STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2018-000146

THE STATE,

Respondent,

vs.

RICKEY WADDELL WILSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, SC 29526
(843) 915-5460

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Respondent accepts Appellant's Statement of the Case for purposes of this appeal.

STATEMENT OF FACTS

Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented at trial was that Virginia Eakers, the victim, was a homeless woman in her early eighties. Although she had no permanent residence, she would occasionally stay in inexpensive hotels and friends would occasionally let her stay with them. Her friends were of the opinion that she did not want a home, and that she preferred a transient lifestyle and wandering alone with her beloved cat, rather than associating with those similarly situated to her. ***Tr. 115; 117; 509-12; 522; 643.*** On the other hand, Appellant had a very limited monthly income and lived in a very cramped motel room that he was apparently very desperate to leave because it was infested with bed bugs. *See* ***Tr. 325; 363; 575; 650.***

Allison Hardin was one of the victim's friends. She testified that she works in the City of Myrtle Beach's planning department. The victim went to City Hall where Ms. Hardin worked, about five years before the trial, and asked the receptionist for her, for some unknown reason. The victim asked if Ms. Hardin knew of any place that would loan her $500.00 "to help pay off some debts." Ms. Hardin loaned her $500.00, which she was unable to repay. She had a "quiet" demeanor. Ms. Hardin loaned the victim smaller amounts of money on other occasions and she repaid most of those loans. ***Tr. 112-14.***

There were other times when the victim asked for money but Ms. Hardin was unable to loan her any. The victim would say that it was okay and that she understood. Ms. Hardin never saw the victim angry. When she was mad, she would fuss and "twist her mouth." The victim never stayed with Ms. Hardin and, to her knowledge, Irene Miller was the only person with whom the

victim stayed. ***Tr. 114-15***. Ms. Hardin last saw the victim on the Thursday and Friday before she was murdered. ***Tr. 116***.

"She was out of money and/or close to being out of money and needed a place to stay because the weather was turning cold." Unfortunately, Ms. Hardin did not have enough money to loan her and had company visiting. Because the shelter would not take her, the best that Ms. Hardin "could do for her at the time was to help her find a reasonable accommodation for the weekend and start looking for a shelter place." ***Tr. 116***. So, Ms. Hardin went online and found three inexpensive hotels that the victim could afford. One of these hotels was the Rodeway Inn and the victim chose it. ***Tr. 118-19***.

Ms. Hardin testified that the victim kept her money in a wallet that was on a chain she tucked into her shirt and that she carried her belongings in bags. She left some of these bags with Ms. Hardin until she could find a place to stay. ***Tr. 115; 117; 119-20***. The victim most always wore a black blouse, a black skirt and a black head scarf. Also, she "often smelled of body odor." ***Tr. 117-18***. The victim used to have a cat, named Kit, until the City took it away from her. Ms. Hardin explained that the victim's refusal to give up the cat made it difficult to find a shelter willing to accept her. ***Tr. 117; 119***.

Mr. Ronnie Evans, an employee of the Rodeway Inn, checked the victim into the hotel when she arrived on Friday May 20, 2016. She said that someone from City Hall had sent her there. Also, she was accompanied by a man. Mr. Evans assigned the victim to Room 314 because she did not have a preexisting reservation. Although the hotel's office is on the street level, it is actually on the hotel's second floor. ***Tr. 136-38; 142-43***. Shortly after the victim got settled into her room, the man who was with her when she checked in stopped back by the office, and gave Mr. Evans his name, Rickey Wilson, and phone number. Appellant told Mr. Evans that he lived in

the area and to contact him if the victim needed any help because he would be more than happy to help her. ***Tr. 140-41.***

