given statements to Investigator Mauldin. (R.p.84, lines 2-25). On cross-examination, Appellant confirmed the solicitor's suspicion

⁴ This testimony is in contradiction to the claim made in Appellant's brief that Richland County retains DNA profiles of crime victims in the main database. (Brief of Appellant, p.12, n.2). Although a profile of a victim's DNA is developed by the lab for elimination purposes, and a copy of that profile is retained by the lab, there was no evidence a victim's DNA profile is kept in the criminal database used for future investigations.

that if he wasn't told the police had a DNA match, he would have simply claimed he was never at Victim's house.⁵ He then acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case or about the sample being destroyed after the initial comparison. (R.p.85, line 5-p.86, line 17).

The trial court then heard arguments from Appellant and the State. Appellant argued his situation could be distinguished from McCord because the consent form in McCord included additional language that does not appear on the Richland County consent form. He further argued the State self-limited the scope of any consent he might have given by telling him they wanted his DNA for a particular reason. The State responded that the Richland County consent form was sufficiently broad and similar to the form in McCord to demonstrate consent. The trial judge questioned whether a sixteen year old is capable of giving consent and the State noted age was simply a factor like any other factor that must be considered in making the determination. The State argued Appellant had no reasonable expectation of privacy in the DNA profile once it had been given for a legitimate purpose. The State further argued that even if consent was not valid for some reason, Appellant's statements should not be suppressed because the police would have inevitably discovered he was involved in the crimes through other means. (R.p.88, line 7-p.97, line 17). The following morning the trial court heard additional arguments from Appellant and the State, further explaining their respective positions. Ultimately, the trial court denied Appellant's motion to suppress and ruled the DNA results were admissible. (R.p.103, line 18-p.114, line 21).

⁵ This comment demonstrates Appellant's willingness to offer self-serving testimony and shows his lack of credibility. The State submits it lends support to the trial court concluding Appellant's consent was voluntary under the totality of the circumstances.

Trial

At trial, Investigator Carwell described the Richland County Sheriff's Department's "Consent to Search for D.N.A. Evidence" form which was signed by Appellant before he provided a DNA sample in 2010. He testified Appellant gave voluntary consent and then provided a swab from his mouth. The signed form was admitted into evidence subject to Appellant's previous objection. (R.p.198, line 1-p.200, line 20).

Forensic scientist John Barron with the Richland County DNA lab identified the buccal swab given by Appellant and testified he extracted DNA from that swab. The swab was admitted into evidence over Appellant's objection. (R.p.212, line 3-p.219, line 24). Forensic scientist Gray Amick with the Richland County DNA lab identified the washcloth from the Victim's house and testified he extracted DNA from seminal fluid on that cloth. Appellant renewed his previous objection to the results of that testing; however, the objection was overruled and Amick testified the fluid was a DNA match to Appellant. (R.p.220, line 16-p.234, line 14).

Investigator Josh Mauldin described Appellant's arrest and the various statements he provided in regard to the crimes. Without articulating specific grounds, Appellant renewed his previous objections to each statement and his objections were overruled. (R.p.265, lines 7-11; p.269, lines 21-25; p.274, lines 16-23; p.292, line 24-p.293, line 10). After the State rested and again after the defense rested Appellant renewed all of his previous motions and objections. (R.p.315, lines 15-17; p.328, lines 16-24).

ARGUMENT

I.

Appellant's argument that the trial court erred in refusing to suppress all evidence flowing from the retention and use of his DNA profile to match seminal fluid discovered at the crime scene is not preserved for appellate review because the specific grounds argued on appeal were neither raised to nor ruled upon by the trial court, and even if preserved, the evidence was properly admitted because Appellant's expectation of privacy in his saliva sample and the DNA contained therein was extinguished when he voluntarily consented to give the sample to State authorities without any limitation on the scope of his consent.

Appellant argues the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent use of his DNA profile because his DNA was taken when he was juvenile and maintained in a database not authorized by state law, and because this use exceeded the scope of his "contractual consent." His argument hinges on the premise that the taking and use of his DNA should be analyzed under contract principles rather than under a standard Fourth Amendment exclusionary rule analysis. Appellant argues: (1) the sheriff had no "contractual right" to keep his DNA past the time necessary to test it in connection with the 2010 burglary because the "contract" to provide a DNA sample was limited solely to the sheriff's investigation of that burglary; (2) the "contract" is voidable because he made it prior to turning eighteen and never ratified it after reaching the age of majority; and (3) the "contract" is void *ab initio* as an illegal contract because the sheriff has no authority to maintain its own DNA database where the sole repository of citizens' DNA profiles is maintained by the State Law Enforcement Division (SLED) pursuant to the State DNA Database Act.

Issue Preservation

Initially, the State submits Appellant's argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements for preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). The South Carolina Rules of Evidence provide that:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, **and . . . In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.**

Rule 103, SCRE (emphasis added). This rule is generally in accord with prior South Carolina law which requires a contemporaneous objection with specific grounds to preserve an error for review. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding that a contemporaneous objection is required to preserve an issue for appellate review); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing).

At trial, Appellant articulated two grounds in support of his motion to suppress. First he claimed he did not voluntarily consent to giving the DNA sample. Second he

claimed even if the consent was voluntary, the use of the DNA sample in the subsequent criminal investigation was outside the scope of his consent. Appellant argued that since the DNA match should be suppressed, all other evidence obtained as a result of that match would be fruit of the poisonous tree, and should also be suppressed. He handed up a written motion in support of the argument which was marked as Court's Exhibit No. 2. (R.p.11, line 8-p.12, line 6). Appellant never argued his consent to give the DNA sample should be analyzed under contract principles and he never mentioned the word "contract" in his written motion to suppress. He also did not argue the Richland County database itself was illegal. (R.p.343). As a result, the trial court was not given an opportunity to make a ruling about the propriety of an analysis under contract law or the specific contract grounds raised by Appellant in this appeal. Likewise, the trial court was deprived of the opportunity to consider the underlying legality of the Richland County DNA database. Instead, the trial court reviewed Appellant's motion to suppress under traditional Fourth Amendment principles, denied that motion, and ruled the DNA results were admissible. (R.p.103, line 18-p.114, line 21). Because the argument and grounds now raised in this appeal were neither raised to nor ruled upon by the trial court, they are not preserved for review. Rule 103, SCRE; Brown, supra; Byers, supra; Bailey, supra.

To the extent this Court finds Appellant's current argument is adequately preserved for review, the State nonetheless submits it is without merit because Appellant's underlying premise is flawed. A motion to suppress evidence on grounds it was taken without consent, or that its use exceeded the scope of the consent that was given, falls squarely within the ambit of the Fourth Amendment and its prohibition against unreasonable searches and seizures. Thus, the trial court properly considered

Appellant's motion to suppress under a traditional Fourth Amendment analysis, and appropriately applied that analysis before deciding to admit the DNA evidence.

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 2779 (2013); State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317 (Ct. App. 2012). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189, 205–06, 656 S.E.2d 359, 368 (2008). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Thus, when reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004); State v. Pichardo, 367 S.C. 84, 95–96, 623 S.E.2d 840, 846 (Ct. App. 2005).

Law / Analysis

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unreasonable searches and seizures and unreasonable invasions of privacy. S.C. Const. art. I, § 10. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. Brown, 401 S.C. at 88, 736 S.E.2d at 266; State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133 (1990)). The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. Davis v. United States, ___ U.S. ___, 131 S.Ct. 2419 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. Davis, 131 S.Ct. at 2423; Brown, 401 S.C. at 88, 736 S.E.2d at 266. Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. Brown, 401 S.C. at 89, 736 S.E.2d at 266; Wright, 391 S.C. at 442, 706 S.E.2d at 327. These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. Brown, 401 S.C. at 89, 736 S.E.2d at 266; State v. Dupree, 319 S.C. 454, 456, 462 S.E.2d 279, 287 (1995); State v. Moore, 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008). Where the accused voluntarily consents

to give a biological sample to law enforcement without any limitation on the scope of his consent, it extinguishes his expectation of privacy in that sample. McCord, 349 S.C. at 485, 562 S.E.2d at 693.

Consent to Search and Provide DNA Sample

Appellant contends he did not consent to provide a sample of his DNA because the totality of the circumstances shows he did not knowingly and voluntarily waive his privacy rights in his DNA profile. The State disagrees.

Whether consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977); State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003). The State bears the burden of establishing the voluntariness of the consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Mattison, 352 S.C. at 584, 575 S.E.2d at 855. The “totality of the circumstances” test applies whether the consent was given in a non-custodial or custodial situation. Wallace, 269 S.C. at 550, 238 S.E.2d at 676; Mattison, 352 S.C. at 584, 575 S.E.2d at 855. In a custodial situation, the custodial setting is a factor to be considered in determining whether consent was voluntarily given. Wallace, 269 S.C. at 552, 238 S.E.2d at 677; Mattison, 352 S.C. at 584, 575 S.E.2d at 855. Custody alone, however, is not enough in itself to demonstrate a coerced consent to search. Mattison, 352 S.C. at 584, 575 S.E.2d at 855; State v. Brannon, 347 S.C. 85, 90, 552 S.E.2d 773, 775 (Ct. App. 2001).

The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge. Mattison, 352 S.C. at 584-85, 575

S.E.2d at 856; State v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995).

A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. Mattison, 352 S.C. at 585, 575 S.E.2d at 856; State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (dealing with voluntariness of a statement); State v. Greene, 330 S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997).

At the suppression hearing, Deputy Carwell testified he read the DNA consent form to Appellant, after which Appellant signed the form and provided a swab from his mouth as a DNA sample. On the form Appellant acknowledges: "This written permission, is being given be me, to the above named Investigator, freely, voluntarily, and without threats or promises of any kind." (R.p.341; R.p.343). Carwell testified he did not make any promises to Appellant about what would happen if he provided the DNA sample and did not threaten or coerce him into giving consent. He testified Appellant understood what was being asked of him in providing the DNA sample and did not appear to be under the influence of any drugs or alcohol. (R.p.71, line 19-p.76, line 17). On cross-examination, Carwell acknowledged Appellant was sixteen years old when he gave consent but explained that regardless of the age of a suspect there was no requirement or internal policy to get parents involved before seeking consent for a DNA sample.⁶ (R.p.78, line 1-p.81, line 11).

Appellant testified that when he gave the DNA sample in 2010 Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA, and claimed if they had told him, he would not have

⁶ While age is an appropriate factor to consider in determining whether an accused gave voluntary consent, the ultimate determination is based on a consideration of the totality of the circumstances. U.S. v. Boone, 245 F.3d 352 (4th Cir. 2001).

given the sample. (R.p.84 lines 2-25). However, on cross-examination, Appellant acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case, or about the sample being destroyed after the initial comparison. (R.p.85, line 5-p.99, line 17). Appellant never claimed he was promised the DNA would not be stored or used for other purposes, offered no testimony to suggest he felt threatened or coerced to consent, and never claimed his age, maturity, education, intelligence or lack of experience rendered his decision involuntary.

The trial court denied Appellant's motion to suppress and ruled the DNA results were admissible because Appellant consented to give the sample in 2010. (R.p.103, line 18-p.114, line 21). Based on the existence of evidence in the record, particularly the signed consent form, the State submits there was no abuse of discretion in the trial court's ruling that Appellant's consent was voluntarily given. It was a conclusion of fact determined from the totality of the circumstances which was not manifestly erroneous; therefore, the State submits it should be affirmed. Rochester, supra; Mattison, supra.

Scope of Search: Retention and Use of DNA Profile

At trial Appellant also maintained that even if he did voluntarily consent to initially give the DNA sample, the Sheriff's Department exceeded the permissible scope of consent when it kept the DNA profile in an in-house database and later used it to match him to the crime scene. The State disagrees.

Under our state constitution suspects are free to limit the scope of the searches to which they consent. State v. Forrester, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001); State v. Funderburk, 367 S.C. 236, 240, 625 S.E.2d 248, 250 (Ct. App. 2006); Mattison, 352 S.C. at 585, 575 S.E.2d at 856. When relying on the consent of a suspect, a police

officer's search must not exceed the scope of the consent granted or the search becomes unreasonable. Forrester, 343 S.C. at 648, 541 S.E.2d at 843; Funderburk, 367 S.C. at 240, 625 S.E.2d at 250; Mattison, 352 S.C. at 585, 575 S.E.2d at 856. Even in a situation where police have received a general and unqualified consent, “ ‘the police do not have carte blanche to do whatever they please.’ ” Forrester, 343 S.C. at 648-49, 541 S.E.2d at 843 (quoting 3 Wayne R. LaFare, *Search and Seizure* § 8.1(c), at 612 (3d ed. 1996)). The scope of the consent is measured by a test of “ ‘objective’ reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?” Florida v. Jimeno, 500 U.S. 248, 251 (1991); Mattison, 352 S.C. at 585-86, 575 S.E.2d at 856.

At the suppression hearing, Carwell did not give Appellant any kind of qualifications about how the DNA sample would be used, kept, or maintained, or what it would be compared against. (R.p.71, line 19-p.76, line 17). He testified he made no promises about what the Sheriff's Department would do with Appellant's DNA profile after the conclusion of the investigation or that they would destroy the DNA profile if it did not match anything in the 2010 burglary investigation. (R.p.82, lines 3-23). Indeed, Carwell testified the point of seeking Appellant's DNA was both to compare it to items from the 2010 burglary AND to enter it into the database. (R.p.83, lines 1-7).

Appellant testified that when he gave the DNA sample in 2010 Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA, and claimed if they had told him, he would not have given the sample. (R.p.84, lines 2-25). However, on cross-examination, Appellant acknowledged his signature on the DNA form and admitted the form said nothing about

the sample being used only for the 2010 case or about the sample being destroyed after the initial comparison. (R.p.85, line 5-p.86, line 17). Appellant never claimed he was promised the DNA would not be stored or used for other purposes.

The trial court denied Appellant's motion to suppress and ruled the DNA results were admissible because Appellant consented to give the sample in 2010. (R.p.103, line 18-p.114, line 21). The State submits the trial court did not err in denying the motion to suppress because evidence exists to support this finding. The record indicates Appellant imposed no limits on the scope of the search he granted when he signed the consent to search form. On the form he says: "I am aware that any evidence obtained as a result of this search can be used against me in a court of law." The State submits that a reasonable person would have understood that consent to encompass the Sheriff Department's retention and possible future use of the DNA sample.

Appellant argues McCord, *supra*, supports his position because the federal written consent form at issue contained broader language than the Sheriff Department's waiver in Appellant's case. In particular, the federal form noted the blood sample could be used "for whatever purpose the Violent Crime Task Force Department may see fit." Appellant contends that without this additional language the consent form in his case was not broad enough to extend his consent beyond testing for the 2010 burglary. The State disagrees and submits Appellant has misconstrued McCord. The compelling portion of both the federal form and the consent form in Appellant's case includes language that the evidence may be used against the accused in court. In addition, neither form puts limitations on the scope of consent. The federal form may be stronger due to the additional language about use of the sample, but both forms demonstrate a grant of

consent without limitations on use. Again, under a totality of circumstances this evidence supports the trial court's determination, and that determination should be affirmed.

Withdrawal of Consent

Appellant suggests he effectively withdrew his contractual consent when he failed to ratify it upon reaching the age of majority.⁷ However, as explained above, Appellant gave written consent for the Sheriff to take his DNA, placed no limits on the scope of that consent, and made no statement or act to withdraw that consent. Conduct falling short of "an unequivocal act or statement of withdrawal" is not sufficiently indicative of an intent to withdraw consent. Mattison, 352 S.C. at 587, 575 S.E.2d at 858; United States v. Alfaro, 935 F.2d 64, 67 (5th Cir. 1991). Effective withdrawal of consent to search requires unequivocal conduct, in the form of either an act, statement or some combination of the two that is inconsistent with consent previously given. Mattison, 352 S.C. at 585, 575 S.E.2d at 858; Burton v. United States, 657 A.2d 741 (D.C. 1994). The State submits Appellant's failure to ratify his previously given consent when he turned eighteen falls far short of an unequivocal act or statement of withdrawal. See Mattison, 352 S.C. at 585, 575 S.E.2d at 858 (holding Mattison's act of lowering his hands as the officer searched his groin area fell short of an unequivocal act or statement of withdrawal).

For all of the reasons above, the State submits the trial court's denial of Appellant's motion to suppress did not constitute an abuse of discretion. Therefore, Appellant's conviction should be affirmed. To the extent Appellant continues to argue his consent should be analyzed under contract principles, the State submits he should attempt to advance that argument in the proper forum. Appellant is free to pursue a civil

⁷ Appellant claims when he "discovered that his DNA had been kept, he asked that it be suppressed." To the contrary, Appellant gave a statement implicating himself in the crimes when he learned his DNA had been kept, and only asked that it be suppressed when the case was called for trial.

action for breach of contract, specific performance, damages, or whatever other remedy he believes is applicable to his alleged contract with the Sheriff's Department.

CONCLUSION

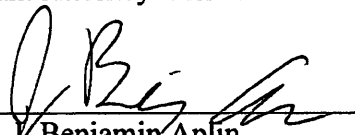
For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
November 18, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2012-212242

THE STATE, ...RESPONDENT

v.

EDWARD M. DUNN, ...APPELLANT.

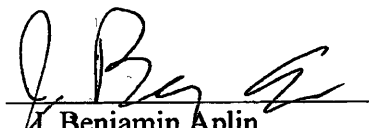
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule
211(b), SCACR.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
November 18, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2012-212242

RECEIVED
NOV 18 2013
SC Court of Appeals

THE STATE, ...RESPONDENT

v.

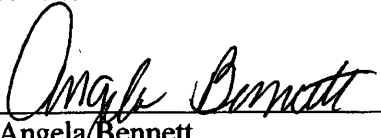
EDWARD M. DUNN, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated November 15, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

David Alexander, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 18th, day of November, 2013.


Angela Bennett
Executive Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ORIGINAL

RECEIVED

NOV 18 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

FINAL REPLY BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES**Cases**

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Statutes

S.C. Code Ann. § 23-3-600..... 3

ARGUMENT

At no point in its brief did the Attorney General contend that the DNA database maintained by the Richland County Sheriff's Office is authorized by state law. The Attorney General only argued that that this illegal invasion of our citizens' privacy is not preserved for appeal. Since the Attorney General addressed the merits of all of the other issues it contended were unpreserved, the logical conclusion is that South Carolina's top law enforcement official believes that Richland County's database is illegal. This Court should not allow an issue of this magnitude to escape its attention because of the State's issue preservation smokescreen.

The issue of the illegal database is preserved for appeal. The scope of Appellant's consent was the primary issue in the trial of this case. Appellant argued that the retention of his DNA sample exceeded the scope of any alleged consent. R. 88, ll. 7 – 97, l. 9; R. 103, l. 69 – 115, l. 12; R. 343. Whether the retention of appellant's DNA was legal cannot be decided without reference to the State DNA Database Act. See S.C. Code Ann. § 23-3-600 *et seq.* Appellant argued that the scope of his consent was violated and retention of his DNA was unconstitutional. The idea that this Court cannot consider what appears to be an admittedly illegal database when determining the consent issue construes error preservation's specificity requirement too narrowly.

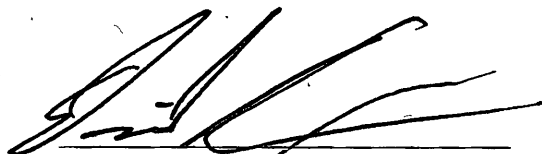
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documents—contract law—has no bearing in this analysis. Since it is admitted that individuals are free to limit the scope of consent given to searches, utilizing contract law principles in analyzing the agreement between the State and the suspect will help the Court reach correct decisions.

CONCLUSION

It is clear that Appellant's rights under the South Carolina Constitution, United States Constitution, and state law were violated in this case. This Court should reverse.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

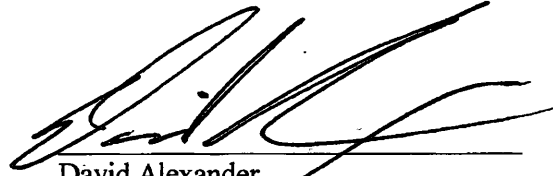
ATTORNEY FOR APPELLANT

This 18th day of November, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply 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."

November 18th 2013



David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED
NOV 18 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

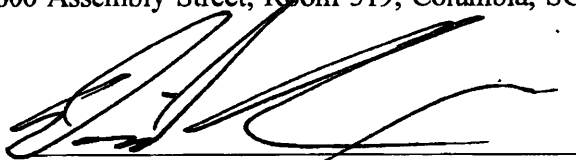
EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

CERTIFICATE OF SERVICE

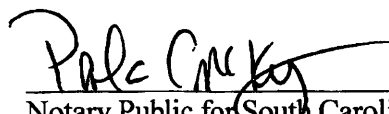
The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above-referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of November, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2013.

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

RECEIVED

NOV 18 2013

SC Court of Appeals

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Edward M. Dunn, Appellant.

Appellate Case No. 2012-212242

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-249
Heard May 7, 2014 – Filed June 25, 2014

AFFIRMED

Appellate Defender David Alexander, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia, for Respondent.

PER CURIAM: Edward M. Dunn appeals his convictions for kidnapping, armed robbery, and first-degree burglary. Dunn argues the trial court erred in refusing to suppress all evidence flowing from the retention and use of his DNA profile. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v.*

Moore, 377 S.C. 299, 308-09, 659 S.E.2d 256, 261 (Ct. App. 2008) ("[A] warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." (quoting *State v. Bultron*, 318 S.C. 323, 331-32, 457 S.E.2d 616, 621 (Ct. App. 1995)); *id.* at 309, 659 S.E.2d at 261 ("These exceptions include . . . consent." (citing *State v. Dupree*, 319 S.C. 454, 456-57, 462 S.E.2d 279, 281 (1995)); *State v. Mattison*, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003) ("Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." (citing *State v. Wallace*, 269 S.C. 547, 238 S.E.2d 675 (1977)); *State v. Dorce*, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995) ("The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge."); *Mattison*, 352 S.C. at 585, 575 S.E.2d at 856 ("A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion." (citing *State v. Rochester*, 301 S.C. 196, 391 S.E.2d 244 (1990)); *id.* (finding no abuse of discretion in the trial court's ruling that appellant's consent was voluntarily given where appellant consented to the police officer's request to search him without imposing any limits on the scope of the search, no evidence indicated appellant was incompetent, and the record revealed no threats or coercion); *State v. Forrester*, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001) ("Under our state constitution, suspects are free to limit the scope of the searches to which they consent."); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (noting the scope of the consent is measured by a test of "'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?"); *State v. McCord*, 349 S.C. 477, 485, 562 S.E.2d 689, 693 (Ct. App. 2002) (finding no improper search or seizure occurred as the appellant's expectation of privacy "was extinguished when he voluntarily gave the blood sample to federal authorities without any limitation on the scope of his consent").¹

¹ As to Dunn's arguments that (1) the contract for taking his DNA was voided and illegal, (2) he never ratified the contract as an adult, and (3) the Richland County Sheriff's Department's DNA database was illegal: *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (holding that for an objection to be preserved for appellate review, the objection must be made "with sufficient specificity to inform the circuit court judge of the point being urged by the objector" (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))); *State v. Dunbar*,

AFFIRMED.

HUFF, THOMAS, and PIEPER, JJ., concur.

356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *id.* at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."); *State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review.").



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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

July 11, 2014

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Edward M. Dunn
Lower Court Case No. 2011GS4003525, 2011GS4003526, 2011GS4003527
Appellate Case No. 2012-212242

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
David Alexander, Esquire
John Benjamin Aplin, Esquire
The Honorable G. Thomas Cooper, Jr.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF RichlandEdward Maurice Dunn SR #351031
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

2015 CP 4001657

2015 MAR 17 PM 2:03
JEANETTE W. MCBRIDE
C.C.P. & C.S.

RICHLAND COUNTY
FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee County Correctional Institution
2. Name and location of Court which imposed sentence Richland, Court of General Sessions
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Armed Robbery / 2011GS4003525
 - (b) Kidnapping / 2011GS4003256
 - (c) Burglary - First degree / 2011GS4003527
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Armed Robbery - 5-24-12 / 30 years
 - (b) Kidnapping - 5-24-12 / 30 years

Revised 3/2003

- (c) Burglary First degree - 5-24-12 / 30 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Richland County, Court of General Sessions
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 6-25-14
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NO
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- ... , which was unresponsive for many to argue that the State DNA Database act made the Sheriff's database illegal and keeping my DNA in the database violated my statutory and constitutional rights. on appeal, the state
- (a) conceded that the database was illegal. All evidence after this Mayoral Retention of my DNA should have been suppressed as fruit of the
- (b) poisonous tree. Trial counsel also failed to preserve this argument for appeal
- (c) as was found by the court of appeals. Attached to my application is a copy of my brief to the court of appeals and its opinion which explain this issue in more detail
11. State concisely and in the same order the facts which support each of the grounds set out

in (10):

- (a) relevant Facts: (See brief Attached to Application)
- (b) Relevant Facts: (See transcript pg. 535-536)
- (c) Relevant Facts: (See transcript pg. 75-78)
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) NO / consent Argument / Because it wasn't preserved as an issue for Appeal
- (b) NO / Plea Negotiation Argument / Because It wasn't raised as an issue during Trial.
- (c) NO / miranda Argument / Because It wasn't raised as an issue during Trial

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Deon O'Neil 1720 Main St. Suite 202 Columbia, SC 29201
 - ii. David Alexander 1330 Lady St. Suite 401 Columbia, SC 29201
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Deon O'Neil - Trial court attorney
 - ii. David Alexander - Appellate Defender
 - iii. _____

19. State clearly the relief you seek in filing this application:

I, Edward M. Dunn Jr. Respectfully Ask That my charges be vacated and my conviction case's be overturned. Due to my constitutional rights being violated.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA

County of

)
)
)

VERIFICATION

I, E.D., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Edward M. Dunn SR.Edward M. Dunn SR.