Mr. Christopher Smoyer, the property manager for the Rodeway Inn,[1] was not at the hotel when the victim checked in on May 20th, but became aware of an elderly guest at the hotel named Virginia Eakers because the front desk clerk, Mr. Evans, called him and told him that Evans was kind of concerned. Around check-out time on May 21st, Mr. Smoyer got a call from a man in Room 314 saying that he wished to extend the stay at the Rodeway Inn. Because Room 314 had already been booked to someone else for that night, Mr. Smoyer told the man that they had to move them to another room. Shortly after this conversation, around 11 a.m., the man (Appellant) and the victim came down to the front desk, and the victim booked Room 211 for one night, with her new check-out date being at 11:00 a.m. on May 22nd. According to Mr. Smoyer, the victim was a "very nice lady" who used a cane to walk. ***Tr. 122-23; 127-32.***[2]

The victim did not check out at 11 a.m. on Sunday, March 22nd as scheduled. When someone is scheduled to check out but has not, the employee working the front-desk usually starts calling the room and housekeeping checks on the rooms that do not answer. So, Mr. Evans called Room 211 a few times on Sunday, May 22nd, but there was no answer. Since the victim was an older woman, he gave her a little extra time before he sent housekeeping to the room. The

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[1] Mr. Smoyer explained that the Rodeway Inn is located at 1401 South Ocean Boulevard, Myrtle Beach, and that one side of the hotel faces the Days Inn. ***Tr. 122-27.***

[2] In his statement to police (State's Ex. 2), Appellant claimed that he went with the victim to help her check in at the Rodeway Inn. Appellant said that they gave her a room key and walked her to her room on the third floor. When they got into the room, it was very cold and he helped her adjust the thermostat. He then stated that he left. The next morning, he got a call from the victim and went to her hotel room. Appellant also said that he helped her move from the third floor down to the second floor because she was feeble and afraid of heights. See also ***Tr. 546-47.***

housekeepers were unable to get into the room with their key. As a result, the housekeeper came to the office to get Mr. Evans who had a master key. ***Tr. 144-45.***

Mr. Evans went with a housekeeper to the victim's room, knocked on the door, and used the master key to open the door when no one answered his knock. When he opened the door, he heard water running in the shower. As a result, he asked the head housekeeper, Ms. Edna Fraser, to go into the room because he was a male and the victim was a woman, and he did not want to enter the room while there was water running in the bathroom. Ms. Fraser entered the room first. She took about five steps into the room before she turned around and told Mr. Evans that he needed to come in because she thought there was something wrong. ***Tr. 145-46.***

When Mr. Evans entered the room, it a mess. Both beds were in disarray, and there were blood stains on the floor and all over the sheets. Then, Mr. Evans looked into the bathroom and saw the victim in the bathtub, with the water running "full blast" but no water in the tub. She was unresponsive, had visible head injuries, and was obviously dead. Mr. Evans immediately left the room and called 911. Police and EMS arrived on scene in less than twenty minutes. ***Tr. 146-48; 163-66.***

Several officers responded to the Rodeway Inn and investigated this horrific crime. Officer Nathan Howitt was the initial responding officer to the scene in Room 211. After he observed the crime scene, he determined the death was not a natural event, and reported to his supervisors that he believed the death was a homicide. Additional units were then dispatched to the scene. ***Tr. 319-20.***

The first thing that responding officers noticed was that the door frame and locking mechanism for Room 211 appeared to be intact, indicating that there was no forced entry into the room. As the officers entered the room, they noticed that the T.V. was on. Moreover, immediately

to the right of the door was a table with a pair of gray or silver sunglasses. Also, they found two full size beds situated against the left wall, with what appeared to be a bloody handprint and droplets scattered about the comforter on the bed furthest from the door and closest to the bathroom. The officers observed blood pooling at the foot of bed that was furthest from the door. On the floor at the foot of this bed and in between the two beds, officers observed a large pool of blood and there was a second, smaller pool of blood next to it. In between the two beds there was a nightstand that had a telephone with blood on it and the cord was pulled out of the wall. Going further into the room, officers found a cane, wrapped in a towel on the vanity. ***Tr. 169-71; 236-41; 558-59.***