SWORN to and subscribed before me this

day of Jan, 2015.Debra Surles (L.S.)
Notary Public

My Commission Expires:

11-4-2015

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, E.D., hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Edward M. Dunn Sr.

Applicant

SWORN or affirmed to and subscribed before me this

16 day of Jan, 2015.

Debra Suris

Notary Public

My Commission Expires: 11-4-2015

RICHLAND COUNTY
FILED
2015 MAR 17 PM 2:04
JEANETTE W. HEBRIDE
C.C.P. & G.S.

10. (B) 12 Trial Counsel was Ineffective For Failing to bring an plea negotiation that was discussed between the solicitor and my Trial Attorney to my Attention. It was said by the solicitor that the plea bargain was set to take place on a specific date in front of a different Judge. During trial my Judge asked the solicitor was there any plea bargain's negotiated, the solicitor proceeded to say that it was discussed but she doesn't know why they never came to an conclusion, my trial attorney consistently told me that she was not willing to bargain any plea's and did not bring to my knowledge that such conversation took place between them at all. Therefore, I believe there's a reasonable probability that had I took a plea bargain, I would not have went to trial and the result of the proceeding would have been different. Which I believe also violates my 6th Amendment. (See *Dawte v. State* 675 S.E.2d 416) (SC 2009)

Relevant Facts: (See transcript pg's 535-536)

10. (C) I emphatically believe that my 5th and 14th Amendment was violated because my miranda rights were not read to me until after being under the inquisition by Inv. maulden. I was being questioned right after I was arrested and put into the police car heading to headquarters. once there, Inv. maulden questioned me some more and heard my verbal statement before the time was set and I was apprised of my rights. It is documented that he started questioning me at 11:34 and I was read my rights at 11:38. Inv. maulden impermissibly interrogated me within the meaning of miranda's procedures. (See *miranda v. Arizona*)

Relevant Facts: (See transcript pg's 75-78)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

INITIAL REPLY BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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

ATTORNEY FOR APPELLANT

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ARGUMENT

At no point in its brief did the Attorney General contend that the DNA database maintained by the Richland County Sheriff's Office is authorized by state law. The Attorney General only argued that that this illegal invasion of our citizens' privacy is not preserved for appeal. Since the Attorney General addressed the merits of all of the other issues it contended were unpreserved, the logical conclusion is that South Carolina's top law enforcement official believes that Richland County's database is illegal. This Court should not allow an issue of this magnitude to escape its attention because of the State's issue preservation smokescreen.

The issue of the illegal database is preserved for appeal. The scope of Appellant's consent was the primary issue in the trial of this case. Appellant argued that the retention of his DNA sample exceeded the scope of any alleged consent. Tr. 101, ll. 7 – 110, l. 9; Tr. 116, l. 82 – 128, l. 12; R. ____ (Motion Suppress DNA Evidence and Derivative Evidence). Whether the retention of appellant's DNA was legal cannot be decided without reference to the State DNA Database Act. See S.C. Code Ann. § 23-3-600 *et seq.* Appellant argued that the scope of his consent was violated and retention of his DNA was unconstitutional. The idea that this Court cannot consider what appears to be an admittedly illegal database when determining the consent issue construes error preservation's specificity requirement too narrowly.

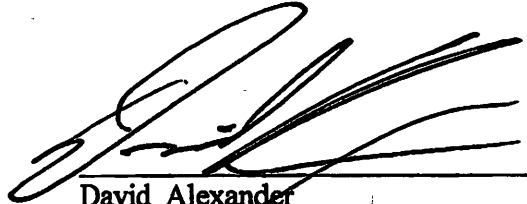
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documents—contract law—has no bearing in this analysis. Since it is admitted that individuals are free to limit the scope of consent given to searches, utilizing contract law principles in analyzing the agreement between the State and the suspect will help the Court reach correct decisions.

CONCLUSION

It is clear that Appellant's rights under the South Carolina Constitution, United States Constitution, and state law were violated in this case. This Court should reverse.

Respectfully submitted,


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

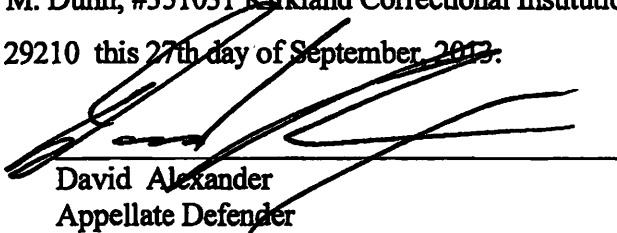
EDWARD M. DUNN,

APPELLANT

APPELLATE CASE NO 2012-212242

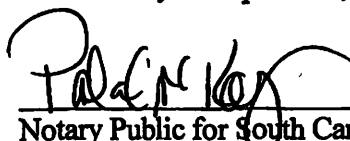
CERTIFICATE OF SERVICE

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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also served upon Mr. Edward M. Dunn, #351031 Kirkland Correctional Institution 4344 Broad River Road Columbia, SC 29210 this 27th day of September, 2013.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of September, 2013.



Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Edward Dunn, Jr., #351031

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2015-CP-40-01657

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed March 17, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the July 2011 term of the Court of General Sessions for Richland County for Armed Robbery (2011-GS-40-03525), Kidnapping (2011-GS-40-03526), and Burglary First Degree (2011-GS-40-03527). Applicant was represented by Deon O'Neil, Esq. Applicant proceeded to trial on May 24, 2012. He was convicted as indicted. The Honorable G. Thomas Cooper, Jr. sentenced Applicant to thirty (30) years' imprisonment for each charge. These sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by David Alexander, Esq. Following the submission of briefs by both sides, the South Carolina Court of Appeals dismissed the appeal. State v. Dunn, No. 2014-UP-249 (filed June 25, 2014). The Remittitur was issued on July 11, 2014.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance Counsel, in that;
 - a. Counsel "was ineffective for failing to argue that the State DNA Database act made the Sheriff's database illegal and keeping my DNA in the database violated my statutory and constitutional rights,"
 - b. Counsel "also failed to preserve [the DNA argument] for appeal as was found by the Court of Appeals",
 - c. Counsel "was ineffective for failing to bring an plea negotiation that was discussed . . . to my attention",
2. Due Process Violation, in that;
 - a. "[M]y [M]iranda rights were not read to me until after being under the inquisition by Iv. Malden"

III.

Applicant's first claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground

for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges due process violations. In the event Applicant alleges independent claims of due process violations, Respondent submits such claims are likewise without merit. A due process violation only occurs "when a defendant in a criminal trial is denied the fundamental fairness

essential to the concept of justice.” State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (citing 21 Am.Jur.2d, Criminal Law § 640 (1981)). Respondent submits the record fully demonstrates Applicant’s trial procedures fully complied with the requirements of due process. Accordingly, Respondent submits this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCP.

V.

Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

VIII.

WHEREFORE, having made its Return. Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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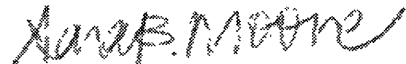
July 9th, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
EDWARD DUNN, JR., #351031	)	2015-CP-40-01657
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA.	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan D. Waller, Esquire
Giese Law Firm
1315 Blanding Street
Columbia SC 29201

DATED this 8th day of July, 2015.


 Sara B. Moore, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2015-CP-40-01657
	)	
	)	
	)	
	)	
EDWARD MAURICE DUNN, JR.,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
DEFENDANT.	)	
	)	

July 11, 2016
Columbia, South Carolina

B E F O R E:

THE HONORABLE D. CRAIG BROWN, JUDGE.

A P P E A R A N C E S:

JONATHAN WALLER, ESQ.
Attorney for the Plaintiff

JESSICA KINARD, ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Circuit Court Reporter

I N D E X

(PW) - Denotes Plaintiff's Witness
(DW) - Denotes Defense Witness

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(PW) DEON O'NEIL:

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E X H I B I T S

(There were no exhibits submitted.)

P R O C E E D I N G S

THE COURT: Yes, ma'am.

MS. KINARD: Thank you, Your Honor. May it please the Court. This is the matter of -- I'm honestly not sure if it's Maurice Edward Dunn --

Is that correct?

THE DEFENDANT: Junior.

MS. KINARD: Junior, thank you.

Versus the State of South Carolina, case number 2015-CP-40-06157. We're here before the Court on an application for Post Conviction Relief that was filed March 17th, 2015. The Applicant is presently confined pursuant to orders of the Richland County Clerk of Court. He was indicted at the July 11th term of the General Sessions Grand Jury for Richland County for armed robbery, kidnapping, burglary in the first degree, as well as attempt to commit sexual sexual assault, I believe.

He was represented by Deon O'Neil and Victor Li. They proceeded to trial on May 24th, 2012. He was convicted of the armed robbery, kidnapping and burglary first. The Honorable G. Thomas Cooper sentenced him to 30 years imprisonment for each charge to be served concurrently.

A timely notice of his appeal was filed on his behalf and an appeal was perfected by David Alexander. This was

1 briefed by both sides and the Court of Appeals dismissed
2 the appeal. Remittitur was returned on July 11th, 2014.
3 The State is present and ready to proceed.

4 Mr. Dunn is presented and represent by Jonathan
5 Waller.

6 THE COURT: Mr. Waller, how are you, sir?

7 MR. WALLER: I'm good, Your Honor. How are you?

8 THE COURT: Doing good. Are you ready to proceed?

9 MR. WALLER: I am, Your Honor.

10 THE COURT: Go ahead.

11 MR. WALLER: Thank you, Your Honor. I would call
12 Edward Dunn.

13 THE COURT: Mr. Dunn, sir, if you could come around
14 and be sworn on the witness stand, please.

15 Place your left hand on the Bible, raise your right
16 hand, sir.

17 EDWARD MAURICE DUNN, JR., after
18 being duly sworn, testified as follows:

19 THE COURT: All right. Please be seated. State your
20 name for the record spelling your last name for my court
21 reporter.

22 THE WITNESS: Edward Maurice Dunn, Jr. D-U-N-N is my
23 last name.

24 THE COURT: Thank you very much, Mr. Dunn.

25 Mr. Waller, you are so recognized.

1 MR. WALLER: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. WALLER:

4 Q Good morning, Mr. Dunn. How are you today?

5 A Good morning. I'm doing fine.

6 Q Mr. Dunn, where are you from?

7 A Originally? Born?

8 Q Yes, sir.

9 A New Jersey, Patterson.

10 Q Okay. When did you make your way down to South
11 Carolina?

12 A 2004, maybe.

13 Q Okay. I want to talk a little bit about the charges
14 we're here on today, but before that, I want to go back a
15 little bit further. Had you been arrested or talked to by
16 law enforcement about some burglaries prior to this
17 incident?

18 A Yes, I have.

19 Q Okay. And what did law enforcement talk to you
20 about?

21 A Well, back when I was 16 years of age, me and the guy
22 was suspect for a burglary. And, you know, when we was
23 apprehended, the police asked me to give them, you know,
24 my consent to see if my fingerprints, you know, was -- I
25 guess, they found some stolen items. So he asked me to

1 use my fingerprints to see if it matched those items.

2 Q Okay. Was it just fingerprints or was there DNA,
3 also?

4 A It was a DNA swab, also.

5 Q Okay. So you gave them your DNA?

6 A Yeah.

7 Q Is that right?

8 A But he told me the only reason that, you know, I was
9 going to give him my DNA was to see if it matched that
10 incident and that incident only --

11 Q Okay.

12 A -- at the time. It was either going to free me or
13 get me in trouble.

14 Q Okay. And what ended up happening with those
15 burglaries?

16 A I --

17 Q Was it your DNA?

18 A Huh?

19 Q Was it your DNA that matched?

20 A On those items?

21 Q Yes.

22 A No.

23 Q So you didn't get charged with those burglaries?

24 A I did not.

25 Q So you voluntarily gave your DNA to Richland County

1 law enforcement?

2 A To him, the officer, yeah.

3 Q The officer, okay.

4 A For that reason.

5 Q Okay. And then fast forward, and you got arrested
6 again?

7 A Yep.

8 Q On an armed robbery; is that right?

9 A Yes.

10 Q Kidnapping?

11 A Yes.

12 Q A burglary first degree?

13 A Yes.

14 Q And an attempted criminal sexual conduct in the first
15 degree?

16 A Yes, sir.

17 Q Is that right?

18 A Yes.

19 Q And all that was from the same incident; is that
20 right?

21 A Yes, sir.

22 Q Okay. Now, how did -- how did you get an attorney in
23 that case?

24 A I was appointed one --

25 Q Okay.

1 A -- for the trial.

2 Q Who were you appointed?

3 A Deon O'Neil.

4 Q Okay. After you were arrested, did you make bond or
5 were you given a bond or were you locked up the whole
6 time?

7 A I was locked up the whole time. I was not given a
8 bond.

9 Q Okay. When was the first time after you were
10 arrested that you met with Deon O'Neil?

11 A Maybe three months in -- three months into my court
12 time.

13 Q Okay. So about three months after you got arrested?

14 A Yeah.

15 Q Okay. What did y'all talk about that first time you
16 met, if you recall?

17 A Well, you know, basically, he just introduced
18 himself, you know, told me that he's my appointed attorney
19 and we spoke about, you know -- basically, he just asked
20 me what happened, you know, in my situation, in my case.
21 And I pretty much told him what happened, you know, my
22 side of the story. And I pretty much asked him, you know,
23 like, what is the best thing for me to do, you know,
24 because I'm trying to plead my innocence.

25 Q Right.

1 A So, you know, basically, he was just -- you know, I
2 asked him, you know, is it, you know, whatever I have to
3 do to plead my innocence, that's what I'm willing to do.

4 So, you know, he just told me that, you know, we was
5 going to, you know, -- basically, he asked me what did I
6 want to do.

7 Q Okay.

8 A And I told him that, you know -- I mean, if he can
9 somehow see if the solicitor wanted to negotiate a
10 bargain, a plea bargain or something or if we have to go
11 to trial to plead my innocence, I'm willing to do that.

12 Q We're going to come back to that in just a second.

13 When y'all first met or maybe not at the first
14 meeting, did y'all ever discuss your constitutional
15 rights?

16 A The first time?

17 Q Just any time.

18 A No.

19 Q Okay. Did you -- do you recall having a conversation
20 with Mr. O'Neil about your right to a jury trial?

21 A Right to a jury trial?

22 Q Yes, sir. You had a jury trial --

23 A Not the --

24 Q -- did you discuss that you had a right to one?

25 A Not the first time, no.

1 Q Okay.

2 A Not the first meeting.

3 Q Did y'all ever discuss that you had the right to
4 remain silent?

5 A I don't recall that either.

6 Q Okay. You gave a statement to law enforcement; is
7 that right?

8 A (Nods in the affirmative.)

9 Q You talked to law enforcement?

10 A Yes.

11 Q And, actually, you talked to your mother on the phone
12 at the sheriff's department; is that right?

13 A Yes, I did.

14 Q And all that happened before Mr. O'Neil represented
15 you; is that correct?

16 A Yeah, it happened before.

17 Q What did you and Mr. O'Neil talk about regarding
18 those -- I guess, two different statements is the best way
19 to put it?

20 A The statements that me and the police officers had?

21 Q Yes, sir.

22 A We didn't discuss that. We didn't discuss that. The
23 first time me and Deon met, like I said, we just spoke --
24 he just introduced himself and, basically, asked me what
25 did I want to do? You know, I just explained my side of

1 the story. And, you know, he said, Well, he's going to
2 try to speak with the solicitor to see if we can get a
3 plea bargain, some type of negotiations, a YOA or
4 something like that. And, you know, next time he sees me,
5 he'll let me know, you know, what's the best thing for us
6 to do.

7 Q Okay. Well, when y'all were getting ready to go to
8 trial -- at some point y'all met and were talking about
9 the upcoming trial, did y'all ever discuss the two
10 statements that you gave?

11 A The second time that he came to see me, he showed me
12 his -- my motion.

13 Q Okay.

14 A You know, we discussed the motion and things like
15 that. And he said that the solicitor did not want to, you
16 know, come to a conclusion with the plea bargain. He said
17 that she felt like she had a good case or something, that
18 we were going to have to go to trial.

19 Q Okay. But did y'all ever discuss anything about the
20 two statements that you gave?

21 A No, we didn't.

22 Q Okay. When y'all were getting ready to go to trial,
23 did y'all discuss the DNA issue?

24 A Getting ready to go to trial?

25 Q Yes, sir. When y'all were preparing, did y'all

1 discuss the fact that the State had a DNA match of you?

2 A Yeah, we did.

3 Q Okay. What did y'all talk about?

4 A Basically, you know, I told them, you know, dealing
5 with my case, my -- well, my side of the story, I told
6 him -- he said that they said they had a match, you know,
7 and the obtaining of it was illegally and that they put it
8 in a database or something that was illegal.

9 Q That's what he told you?

10 A Yes.

11 Q He told you that the Richland County database was
12 illegal?

13 A Yeah.

14 Q And this is when y'all were preparing for trial?

15 A Yeah --

16 Q Okay.

17 A -- this was.

18 Q What else did you and Mr. O'Neil talk about?

19 A Just that when he showed -- the second time before
20 going to trial, he just showed me my motion or discovery.

21 Q Did y'all talk about how you got arrested? How you
22 were arrested?

23 A Yeah, I explained how I was arrested.

24 Q Okay. When y'all -- let me ask you this. How did
25 Mr. Li become involved in your case?

1 A That was during trial.

2 Q Okay.

3 A My first day at the trial. I guess he was appointed,
4 too, also.

5 Q Okay. But you didn't know him until --

6 A Until --

7 Q -- the trial started?

8 A -- the first day of trial, yeah.

9 Q Had you ever met with him before?

10 A No, sir.

11 Q Had you ever talked to him on the phone before?

12 A No, sir.

13 Q Okay. When the trial started, were you able to talk
14 to Mr. O'Neil or Mr. Li at breaks or things like that?

15 A Yes. With both.

16 Q Okay. What did you tell him, if you recall, during
17 the trial?

18 A Which one?

19 Q Either one?

20 A Either one. I remember Li, if I'm correct, Li.

21 Q Yes, sir.

22 A He, you know, introduced himself and Deon introduced
23 him to me, as well. And that's pretty much it, you know.
24 I can't really recall the exact, you know, conversation we
25 had, you know, questions, but that's about it.

1 Q Okay. I want turn back just a little bit to when
2 y'all were getting ready for the trial, preparing for the
3 trial. How many times do you think you met with
4 Mr. O'Neil?

5 A O'Neil?

6 Q Yes, sir.

7 A Just twice.

8 Q Okay. Just twice?

9 A Uh-huh.

10 Q When was the second time? Do you recall?

11 A Yes. That was on some time -- that was maybe a few
12 weeks before our first day of trial.

13 Q Okay. Do you remember what y'all had talked about at
14 that point?

15 A Yeah. Like I said, that's the second time he seen
16 me. That's when he let me know that, you know, the
17 solicitor did not want to come to an agreement on a plea
18 bargain and that, you know, pretty much we had to go
19 forward with trial. And he said that he was going to try
20 to, you know, get a cap or something on the sentencing and
21 he gave me the -- he told me that I should be going to
22 trial soon.

23 Q Okay.

24 A That's pretty much it.

25 Q Did he tell you -- did y'all talk about your strategy

1 at all for the trial?

2 A Strategy? No.

3 Q Yes, sir. Well, what did you think was going to
4 happen when you went to trial?

5 A Honestly, I had no clue. I mean, I had no clue.

6 Q Well, did you have any questions for him?

7 A For O'Neil?

8 Q For Mr. O'Neil, for Mr. Li, for anybody?

9 A I mean, yeah, yeah, I did. You know, like some of
10 the stuff that I felt like, you know, was wrong of me
11 being arrested and stuff, yeah.

12 Q Okay. Well, what did you think was wrong with you
13 being arrested?

14 A Well, first of all, dealing with the consent, you
15 know, the consent part of my DNA being obtained illegally.

16 Q Did you raise that to Mr. O'Neil? Did you bring it
17 up to him?

18 A Yes.

19 Q What did he tell you about him?

20 A He said that he feels I was absolutely right about
21 that, and he did bring that up during trial.

22 Q Okay. Anything else that y'all talked about as far
23 as getting ready for trial other than the DNA issue? You
24 didn't have any other questions for him?

25 A I remember before I went upstairs before the Judge,

1 you know, he came to see me downstairs, you know, of the
2 courtroom.

3 Q In the holding cell?

4 A Yeah.

5 Q Okay.

6 A And we were supposed to go in front of a woman judge.

7 Q Okay.

8 A I can't recall her name right now, but he told me
9 that she -- you know, something happened with -- somehow I
10 wasn't going to be able to go in front of her and that I
11 was going to have to go in front of Judge Cooper.

12 Q Okay.

13 A And I asked did I have to, you know, or could I, you
14 know, waive it or something so I could go in front of the
15 judge that I was supposed to go in front of in the first
16 place. And he said no, I pretty much couldn't waive it
17 and that if I refused to go in front of Cooper, that I
18 would be tried in my absence.

19 Q Okay. To the best of your understanding, was there
20 ever a plea offer made to you?

21 A To me?

22 Q Well, did you ever hear of one being made?

23 A No, I didn't.

24 Q Okay.

25 A I mean, during trial, I heard the Judge ask the

1 solicitor was there any type of plea bargain,
2 negotiations, you know, talked about between my lawyer and
3 the solicitor. And she said it was and that they had an
4 appointed date and -- you know, a date for me to plead to
5 all charges, I guess. I know it's in the trial -- in my
6 transcript. But then the Judge asked my lawyer, Deon, you
7 know, is that correct, and he said yeah, but they don't
8 know why they didn't come to a conclusion for some reason.

9 Q Okay. Did you ever know of any plea offer being made
10 to you?

11 A Not me, no.

12 Q Okay. Mr. Dunn, I've asked you all the questions I
13 have. Is there anything you think I've forgotten or left
14 out or the Court needs to be aware of Mr. O'Neil's or Mr.
15 Li's representation of you?

16 A Yeah. I feel like -- well, I believe that, you know,
17 he was ineffective on the assistance of counsel part
18 dealing with the plea negotiations.

19 Q Okay. Let me just stop you right there. Is there
20 anything from a factual standpoint, anything that took
21 place between y'all that you think he did wrong or he
22 should have done better or?

23 A Yeah, you know, my counsel. He could have did better
24 with my counsel.

25 Q Okay.

1 MR. WALLER: I don't have any further questions for
2 you. Please answer any questions Ms. Kinard may have.

3 THE WITNESS: Okay.

4 CROSS-EXAMINATION

5 BY MS. KINARD:

6 Q Good morning, Mr. Dunn.

7 A Good morning.

8 Q So when you first met with Deon, did y'all discuss
9 your theory of the case? In other words, what you thought
10 happened?

11 A My side of the story?

12 Q Right.

13 A Yes, ma'am.

14 Q And you told him your whole version of events?

15 A Yes, ma'am.

16 Q And that was the first time that y'all met?

17 A The first time, yes.

18 Q Did you provide him with any names of people that he
19 could go talk to or interview that might help your side of
20 the case?

21 A Not -- no, ma'am.

22 Q At any point, did you do that, not just the first
23 meeting?

24 A I did provide -- not help my side -- yes, yes, ma'am.

25 I did provide him with the guy Shorty's name, and he said

1 that they were going to look into it and see, you know,
2 his alibi of the situation, but I guess his alibi wasn't
3 never pursued or something.

4 Q And just to clarify, Shorty was allegedly with you
5 that night?

6 A Yes, ma'am.

7 Q When you said that Deon showed you your motion, can
8 you explain what that means? Does that mean that y'all
9 reviewed your discovery together?

10 A My motion of discovery?

11 Q Right.

12 A Yes, ma'am.

13 Q So your motion would be anything that came from the
14 Rule 5 or Brady motion, anything that the State turned
15 over; is that correct?

16 A Yeah, the motion consisted of, you know, all the
17 statements and the -- you know, I was -- I got arrested
18 with another individual and, you know, he said that I did
19 some other burglaries or something like that with him,
20 which I, you know, I was trying to prove my innocence on
21 that part, too. So he just showed me his statement saying
22 that I did this so and so with him. You know, the -- I
23 guess the evidence and stuff of the case and whatnot, like
24 statements from the victims.

25 Q He reviewed all of that with you?

1 A Yes.

2 Q Y'all talked a little about the DNA issue and you
3 discussed that it may or may not have been legal. Is that
4 the word that you used?

5 A Yeah, that it wasn't legal.

6 Q It was not legal. Okay. Did you bring that up or
7 did Deon?

8 A I did.

9 Q And y'all discussed that at length?

10 A Yes, ma'am.

11 Q Is that before trial you discussed that and how to
12 defend against that issue?

13 A That was before trial and during trial.

14 Q And you mentioned earlier you read the transcript
15 and, obviously, you were there. Do you remember there
16 being a really long pretrial process, meaning before the
17 jury came in?