Officers also found crumpled up tissues and balled up towels or washcloths that appeared to be wet and have blood on them as well. When the officers entered the bathroom, they saw a small amount of blood on the bottom, left-hand corner of the door frame, and both the bathroom floor and tub area were wet from the water running. The victim was laying in the bathtub, fully clothed, with her back to the door. She was on her right side and facing away from the door, "in sort of a fetal position." She had very obvious injuries, including "severe trauma and swelling of her face" and she appeared to be dead. Det. Whitmire testified that her facial injuries were so bad that her eyes and ears were swollen shut, and "her face and head [were] indistinguishable." Also, "you could see what appeared to be fingernail marks in the side of her neck."[3] ***Tr. 170; 241-43; 320; 329; 556-60.***

Officers discovered early in their investigation that while the Rodeway Inn did not have any surveillance cameras, the Days Inn, which is immediately adjacent to the Rodeway Inn and is under the same management, had a Samsung surveillance system that was intentionally set up to

[3] Officer Logan Cooper identified the victim by her ID, which was found in the room.

be able to monitor both the Rodeway Inn and the Days Inn. Specifically, one of the Days Inn video cameras showed the victim's room, Room 211. ***Tr. 176-78; 200-02.***

James Barfield, a Days Inn employee, had installed and maintained the cameras that provided surveillance of the Rodeway Inn and the Days Inn. He testified that the system was in working order on May 20th through May 23rd. The sixteen cameras at the Days Inn recorded to a hard drive that was located at the Days Inn office. The hard drives were able to store a couple weeks of footage at one time. ***Tr. 200-04.***

Mr. Barfield gave the police a whole hard drive that included footage from all of the camera angles, including footage from camera number 9, which was focused on Room 211. ***Tr. 188; 205-06; 245-46.*** Without objection, he testified that, out of curiosity, he had watched all of the video footage of the Rodeway Inn from the point when Appellant "first came on the property" up to the point when hotel staff found the victim. ***Tr. 206.*** He specifically watched Room 211 and testified that no one went into or left Room 211, other that Appellant and the victim. ***Tr. 207.***

Officers quickly learned that Appellant lived in apartment 19 of the Victory Motel, which was located at 202 South Ocean Boulevard in Myrtle Beach.[4] They also discovered that his apartment only had one point one point of entrance and egress, and that the Victory Motel had a video surveillance system that runs on a 90-day loop, which cannot be deleted or edited. Camera 06 of the system sat about 18 inches above Appellant's door, and it faced straight down and toward the hallway overlooking his apartment. The system was located in the property manager's nearby home. When the officers asked her if they could see the security footage, she put the video footage on a thumb drive and gave them a copy. ***Tr. 223-24; 228-29; 254-56.***

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[4] The Victory was demolished on November 9, 2018. *See* https://www.youtube.com/watch?v=65BmepiLW3Y.

Det. Peter Woods, Det. Jade Roy, and Det. Tiffany Whitmire reviewed all of the video surveillance footage from the Rodeway Inn and the Victory Motel, including the missing portion of Rodeway Inn video from midnight on the 22nd until hotel staff found the victim's body. Each officer testified that no one entered or left Room 211 from midnight until the victim was discovered. ***Tr. 178-79; 191-93; p. 564-69.***

Respondent submits that Appellant's speculation about what the missing segment of video may have contained is merely a clever red herring designed to divert attention from the video that the State actually presented at trial from both the Days Inn cameras (State's Exs. 15 and 41) and the camera at Victory Motel (State's Exs. 17 and 82). The camera that pointed directly down to Appellant's room at the Victory shows him leaving his room at 6:53 p.m. on May 21, 2016. He is wearing his gray sunglasses, a light print shirt, dark colored pants and light colored shoes. He goes back into his room and exits his room at the Victory at 6:54:33 p.m. He is wearing the same clothes, but this time he has on a white hat pulled down to cover his face. The sunglasses that he was wearing when he left his room are the ones that were found at the crime scene. He left the Victory Motel and walked right past the office of the Rodeway Inn, arriving at the victim's room, Room 211, at 7:21 p.m. on May 21st. He knocked on the door, waited for a minute, and can be seen entering the room at 7:22:40 p.m. He stayed in Room 211 until 8:06 p.m. From 8:06 p.m. until the end of the video at midnight on the 22nd, no one else entered the room. ***Tr. 189; 594-98; 604-05.***

Appellant can be seen opening the door and exiting the victim's room at 8:06 p.m. He is carrying a canvas bag with the whales on the front and a plastic grocery bag. He then walks up a stairwell that comes up to the Ocean Boulevard level of the Days Inn, near the front of the office. He appears to be walking very close to the Days Inn side of the walkway, taking a very circuitous route that is clearly different than the route he followed every other time he left the Rodeway Inn.