18 A Yes, ma'am.

19 Q Do you remember witnesses being called and a lot of
20 legal talk with the attorneys and the Judges?

21 A Yes, ma'am.

22 Q Or, Judge, excuse me. And you remember a lot of that
23 being about the DNA and whether it was admissible?

24 A No, that wasn't, that was afterwards.

25 Q After?

1 A After the pretrial.

2 Q So during the trial itself?

3 A Yeah, during, yes, ma'am.

4 Q Do you remember what was discussed during pretrial?

5 A Basically --

6 Q Was it a little about the statements provided?

7 A Yeah, the statements and --

8 Q The phone call?

9 A The phone call. You know, my side of the story,
10 basically.

11 Q And did your attorneys argue those issues to the
12 Judge?

13 A Yes, yes, ma'am.

14 Q So a lot of time was spent discussing these
15 evidentiary issues?

16 A Yes, ma'am.

17 Q Okay.

18 MS. KINARD: Those are all the questions I have.

19 Thank you.

20 THE WITNESS: All right.

21 THE COURT: Any redirect?

22 MR. WALLER: Nothing further, Your Honor.

23 THE COURT: All right. Sir, Mr. Dunn, you may step
24 down. Thank you.

25 THE WITNESS: All right.

1 THE COURT: All right. Anything further, Mr. Waller?

2 MR. WALLER: Yes, sir. The Applicant would call Deon
3 O'Neil.

4 DEON O'NEIL, after being duly
5 sworn, testified as follows:

6 THE COURT: Sir, you may take the witness stand and
7 state your full name for the record, spelling your last,
8 please.

9 THE WITNESS: Full first is Ernest Deon O'Neil. Last
10 name O'Neil, O-N-E-I-L.

11 THE COURT: Mr. Waller.

12 MR. WALLER: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. WALLER:

15 Q Good morning, Mr. O'Neil. How are you today?

16 A All right.

17 Q How did you come to represent Edward Dunn?

18 A I received Mr. Dunn's case as a conflict from the
19 public defender's office, would have been, I think, late
20 June of 2011.

21 Q Okay. And do you recall when you first met with him?

22 A It would have been in early in July.

23 Q Okay.

24 A I think -- his mother and father were real involved
25 in his case. I think I remember getting an e-mail from

1 his father late June. I think I remember telling his
2 father I would see him in the next couple of weeks.

3 Q What was your understanding when you were able to
4 receive discovery and review it of the State's position on
5 the case?

6 A I think I received discovery -- from looking back on
7 my e-mail chains in this case, I received discovery via
8 e-mail from the solicitor would have been in August
9 of 2011. And then I would have went down and talked with
10 Mr. Dunn about that discovery, went over that with him.
11 And I checked my e-mail chains and I think around
12 November, I think, 18th, 2011, the solicitor at that point
13 indicated that she had reviewed the evidence in the case
14 and she was not making an offer in the case. It kind of
15 progressed back and forth between me and the solicitor
16 about whether or not she was going to make an offer, not
17 going to make an offer.

18 She stood on that position that she was not going to
19 make an offer on the case, meaning make it either a
20 sentencing recommendation or a reduction in the charges.
21 However, to kind of fast forward a little, around March or
22 some time, I spoke again with Mr. Dunn and his parents,
23 separately, of course. And we looked at the calendar and
24 I think Judge Lee was coming April 17th, 2012. Judge Lee
25 was coming. And I told Mr. Dunn I thought Judge Lee would

1 be a favorable Judge for him to go in front of even if the
2 solicitor wasn't making any sort of plea offer.
3 Basically, our options were either to plea straight up or
4 go to trial. And I thought Judge Lee would be a good
5 Judge to go in front of.

6 So we had Mr. Dunn brought over to plea in front of
7 Judge Lee. When we got there, Judge Lee was not taking
8 pleas that particular week here. She had been assigned to
9 do trials. And that's kind of where I think Mr. Dunn got
10 the impression that he didn't go up to court because Judge
11 Lee was not taking pleas that day.

12 Q So the Court understands, if you can give a brief
13 rundown of what the State alleged took place.

14 A The State alleged that Mr. Dunn, essentially,
15 committed a burglary by breaking into an elderly lady's
16 house and then sexually assaulting her.

17 Q When you met with Mr. Dunn, his story was a little
18 bit different; is that right?

19 A His story was different from that, yeah.

20 Q What was his story?

21 A He always agreed that he went with this guy, Shorty,
22 to commit a lick, but he always maintained that he never
23 went inside -- never initially went inside the house and
24 he was not the person that sexually assaulted the victim
25 in the case, that it was the codefendant that sexually

1 assaulted her and he had nothing to do -- no prior
2 knowledge of that.

3 Q And not that it matters for these proceedings, but he
4 was actually found not guilty of the attempted CSC?

5 A Correct.

6 Q How did they identify Mr. Dunn?

7 A Through DNA.

8 Q Okay. How did they know how to match him?

9 A They ran -- when I say they, the Richland County
10 Sheriff's Department collected a DNA sample from a wash
11 rag at the scene of the crime here. They ran that DNA
12 sample through their own in-house DNA database here and
13 that sample in their in-house DNA database matched the
14 sample they took earlier from Mr. Dunn, from the arrest
15 when he consensually gave a sample for that arrest.

16 Q Okay. And their DNA database is not the CODIS
17 database?

18 A That's correct.

19 Q It's not the State database that any person convicted
20 of certain crimes has to submit a DNA sample on record,
21 it's not that database?

22 A Correct.

23 Q Okay. What is your understanding of the Richland
24 County database?

25 A It's my understanding that they, essentially, took

1 samples from individuals if the individual gave consent in
2 a particular case and they kept it and did not destroy it.

3 Q Okay. So they had their own database going on?

4 A Yes.

5 Q With Mr. Dunn's case, he was actually not even
6 charged with the -- what he gave at his initial sample
7 for; is that right?

8 A Yeah, the previous case there was a burglary that was
9 alleged that had a DNA sample in evidence. They asked --
10 Mr. Dunn's name somehow came up in that investigation.
11 They asked Mr. Dunn to provide a sample to exclude himself
12 from that investigation. He did and his sample did not
13 match the DNA sample found at that previous burglary.

14 Q So what was your strategy in dealing with the DNA
15 issue in the case at issue here today?

16 A Well, it was kind of twofold. First, we were trying
17 to suppress it and keep it from coming in evidence to
18 start with by alleging that by keeping the sample, the
19 State exceeded the consent Mr. Dunn originally gave by
20 giving the sample.

21 Q What did you base that on?

22 A Just off basic consent law. I had a case I filed
23 with the motion that, basically, said that defendants have
24 a right to limit their sample here -- I'm sorry, limit
25 their consent. And by agreeing to only give the DNA for

1 that particular case, it was my opinion that Mr. Dunn
2 limited his consent to that previous case and that
3 previous case only.

4 Q Okay. Did you make the argument that Mr. Dunn was
5 not able to give consent because he was 16 at the time?

6 A I don't think I raised that argument.

7 Q Okay. Did you make the argument that he never
8 ratified the contract? I guess the State's position was
9 that consent is a contract between the two parties. And
10 as a 16-year-old, did you make the argument that he never
11 ratified the contract when he turned 18 and became of
12 majority?

13 A I did not, no.

14 Q Did you ever make the argument that Richland County
15 keeping that database was illegal and it fell outside of
16 the State DNA statute?

17 A No, I never made a broad argument as to the legality
18 of the database itself.

19 Q So you focused mainly on the consent issue and that
20 Mr. Dunn had limited his consent just to that previous
21 case?

22 A Yes.

23 Q Do you recall what the Court's ruling was?

24 A They did not rule in my favor, or Mr. Dunn's favor.

25 Q Okay. And just for clarification sake, did you --

1 did you object every time there was an issue brought up
2 about the DNA?

3 A I believe I did, but the record speaks for itself. I
4 believe I did, though.

5 Q If I could get you to -- do you have a copy of the
6 transcript?

7 A I do.

8 Q If I could get you to turn -- we're kind of shifting
9 gears here just little bit. If I could get you to turn to
10 Page 147 of the transcript.

11 MR. WALLER: Your Honor, does the Court have a copy?

12 THE COURT: Yes.

13 Q If you would take a look at Line 10. This is during
14 the jury selection process.

15 A Okay.

16 Q Line 10, going to -- continuing on to Line 16?

17 A Yes, sir.

18 Q Did you have any issue with the comments made by that
19 juror that they might have tainted the entire jury pool?

20 A The idea that it tainted the entire jury pool did not
21 immediately come to mind when I read the comments. It
22 came to mind that I did not think he would be an
23 appropriate juror, but the idea that he tainted the jury
24 pool did not come to mind immediately, no.

25 Q So the comments about someone from that neighborhood

1 is usually guilty if they're charged?

2 MS. KINARD: Objection, I don't believe that's what
3 the record states.

4 THE COURT: Well, the record speaks for itself. I'll
5 not allow you to make a conclusion. It does speak for
6 itself. I'll look at it.

7 MR. WALLER: And I apologize.

8 THE COURT: That's all right.

9 MR. WALLER: All right.

10 THE WITNESS: Yeah, I think he said that there's not
11 too many times people -- they didn't really do what they
12 were accused of.

13 MR. WALLER: I have no further questions, thank you.

14 THE COURT: Cross-examination.

15 MS. KINARD: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MS. KINARD:

18 Q Mr. O'Neil, I'd like to go back just a little bit and
19 get some background information about you. How long have
20 you been practicing criminal law?

21 A At that time, would have been -- well, I was licensed
22 to practice in November of 2006. This trial would have
23 been in June of 2011, so it would be close to
24 four-and-a-half years.

25 Q Thank you. Now, when you started meeting with

1 Mr. Dunn, did you discuss his indictments with him?

2 A We would have went over the indictments, the
3 discovery materials and all those things.

4 Q And that included discussing the elements the State
5 would have to prove for each charge?

6 A In particular, what we discussed in his case was that
7 Mr. Dunn gave a statement that, basically, said that he
8 was the lookout for the armed robbery -- for the burglary
9 part of the case here. We kind of discussed that in
10 detail because I had to let him know that if he agreed to
11 be the lookout in the burglary case, he was, essentially,
12 admitting to the burglary itself under the hand of one,
13 hand of all. If he agreed to do the burglary, then he's
14 responsible for every -- and we specifically talked about
15 this, he's responsible for everything that's foreseeable
16 based off the burglary, which would make him guilty of the
17 burglary and the armed robbery, but not of any sort of CSC
18 kind of charge.

19 Q To that effect, do you recall asking for a jury
20 charge regarding the hand of one, hand of all versus mere
21 presence?

22 A I think I did, yes.

23 Q Did you review the possible punishments for each
24 charm that he faced?

25 A We did.

1 Q Did you discuss any collateral consequences, such as
2 parole eligibility or percentage of time served?

3 A We would have discussed that the armed robbery and
4 the burglary were most serious offenses and that required
5 him to serve, at least, 85 percent of his time. We also
6 discussed that in the context that he had a separate
7 burglary here that was some controversy as to whether or
8 not he could be facing life without parole on the second
9 set of burglary charges that he had.

10 Q But he was not facing life without parole at this
11 time?

12 A Well, the burglary carried up to a life sentence.

13 Q But it wouldn't have been an LWOP situation because
14 of strikes?

15 A No, it wouldn't have been an LWOP situation because
16 of strikes, no.

17 Q Did you talk to him about his constitutional rights?

18 A As in whether or not he had a right to a jury trial
19 and everything that went along with a jury trial?

20 Q Right.

21 A Yes.

22 Q And the right to remain silent?

23 A Yes.

24 Q Although --

25 A One of the things we did -- me and Mr. Li went and

1 talked to him before the trial. One thing we talked about
2 was whether or not he should take the stand or not because
3 he had already given a statement here, so kind of
4 encompassing that testimony whether or not -- he had the
5 right not to take the stand, whether or not he should or
6 should not take the stand and further testify in the
7 actual trial.

8 Q Since you touched on that, did Mr. Dunn take the
9 stand?

10 A Off the top of my head, I can't remember to be
11 totally honest with you.

12 Q If I mention nonverbal testimony, does that refresh
13 your testimony?

14 A It does not, I apologize.

15 Q So you do not recall that Mr. Dunn did not take the
16 stand, however, he did show his hands?

17 A Yea, I remember that now, yeah.

18 Q Can you describe that a little bit?

19 A I think there was some testimony about tattoos or
20 something, off the top of my head. I think they requested
21 him to show to the jury his hands.

22 Q And that would be for identification purposes?

23 A Yes.

24 Q Talking about constitutional rights, you discussed a
25 little bit that Mr. Dunn was ready to plead straight up to

1 these charges?

2 A Yeah, we were going to plea in front of Judge Lee, I
3 think it was April 17th.

4 Q And because -- well, for various reasons, he decided
5 not to plea, but as part of that, you discussed his right
6 to testify?

7 A Yes.

8 Q And his right to confront the witnesses against him?

9 A Yes.

10 Q And the right to call his own witnesses in his
11 defense?

12 A Yes.

13 Q So you felt he understood all those elements?

14 A I felt he did.

15 Q At any time, did you have any trouble talking to
16 Mr. Dunn or feel like he didn't understand you?

17 A No, he was very intelligent, very involved in his
18 case.

19 Q Did you discuss with him the State's burden of
20 proving guilt beyond a reasonable doubt?

21 A I didn't say it in those particular words, but I
22 indicated to him that the State had to prove their case.
23 It wasn't his job to prove that he was innocent. It was
24 their job to prove that he was guilty here.

25 Q Okay. So as part of your preparation, you discussed

1 his version of the facts and compared them to the State's
2 version of the facts?

3 A Yes.

4 Q And you had a pretty good idea of the State's version
5 of the facts because you spoke with Ms. Campbell or
6 someone from the solicitor's office about plea
7 negotiations?

8 A I think the solicitor was Ms. Fent --

9 Q I'm sorry, you're right, Ms. Fent.

10 A Their version of the facts was pretty straightforward
11 and his version of the facts was consistent from the very
12 beginning when he talked to law enforcement when he was
13 arrested.

14 Q Okay. Now, speaking of his arrest, shortly after his
15 arrest, did he provide a statement to the police?

16 A He did.

17 Q And that, in some part, admitted guilt?

18 A Yeah, he stated that he was the lookout for the
19 robbery, but he didn't go in. He only stepped in while it
20 was going on and then saw what was transpiring during the
21 armed robbery.

22 Q And another element that he had against him, so to
23 speak, was that he made a phone call from the sheriff's
24 department, correct?

25 A Correct.

1 Q Can you describe that a little bit?

2 A He made a phone call to his mother. He had been
3 interviewed by law enforcement and he made a phone call to
4 his mother and they recorded that phone call. And,
5 basically, in that phone call to his mother, he made
6 similar statements as to what was in his written statement
7 here. And at trial, we moved to try to suppress that
8 phone call he made with his mother.

9 Q Along with that motion, did you file a comprehensive
10 motion that was argued pretrial?

11 A Yeah, I filed a written motion on both the DNA issue
12 and the phone call issue.

13 Q Did it include some other issues, as well?

14 A It did.

15 Q Such as a renewed Brady motion?

16 A Yes, we would have renewed Brady. He would have
17 filed a Riddle motion as well and a motion to settle the
18 record of any sort of eyewitnesses and any sort of plea
19 deals given to any sort of other codefendants or
20 eyewitnesses.

21 Q And Jackson v. Denno?

22 A Correct.

23 Q As well as the DNA issue that you discussed on
24 direct?

25 A Correct.

1 Q Speaking specifically to the DNA issue, did you
2 believe that his DNA was legally obtained?

3 A I think -- well, I guess it -- I think it was legally
4 obtained, the question was was it legally retained.

5 Q Makes sense. So was this an issue -- is it fair to
6 say this was an issue that y'all discussed at length?

7 A It was.

8 Q And he understood your position and that you were
9 going to argue against it to the best of your ability?

10 A I told him that I was going to argue that they,
11 essentially, by keeping it violated his rights.

12 Q Do you believe that you made these arguments to the
13 best of your ability in pretrial?

14 A I think I did.

15 Q And as mentioned, do you believe that you renewed
16 these objections to any of your outstanding motions at
17 every possible venture?

18 A Yes, ma'am.

19 Q That was your practice?

20 A Yes.

21 Q One last question regarding a plea offer. In the
22 transcript, it does say that there was a plea offer made.
23 Do you recall that? Was it ever conveyed to your client

24 --

25 A The --

1 Q Or was it just the opportunity to plead versus go to
2 trial?

3 A Yeah, there was never any plea offer in the sense
4 that there was a reduction in charge or recommendation of
5 time. I clearly remember -- I have an e-mail from the
6 solicitor, it would have been November 2011 that clearly
7 stated that. That was not the agreement. The quote,
8 unquote offer was, essentially, to allow him to plea in
9 front of a judge that I picked, which would have been the
10 week that Judge Lee would have been there.

11 Q I have no further questions. Is there anything else
12 you'd like the Court to know about your representation of
13 Mr. Dunn?

14 A Not that I can think of, no.

15 THE COURT: Any redirect?

16 MR. WALLER: Just very, very briefly, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. WALLER:

19 Q Mr. O'Neil, when you argued that the DNA should be
20 suppressed, that's not the only thing you were asking to
21 be suppressed; is that right?

22 A That's correct.

23 Q You've wanted everything suppressed after the
24 match -- after the DNA match, you wanted everything
25 else --

1 A Yeah, we argued that everything that came from that
2 match would have been fruit of the poisonous tree, which
3 would have been his statements, the recorded phone call,
4 everything he made after they matched the DNA.

5 Q They didn't arrest him until they matched him; is
6 that right?

7 A Yeah.

8 MR. WALLER: No further questions.

9 MS. KINARD: Nothing further.

10 THE COURT: Sir, you may step down.

11 Call your next witness, please.

12 MR. WALLER: Your Honor, the Applicant has nothing
13 further.

14 MS. KINARD: The State has no witnesses in this
15 matter.

16 THE COURT: All right. Any argument?

17 MR. WALLER: Just a very brief one. I would ask the
18 Court to consider and review both of -- the order from the
19 Court of Appeals dismissing Mr. Dunn's appeal as well as
20 the initial reply brief of appellate that was attached as
21 part of his application when he filed it.

22 The Court goes into pretty good detail regarding the
23 issue of limiting consent. They give a remanded argument
24 -- or reasoned argument regarding why, I guess, they felt
25 Judge Cooper believed that it was a factual question

1 whether Mr. Dunn had attempted to limit his consent or
2 not. They did, however, say that the arguments that
3 Mr. Alexander, the appellate defender, had raised had not
4 been preserved for appeal.

5 On direct examination, Mr. O'Neil testified that he
6 had not raised the issue that the contract for taking his
7 DNA was void. He never ratified the contract as an adult
8 and that the database in itself was illegal. And
9 Mr. Alexander's reply brief discusses the State DNA
10 database act, South Carolina code as annotated 23-3-600.

11 I would just ask the Court to consider those as it
12 reviews the record.

13 THE COURT: All right. Thank you.

14 MS. KINARD: Your Honor, with respect to that
15 argument specifically, these are issues that have already
16 been dealt with. They've been dealt with at trial, as
17 well as through the appellate process. It's not this
18 Court's job to decide the legality of the DNA database.
19 It's this Court's job to decide whether Mr. O'Neil and Mr.
20 Li were effective in their presentation. I think by the
21 very lengthy pretrial discussions that were had, they did
22 everything that they could to effectively represent Mr.
23 Dunn and argue these motions very strenuously and
24 zealously. And Judge Cooper allowed them to go forward
25 and their assistance was absolutely effective. They did

1 the best they could. There is certainly no prejudice
2 here -- no deficient performance and therefore no
3 prejudice on the basis of effectiveness of assistance of
4 couple. Therefore, this case we put forward does not meet
5 the Strickland test and, therefore, we believe should be
6 denied.

7 THE COURT: I'll take a look at it.

8 MR. WALLER: Thank you, Your Honor.

9 MS. KINARD: Thank you, Your Honor.

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, PENNY M. JOHNSON, Official Court Reporter for the
Second Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate, and
complete Transcript of Record of the proceedings had and the
evidence introduced in the hearing of the captioned case,
relative to appeal, in Court of Common Pleas for Richland
County, South Carolina, on the 11th day of July, 2016.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

January 29, 2018

Penny M. Johnson
Penny M. Johnson
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Edward Maurice Dunn, Jr., #351031,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2015-CP-40-01657

ORDER OF DISMISSAL

RICHLAND COUNTY
FILED
2018 OCT 15 AM 11:38
JEANETTE W. MOORE
C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed March 17, 2015, by Edward Maurice Dunn, Jr. (Applicant). The State (Respondent) made its Return on July 8, 2015, requesting an evidentiary hearing be held. An evidentiary hearing was convened on July 11, 2016, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Jonathan Waller, Esquire. Respondent was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted by the Richland County grand jury for assault with intent to commit criminal sexual conduct (CSC) in the first degree (2011-GS-40-3518), armed robbery (2011-GS-40-3525), kidnapping (2011-GS-40-3526), and burglary in the first degree (2011-GS-40-3527). He was represented by Victor Li and Deon O'Neil, Esquires. On May 21-24, 2012, Applicant proceeded to trial by jury pursuant to which he was acquitted of assault with intent to commit first-degree CSC but was found guilty of the remaining charges. He was

sentenced by the Honorable G. Thomas Cooper, Jr., to three concurrent terms of thirty (30) years' imprisonment for armed robbery, kidnapping, and first-degree burglary.

Applicant filed a timely notice of appeal, and Appellate Defender David Alexander, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issue: "Whether the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of Applicant's DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by Applicant, and was otherwise illegal under state law?" Following briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's conviction and sentence. *State v. Dunn*, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2014). The Remittitur was issued on July 11, 2014.

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance Counsel, in that;
 - a. Counsel "was ineffective for failing to argue that the State DNA Database act made the Sheriff's database illegal and keeping my DNA in the database violated my statutory and constitutional rights,"
 - b. Counsel "also failed to preserve [the DNA argument] for appeal as was found by the Court of Appeals",
 - c. Counsel "was ineffective for failing to bring an plea negotiation that was discussed . . . to my attention",
2. Due Process Violation, in that;

- a. "[M]y [M]iranda rights were not read to me until after being under the inquisition by Ivg. Maulden"

At the evidentiary hearing, Applicant did not make additional claims and proceeded to present testimony in regard to some of the claims set forth in the application.

STATEMENT OF FACTS SET FORTH AT TRIAL

Sometime between 2 a.m. and 3 a.m. on May 28, 2011, seventy-four year old Indira Lonsdale (Victim) was in her sitting room drinking coffee and listening to music when a male intruder entered her home, came from behind, grabbed her by the shoulders, and ordered her to do what he said or he would kill her. The man led Victim to her bedroom, removed the sash from her bathrobe, which was the only article of clothing she was wearing, used the sash to tie her hands behind her back, and told her to bend over the bed. Victim could see a gun in the man's hand. The man then unzipped his pants, put his penis between Victim's legs and, without penetrating her, thrust several times until he ejaculated. Next he made Victim put a pair of her own underwear over her head before leading her to the bathroom. The man gave her a washcloth and told her: "wash yourself good." Victim wiped the ejaculate from her vaginal area, after which the man rinsed the washcloth in the sink and told her to wash again. She wiped herself again and left the used washrag in the sink. The intruder then led Victim to her bedroom and made her lay face down on the floor while he went through her dresser drawers looking for money. In fear that she would be shot if the intruder was not able to find any money, she told him she had \$120 in her wallet and told him where to find it. He then asked Victim for her car keys and left the house. Victim got up, ran to the phone, and called 9-1-1. When she was later interviewed by the police, Victim described the intruder as a young, small built, black male with

a northern accent and curly hair that hung over the side of his face. (Tr.p.199, line 12-p.213, line 19; p.229, line 5-p.230, line 25).

The Richland County Sheriff's Department collected the washcloth from Victim's sink and developed a DNA profile from seminal fluid detected and extracted from the cloth. (Tr.p.289, line 12-p.293, line 18; p.336, line 5-p.338, line 21; p.344, line 3-p.346, line 14). Applicant's DNA profile was already on file with the Sheriff's Department as a result of his providing a sample in September of 2010, in an unrelated matter. (Tr.p.311, line 1-p.313, line 15). Although the washcloth contained a mixture of DNA, the major contributor of that DNA was matched within a reasonable degree of scientific certainty to be seminal fluid from Applicant. Indeed, the frequency of seeing the contributor's profile in the African-American population was approximately one in 140 quintillion. (Tr.p.346, line 12-p.347, line 14; p.363, line 13-p.364, line 16). Based on the DNA match, warrants were obtained for Applicant's arrest.

After Applicant was arrested he was told his DNA was found on the washcloth discovered in Victim's house. Applicant then gave an oral statement admitting his participation in the burglary but denying participation in the attempted sexual assault. He gave an alternative explanation for the presence of his semen on the washcloth. (Tr.p.382, line 19-p.394, line 21). Applicant subsequently gave a written statement repeating his explanation. In those statements he claimed he was outside serving as a lookout while a co-defendant named "Shorty" was inside committing the burglary. Applicant said after about fifteen or twenty minutes he walked into the house and discovered Shorty in Victim's bed: "fucking her from the back." Applicant said: "I got a little excited, so I started to jack off. I used the towel to clean up. I saw it on the ground. I went back outside by the gate and kept watching." (Tr.p.395, line 13-p.406, line 21; States

Exhibits Nos. 1 and 2). Applicant gave a similar story in a telephone call to his mother from the jail. (Tr.p.419, line 11-p.420, line 10).