He took the Ocean Boulevard route, a less direct route, back to his room at the Victory Motel and did not stop anywhere along the way. This took him over thirty minutes as he walked slowly and was staggering, as opposed to the brisk pace at which he had walked earlier. At 8:36:50 p.m., he can be seen returning back to his room wearing the same clothes he was from earlier, but the sunglasses are no longer visible. ***Tr. 598-601; 605-11; 652-53.***

At 8:54:28 p.m., he can be seen leaving his room wearing different clothes than before. Also, he is carrying a plastic grocery style bag and a material shoulder bag, both of which appeared to be full of personal belongings. Then, at 9:39:48 p.m., he can be seen returning to his room with no shoes or shirt on, wearing only blue jeans that appeared to have the cuff rolled up at the bottom and a belt. When he returns to his room, he is no longer carrying the plastic grocery bag and his material shoulder bag appears to be empty. It likewise appears that he might have showered because his hair appeared to be wet when he left his room at 8:54 p.m. after returning from the victim's room. At 10:01:57 p.m., he can be seen again exiting his room at the Victory. He is carrying another plastic grocery style bag. He returns at 10:02:46 without that bag. ***Tr. 260-61; 607-09.***

Officers also obtained Appellant's Sprint cell phone records from May 19 through May 23, 2016 (***Tr.580-81***), and the State introduced those records at trial as State's Ex. 13. ***Tr. 155-62.*** Ms. Irene Miller worked at the Sunrise Motel. She became friends with the victim when the victim came to stay at the Sunrise Motel. The victim would stay for "a couple weeks, and leave and come back." ***Tr. 507-08.***

The victim stayed at Ms. Miller's residence on three occasions: once for a few months, another time for a month and a half, and another for a few weeks. Ms. Miller would also give the victim a ride to the store or bank, if needed. Although Ms. Miller was the victim's friend, she was

never the victim's landlord. ***Tr. 508-11***. Ms. Miller later discovered that the victim would stay with other friends, as well. ***Tr. 515***.

Ms. Miller felt that the victim was a very strong-willed, independent woman. Ms. Miller described the victim's attire as "tattered, kind of bag lady-ish" because she was robbed once and all of her nice belongings were stolen. She thought no one would bother her if she dressed as she did. ***Tr. 510-11***. Ms. Miller described her as "quiet," "[v]ery modest" and the "[s]weetest little being you ever want to meet." She was never aggressive and was somewhat paranoid. ***Tr. 511-12***.

The victim would not easily let people into her life. She would not even let the housekeepers into her room when she stayed at the Sunshine Motel. After getting to know a person for about a month or two, she would start to allow the hotel workers to exchange towels or for similar reasons, but she would not let just anyone into the room easily. ***Tr. 512***. Also, she was generally afraid of people and she disliked crowds, or people looking or staring at her. ***Tr. 523***.

Among the victim's possessions were a ring, a watch a bracelet, some pictures of herself and her driver's license, which she cherished and kept in "mint condition." ***Tr.513***. Ms. Miller testified that the victim had a cat, Kit, and that she took better care of the cat than she did of herself, until the City took the cat away from her because it was sick. ***Tr. 513-14***.