Motion to Suppress

Prior to trial, Applicant made a motion "to suppress the DNA profile that was used for comparison in this case." He articulated two grounds. First Applicant claimed he did not voluntarily consent to giving the DNA sample. Second he claimed even if the consent was voluntary, the use of the DNA sample in the subsequent criminal investigation was outside the scope of his consent. Applicant argued that since the DNA match should be suppressed, all other evidence obtained as a result of that match would be fruit of the poisonous tree, and should also be suppressed. He handed up a written motion in support of the argument which was marked as Court's Exhibit No. 2. (Tr.p.24, line 8-p.25, line 6). The State responded by providing the trial court with a copy of *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). (Tr.p.25, lines 9-18).

In the written motion Applicant first asserted "that under the totality of circumstances his consent was not voluntary." He argued his decision to give the DNA was "coerced and involuntary" because he was 16 years old and, even though he was accompanied by his parents, felt coerced to comply with law enforcement and signed the consent form because he was under arrest and not free to leave. Next Applicant asserted "that law enforcement exceeded the scope of any alleged consent by retaining his DNA in their in house database." Relying on *State v. Forrester*¹ and *State v. Mattison*,² Applicant argued he never consented to having his DNA stored in the Richland County in house crime lab, did not know the lab even existed, and that his consent was only given for the September 20, 2011, burglary being investigated at the time he

¹ 343 S.C. 637, 541 S.E.2d 837 (2001).

² 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

gave the DNA sample. Finally, Applicant asserted "all evidence derived from the illegal retention and comparison of his DNA profile should be excluded as fruit of the poisonous tree." He argued that since the only probable cause for his arrest came from the DNA match obtained through "the illegally retained DNA profile," all written and recorded statements to law enforcement following the arrest should also be suppressed. Applicant never argued the issue of his consent should be analyzed under contract principles and never mentioned the word "contract" in his written motion. He also did not argue the Richland County database itself was illegal. (Court's Exhibit No. 2).

Suppression Hearing

The trial court conducted a suppression hearing on Applicant's motion. The State called Deputy John Carwell of the Richland County Sheriff's Department to the stand. Carwell testified he worked in the burglary unit in September of 2010 and was in charge of a particular burglary that brought him into contact with Applicant. On September 21, 2010, the day after that burglary, he obtained a "petition" for Applicant and had Applicant brought to headquarters.³ Carwell read a DNA consent form to Applicant, after which Applicant signed the form and provided a swab from his mouth as a DNA sample. Carwell testified he did not make any promises to Applicant about what would happen if he provided the DNA sample and did not threaten or coerce him into giving consent. Carwell did not give Applicant any kind of qualifications about how the DNA sample would be used, kept, or maintained, or what it would be compared against. He testified Applicant understood what was being asked of him in providing the DNA sample and did not appear to be under the influence of any drugs or alcohol. (Tr.p.84, line 19-p.89, line 17).

³ Although Carwell did not elaborate on this testimony, this Court presumes he was referring to a juvenile delinquency petition alleging Applicant had participated in a non-violent second degree burglary in 2010, an event which is reflected on his juvenile legal history. (Court's Exhibit No. 9).

On cross-examination Carwell acknowledged he asked Applicant to give a sample of his DNA to compare it against DNA from the scene of a particular burglary and never mentioned it would be put in the Richland County DNA database. Carwell recognized Applicant was 16 years old when he gave consent but explained that regardless of the age of a suspect there was no requirement or internal policy to get parents involved before seeking consent for a DNA sample. He further explained that when a crime victim provides a DNA sample, his or her profile is not stored in the Richland County DNA lab.⁴ (Tr.p.91, line 1-p.94, line 11). On re-direct, Carwell testified he made no promises about what the Sheriff's Department would do with Applicant's DNA profile after the conclusion of the investigation or that they would destroy the DNA profile if it did not match anything in the 2010 burglary investigation. (Tr.p.95, lines 3-23). Indeed, on re-cross Carwell testified the point of seeking Applicant's DNA was to compare it to items from the 2010 burglary AND to enter it into the database. (Tr.p.96, lines 1-7).

Next, Applicant testified on his own behalf. He said that when he gave the DNA sample in 2010, Carwell never told him they were going to put his DNA profile in the DNA lab in Richland County, or that they were going to store his DNA. Applicant testified if they had told him they were going to store his DNA, he would not have given the sample. In regard to the current case, he testified that if the police had not told him they had a DNA match, he would not have given statements to Investigator Mauldin. (Tr.p.97, lines 2-25). On cross-examination, Applicant confirmed the solicitor's suspicion that if he wasn't told the police had a DNA match,

⁴ This testimony is in contradiction to the claim made in Applicant's brief on Appeal that Richland County retains DNA profiles of crime victims in the main database. (Brief of Applicant, p.12, n.2). Although a profile of a victim's DNA is developed by the lab for elimination purposes, and a copy of that profile is retained by the lab, there was no evidence a victim's DNA profile is kept in the criminal database used for future investigations.

he would have simply claimed he was never at Victim's house.⁵ He then acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case or about the sample being destroyed after the initial comparison. (Tr.p.98, line 5-p.99, line 17).

The trial court then heard arguments from Applicant and the State. Applicant argued his situation could be distinguished from *McCord* because the consent form in *McCord* included additional language that does not appear on the Richland County consent form. He further argued the State self-limited the scope of any consent he might have given by telling him they wanted his DNA for a particular reason. The State responded that the Richland County consent form was sufficiently broad and similar to the form in *McCord* to demonstrate consent. The trial judge questioned whether a sixteen year old is capable of giving consent and the State noted age was simply a factor like any other factor that must be considered in making the determination. The State argued Applicant had no reasonable expectation of privacy in the DNA profile once it had been given for a legitimate purpose. The State further argued that even if consent was not valid for some reason, Applicant's statements should not be suppressed because the police would have inevitably discovered he was involved in the crimes through other means. (Tr.p.101, line 7-p.110, line 17). The following morning the trial court heard additional arguments from Applicant and the State, further explaining their respective positions. Ultimately, the trial court denied Applicant's motion to suppress and ruled the DNA results were admissible. (Tr.p.116, line 18-p.127, line 21).

⁵ This comment demonstrates Applicant's willingness to offer self-serving testimony and shows his lack of credibility. This Court finds it lends support to the trial court concluding Applicant's consent was voluntary under the totality of the circumstances.

Trial

At trial, Investigator Carwell described the Richland County Sheriff's Department's "Consent to Search for D.N.A. Evidence" form which was signed by Applicant before he provided a DNA sample in 2010. He testified Applicant gave voluntary consent and then provided a swab from his mouth. The signed form was admitted into evidence subject to Applicant's previous objection. (Tr.p.311, line 1-p.313, line 20).

Forensic scientist John Barron with the Richland County DNA lab identified the buccal swab given by Applicant and testified he extracted DNA from that swab. The swab was admitted into evidence over Applicant's objection. (Tr.p.325, line 3-p.332, line 24). Forensic scientist Gray Amick with the Richland County DNA lab identified the washcloth from the Victim's house and testified he extracted DNA from seminal fluid on that cloth. Applicant renewed his previous objection to the results of that testing; however, the objection was overruled and Amick testified the fluid was a DNA match to Applicant. (Tr.p.333, line 16-p.347, line 14).

Investigator Josh Mauldin described Applicant's arrest and the various statements he provided in regard to the crimes. Without articulating specific grounds, Applicant renewed his previous objections to each statement and his objections were overruled. (Tr.p.392, lines 7-11; p.396, lines 21-25; p.401, lines 16-23; p.419, line 24-p.420, line 10). After the State rested and again after the defense rested Applicant renewed all of his previous motions and objections. (Tr.p.442, lines 15-17; p.455, lines 16-24).

Appeal

As noted above, on appeal Applicant raised the following issue: "Whether the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of

Applicant's DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by Applicant, and was otherwise illegal under state law?" Following briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's conviction and sentence. *State v. Dunn*, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2014). The authority cited suggests the Court of Appeals concluded Applicant voluntarily consented to the police taking a DNA sample and did not limit the scope of that consent. In a footnote, the Court of Appeals also held: Applicant's remaining arguments, "that (1) the contract for taking his DNA was voided and illegal, (2) he never ratified the contract as an adult, and (3) the Richland County Sheriff's Department's DNA database was illegal," were not preserved for appellate review.

EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and then presented the testimony of defense attorney Deon O'Neil (hereinafter "Counsel"). This Court also had before it a copy of Applicant's trial transcript, the records of the Richland County Clerk of Court, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, and the pleadings.

Applicant's Testimony

During the evidentiary hearing, Applicant testified that when he was sixteen years old, prior to the incident which led to the convictions which are the subject of this case, he talked to law enforcement after being apprehended as a suspect in some burglaries. He testified the officers asked for consent to take his fingerprints to compare to fingerprints they had found on items stolen in the burglary, and that in response he voluntarily gave both his fingerprints and a

DNA sample. Applicant testified he was not actually charged with those burglaries. (PCR Tr.p.5-p.7).

Next, Applicant testified about the current charges, explaining that after his arrest he was not given a bond and remained locked-up the whole time before trial. He complained that Counsel did not meet with him for the first time until three months after his arrest. Applicant testified that at the first meeting he told Counsel what happened during the incident, giving his side of the story, and he asked Counsel's advice on the best thing to do to plead his innocence. He said he asked Counsel to find out if the solicitor wanted to negotiate a bargain, but also made clear he was willing to go to trial to plead his innocence. Applicant claimed Counsel did not explain his constitutional rights, such as the right to a jury trial and the right to remain silent, either at that first meeting or at any time before trial. He acknowledged he gave two statements to the police and made a recorded telephone call to his mother from jail, but claimed Counsel did not discuss any of those statements with him at their first meeting. Applicant claimed they only discussed his side of the story and possible plea bargains they might make with the solicitor. (PCR Tr.p.7-p.11).

Applicant testified that the second time Counsel came to see him they began preparing for trial and discussed a possible motion to suppress. He explained the solicitor was not interested in a plea bargain because she felt like she had a good case. Applicant testified he and Counsel discussed the DNA issue and the fact that the State had a DNA match from the crime scene. He testified Counsel told him they would argue: (1) the way the police obtained the original DNA sample from the prior burglary was illegal, and (2) the police putting the sample into the Richland County DNA database was illegal. Applicant testified the only other thing he remembered discussing with Counsel was his motion for discovery. Applicant noted Mr. Li was

also appointed to represent him, but he did not meet Mr. Li for the first time until the trial started. He acknowledged that once the trial started he was able to talk to both Counsel and Mr. Li during the proceedings. (PCR Tr.p.11-p.13).

Applicant concluded his testimony by insisting he only met with Counsel twice before trial and that they never discussed a strategy for trial. He again acknowledged they talked about trying to exclude the DNA evidence and specifically planned to argue the DNA sample from when he was sixteen years old was taken without valid consent, but did not talk about an overall strategy for trial. Applicant then complained that he had to go to trial in front of Judge Cooper instead the "woman judge" he was first told would be hearing his case. He testified he believed Counsel was ineffective and could have done a better job. (PCR Tr.p.13-p.18). On cross-examination Applicant admitted Counsel obtained discovery from the State and reviewed it with him, including his statements, statements from his codefendant, and the DNA evidence. He testified he and Counsel spent a lot of time discussing the motion to suppress the DNA evidence. (PCR Tr.p.18-p.21).

Counsel's Testimony

After testifying on his own behalf, Applicant elicited testimony from Counsel. Counsel testified he was appointed Applicant's case in June of 2011 when it conflicted out of the public defender's office, and he first met Applicant in early July. He testified Applicant's mother and father were very involved in the case and he communicated with his father via email in June. Counsel testified he received discovery from the Solicitor in August of 2011 and went to the jail to go over it with Applicant. He testified he attempted to negotiate a plea offer from the State over the ensuing months but the solicitor would not make an offer, either as a sentencing recommendation or a reduction in the charge, so he prepared for trial. Counsel testified he

advised Applicant that Judge Lee was on the calendar for April 17, 2012, and where his only options were pleading straight-up or going to trial, he thought she would be a favorable judge for Applicant. (PCR Tr.p.22-p.24).

Counsel then described the State's theory of the case and the evidence supporting that theory, as well as Applicant's version of events. He noted the police had identified Applicant from a DNA match of semen at the crime scene to the sample they already had in the Richland County DNA database. Counsel testified his strategy in dealing with the DNA evidence was primarily to seek to suppress the evidence by arguing the State had exceeded the scope of the consent given by Applicant in regard to the prior burglary investigation. He testified he focused on the scope of consent but did not attempt to argue Applicant was not able to give consent at all at the age of sixteen and did not subsequently ratify the contract for consent when he turned eighteen. Counsel also testified he did not make a broad argument as to the legality of the DNA database itself. He noted the Court ruled against suppression at the pretrial hearing, but testified he believes he objected during trial each time the DNA evidence was used. (PCR Tr.p.24-p.29).

On cross-examination by the State, Counsel explained he had been practicing criminal law for four-and-a-half years when he represented Applicant. He described the thorough discussions he had with Applicant about the evidence, the crimes, possible sentences, the Applicant's constitutional rights, whether Applicant should take the stand in his own defense, and the State's burden of proof. Counsel testified they discussed Applicant's partially incriminatory statement to the police and the recording of his inculpatory telephone call to his mother. He testified he filed a written motion to suppress the phone call as well as a written motion to suppress the DNA evidence. Counsel testified he also renewed his *Brady* motion at the start of trial and requested a *Jackson v. Denno* hearing. He testified he intentionally focused

his motion to suppress the DNA evidence on whether law enforcement had illegally retained the DNA sample rather than whether it was illegally obtained and believes he argued for suppression to the best of his ability. (PCR Tr.p.29-p.37). On redirect, Counsel clarified that he argued not just for suppression of the DNA evidence itself, but that everything that followed from the DNA match should have been suppressed as fruit of the poisonous tree. (PCR Tr.p.37-p.38).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety, including a transcript of the post-conviction relief hearing itself. It also notes it heard the testimony at that hearing first hand. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden of proof in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Failure to Argue the Sheriff's Department's DNA Database was Illegal

Applicant contends Counsel was ineffective for failing to argue that the State DNA Database Act made the Sheriff's Department's DNA database illegal, and for failing to argue that keeping his DNA in that illegal database violated his statutory and constitutional rights. He further contends he was prejudiced by Counsel's ineffectiveness because, by failing to make this argument to the trial court, Counsel failed to preserve it for possible appellate review. This Court disagrees and finds that where a challenge to the legality of the local DNA database could not have reasonably resulted in suppression of the evidence at trial, Counsel was not ineffective for failing to make the argument, and Applicant suffered no prejudice, either at trial or on appeal.

In his direct appeal, Applicant argued the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent use of his DNA profile because his DNA

was taken when he was juvenile and maintained in a database not authorized by state law, and because this use exceeded the scope of his “contractual consent.” His argument hinged on the premise that the taking and use of his DNA should be analyzed under contract principles rather than under a standard Fourth Amendment exclusionary rule analysis. Applicant argued: (1) the sheriff had no “contractual right” to keep his DNA past the time necessary to test it in connection with the 2010 burglary because the “contract” to provide a DNA sample was limited solely to the sheriff’s investigation of that burglary; (2) the “contract” is voidable because he made it prior to turning eighteen and never ratified it after reaching the age of majority; and (3) the “contract” is void *ab initio* as an illegal contract because the sheriff has no authority to maintain its own DNA database where the sole repository of citizens’ DNA profiles is maintained by the State Law Enforcement Division (SLED) pursuant to the State DNA Database Act.

In response, the State argued that Applicant’s argument was not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements for preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) (“The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal.”); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). In part, the Court of Appeals agreed. In regard to Applicant’s contract law claims and his claim that the Sheriff’s Department’s DNA database was illegal, the Court of Appeals found they were not preserved for review. State v. Dunn, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2015).

Based on that finding, Applicant now argues Counsel was ineffective for failing to raise the alleged illegality of the local DNA database to the trial court, because by failing to do so he did not preserve it for review. However, this Court finds Counsel could not be ineffective in this regard because, even if Applicant's challenge to the legality of the Sheriff's DNA database was adequately preserved for review, it is without merit. Applicant's underlying premise is flawed. A motion to suppress evidence on grounds it was taken without consent, or that its use exceeded the scope of the consent that was given, falls squarely within the ambit of the Fourth Amendment and its prohibition against unreasonable searches and seizures, not contract law or a statutory challenge to a DNA database. Thus, the trial court properly considered Appellant's motion to suppress under a traditional Fourth Amendment analysis, and appropriately applied that analysis before deciding to admit the DNA evidence. The Court of Appeals affirmed the trial court's decision in this regard.

Only a finding that evidence has been obtained in violation of the Fourth Amendment would result in suppression of that evidence in a criminal trial. *See Davis v. United States*, 564 U.S. 229, 236-38 (2011) (noting the Fourth Amendment itself provides no remedy for a violation of the warrant requirement but recognizing the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment). Here, where the argument Applicant says Counsel should have raised fails to raise a valid Fourth Amendment challenge, he would not have been entitled to suppression of the DNA evidence regardless of the legality of the Sheriff's Department's DNA database. Thus, this Court finds Counsel was not deficient and Applicant suffered no prejudice from Counsel's

failure to raise this argument to the trial court. Accordingly, this allegation must be denied and dismissed with prejudice.

Failure to convey plea negotiations

Applicant alleges Counsel was ineffective for failing to bring plea negotiations with the State to his attention. However, Counsel cannot be ineffective because the negotiations did not result in a plea offer. In order to prevail on a claim counsel was ineffective for failing to convey a plea offer, the applicant must show: (1) plea counsel's failure to communicate the State's initial plea offer constituted deficient performance and (2) the applicant was prejudiced by the deficient performance, in other words there was a reasonable probability that but for this deficient performance, the applicant would have accepted the original plea offer. *Davie v. State*, 381 S.C. 601, 675 S.E. 416 (2009) (emphasis added). However, where plea negotiations were not fruitful, and as a result there was no plea offer to convey, trial counsel cannot be ineffective for failing to convey every aspect of the underlying negotiations. Similarly, a defendant cannot suffer prejudice from the trial counsel's actions in this regard.

Here, Applicant testified he asked Counsel to find out if the solicitor wanted to negotiate a plea bargain, but made clear he was willing to go to trial to plead his innocence. He admitted Counsel discussed possible plea bargains they would attempt to make with the solicitor. (PCR Tr.p.7-p.11). Applicant further testified he understood that the solicitor was not interested in a plea bargain because she felt like she had a good case for trial. (PCR Tr.p.11-p.13). Counsel confirmed Applicant's understanding by explaining he attempted to negotiate a plea offer from the State but the solicitor would not make an offer, either as a sentencing recommendation or a reduction in the charge, so instead he prepared for trial. Counsel advised Applicant his only two options were pleading straight-up or going to trial. (PCR Tr.p.22-p.24). This Court finds

Counsel's testimony with regards to this allegation very credible, and largely consistent with Applicant's testimony. Counsel diligently attempted to negotiate a plea offer from the State but was unsuccessful. He conveyed this information to Applicant and there simply was no plea offer to convey. Because Counsel did indeed convey his inability to obtain a plea offer from the State, this Court finds Applicant has failed to establish any deficiency on the part of Counsel for failing to convey specific plea negotiations. Furthermore, there is no reasonable probability anything Counsel could have done differently would have affected Applicant's decision to go to trial. Applicant offered no testimony to the contrary. For this reasons, this Court also finds Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. This Court finds this allegation must be denied and dismissed with prejudice.

Failure to adequately challenge statements to police

In his application, Applicant complained: "[M]y [M]iranda rights were not read to me until after being under the inquisition by Ivg. Maulden." It appears this is a claim that Counsel was ineffective for failing to adequately challenge the admissibility of his statements to the police, and this Court hereby construes it as such. However, Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds Applicant utterly failed to carry his burden of proof in support of this allegation and it must be denied and dismissed.

Additionally, this Court finds the trial transcript refutes any suggestion Counsel was ineffective for failing to adequately challenge the admissibility of his statements. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Here, the trial court conducted a thorough pretrial *Jackson v. Denno*

hearing before ruling it would admit Applicant's statements to the police. Counsel listened to the testimony of Investigator Mauldin offered by the State and then cross-examined Mauldin on the circumstances surrounding the statements given by Applicant, including the adequacy of the *Miranda* warning given to Applicant before he made those statements. (Tr.p.27-55). Counsel then called Applicant to testify on his own behalf so he could offer his conflicting version of those circumstances. (Tr.p.56-p.68). At the conclusion of the testimony, Counsel argued various grounds for exclusion, including the discrepancies between Mauldin's version and Applicant's version of the *Miranda* warning issue. (Tr.p.68-p.79). Ultimately, despite Counsel's efforts, the trial court ruled Applicant was properly advised of his rights pursuant to *Miranda* and that his statements were admissible. (Tr.p.79-p.84). Based on the foregoing, this Court finds Applicant has failed to establish any deficiency on the part of Counsel, either through direct evidence at the PCR hearing or evidence from trial. In addition, Applicant has presented no evidence which would establish any prejudice on the part of Applicant. In particular, Applicant has wholly failed to provide this Court with any reason as to how Counsel could have additionally challenged the admissibility of his statements, or how any such challenges would have affected the outcome at trial. Accordingly, this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate

appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 9 day of Oct, 2018.



D. CRAIG BROWN
Presiding Judge
Fifth Judicial Circuit

Florence, South Carolina

687

WITNESSES

(S) Joshua Mauldin - Richland County Sheriff

ARREST WARRANT NUMBER

1901957

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

JUL 13 2011

VERDICT

Guilty

5-23-2012

5-24-2012

925

Foreperson of Petit Jury
Date:

DOCKET NO. 2011GS4003525

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JULY TERM 2011

92

THE STATE
vs.

Edward Maurice Dunn Jr

Indictment for
ARMED ROBBERY

SC Code: 16-11-0330(A)
CDR Code: 0139

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jannette W. M. G. S.
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on JULY 13, 2011, the
Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Edward Maurice Dunn Jr did in Richland County on or about May 28, 2011, commit robbery by feloniously taking from the person or presence of INDIRA LONSDALE, by means of force or intimidation, goods or monies of INDIRA LONSDALE, such goods or monies being described as JEWELRY AND/OR MONEY, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he or she was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon; all in violation of §16-11-330(A), SC Code of Laws (1976, as amended)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



DAN JOHNSON, SOLICITOR

689

WITNESSES

✓ (S) Joshua Mauldin – Richland County Sheriff

ARREST WARRANT NUMBER

1901958

ACTION OF GRAND JURY

TRUE BILL

For person of Grand Jury
Date:

JUL 13 2011

VERDICT

Guilty

5-24-2012

305

Foreperson of Petit Jury
Date:

DOCKET NO. 2011GS4003526

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

✓ JULY TERM 2011

92

THE STATE
vs.

Edward Maurice Dunn Jr

Indictment for
KIDNAPPING

SC Code: 16-03-0910
CDR Code: 0095

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. M. Brade
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on JULY 13, 2011, the
Grand Jurors of Richland County present upon their oath:

KIDNAPPING

That Edward Maurice Dunn Jr did in Richland County on or about May 28, 2011,
unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away one
INDIRA LONSDALE, without authority of law, in violation of Section 16-03-0910,
S. C. Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the
statute in such case made and provided.



DAN JOHNSON, SOLICITOR

159

WITNESSES

✓(S) Joshua Mauldin – Richland County
Sheriff

ARREST WARRANT NUMBER

1901959

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

MA 13 2011

VERDICT

Guilty

5-22-2012

5-24-2012⁹⁰⁵

Foreperson of Petit Jury
Date:

905

DOCKET NO. 2011GS4003527

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

✓**JULY TERM 2011**

92

**THE STATE
vs.**

Edward Maurice Dunn Jr

**Indictment for
BURGLARY 1ST DEGREE**

**SC Code: 16-11-0311
CDR Code: 0079**

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jesse W. W. W. W. W.
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

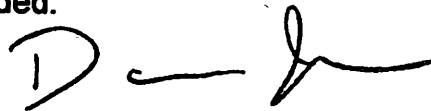
At a Court of General Sessions, convened on JULY 13, 2011, the
Grand Jurors of Richland County present upon their oath:

BURGLARY, 1ST DEGREE

CDR: 0079 16-11-0311

That Edward Maurice Dunn Jr did in Richland County on or about May 28, 2011,
enter the dwelling of INDIRA LONSDALE located at [REDACTED]
without consent and with the intent to commit a crime therein and when, in
effecting entry or while in the dwelling or in immediate flight, the defendant did
enter and/or remain during the night and/or was armed with a deadly weapon
and/or did cause physical injury to a person who was not a participant in the
crime and/or did use or threaten the use of a dangerous instrument and/or did
display what was or appeared to be a knife, pistol, revolver, rifle, shotgun,
machine gun, or other firearm, in violation of Section 16-11-0311(A), Code of
Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the
statute in such case made and provided.



DAN JOHNSON, SOLICITOR