Ms. Miller testified that the victim kept all of her belongings on her person and that "[s]he wouldn't leave those." ***Tr. 521***. The victim did not bathe regularly because she feared that someone was "looking at her or holding ... some type of light on her." ***Tr. 522***.[5] According to Ms. Miller, the victim "always wore a scarf on her head and two tied around her to hold her little purse." She kept the purse on a chain "and she would kind of hook it around her top. And by [tying] these two

[5] In light of Ms. Hardin's and Ms. Miller's testimony, it is clear that the victim's body was found in a place she would not have voluntarily been: in the tub with water running.

scarves she could hold it on her in the middle [under her clothes]. ... [I]t wouldn't slide down and it wouldn't slide up." ***Tr. 523-24.***

Ms. Miller had never met Appellant, but she did speak to him by telephone on two occasions after he called her work several times asking to speak with her.[6] She was very concerned by her conversations with Appellant. In one of the phone calls, he told Ms. Miller that the victim got $3,000.00 a month income and that he only got $768.00 a month. This concerned Ms. Miller because the victim's financial situation was something that was very personal to her, and something that she never discussed. Even Ms. Miller did not know this information. Worse, Appellant seemed confused about why the victim received so much more money than he did, and he mentioned something about her husband being a pilot. In another phone call, he also said that the victim should not be in Myrtle Beach, she should be in Hollywood because she cries. On both occasions, Ms. Miller told him to leave the victim alone and to stay away from her because the victim had been doing this for years and knew what she was doing. ***Tr. 515-21; 591-93.***

Also, Ms. Miller felt like he showed inordinate interest in the victim considering they had just met. The things he said went against everything she knew about the victim. After these phone conversations with Appellant, Ms. Miller became concerned for the victim's safety. She also knew that the victim did not like to be around people for long periods of time. ***Tr. 524-25.***

Scott Williamson, an officer in the Myrtle Beach Police Department's crime scene division, collected a number of items from the victim's hotel room pursuant to a search warrant. The seized items included two bloody wash towels, the bloody telephone headset that was on the nightstand,

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[6] Appellant made four short calls to the Sunrise motel at 12:36 p.m. He received a call back from Ms. Miller at 2:08 p.m., and they talked 8 minutes and 55 seconds. He then called Ms. Miller again at 4:37 p.m. That call lasted 13 minutes and 46 seconds. ***Tr. 591-93.*** Ms. Miller had not recently seen the victim. ***Tr. 524.***

a gray or silver-framed pair of sunglasses and the comforter that had blood stains and a bloody handprint on it. ***Tr. 338-40; 344-48; 350.***

Lt. Doug Furlong supervises the Myrtle Beach Police Department's investigative division and oversaw the investigation "from an administrative perspective." While he was assisting in canvassing of the area, he saw a cement type trash can in the parking lot of the business adjacent to the Victory Motel. This trash can was the closest to Appellant's room. When he removed the trash can's lid, he saw a layer of pine straw that appeared to have been thrown on top. Because he thought this was curious, he removed the pine straw and noticed a Food Lion bag and underneath that there was a material type bag. As he removed those items, he observed that other bags were inside the material bag, and that in one of those bags were a pair of jeans with a brown belt, a vodka bottle, a beer bottle, newspapers and receipts. He removed these items, secured them, and immediately called for the crime scene division. Another officer thereafter photographed the items and he secured them. ***Tr. 279-83; 285.***

Officer Howitt executed the first of two search warrants for Appellant's room at the Victory Motel.[7] When he got to Appellant's room, he noticed that it had a large bed bug infestation and he had to wear a Tyvek hazmat suit to protect himself from them. ***Tr. 263; 325; 358-59; 362-63; 575.*** He found a day planner in Appellant's room with a note written to meet with the victim. ***Tr. 331-32; 577-78.***

Officer Williamson testified that he executed the second search warrant for the room. He was unable to find the white had or the tan shirt with the floral pattern on it, two of the items that

[7] Det. Roy explained that "Once we realized that ... we probably needed to be looking for the blue bag that he had been carrying [when] he exited his room and then returned, we obtained a second search warrant to look for some of those personal belongings that we had observed on the video surveillance that we had not seen prior to the first search warrant on his room." ***Tr. 263.***

were specifically listed in the search warrant. ***Tr. 358-61***. Thus, police never found the clothes Appellant was wearing after he returned to his apartment from the victim's room in the Rodeway Inn, even though they searched his room twice. ***Tr. 263-64; 577; 618***.

In the course of interviewing several people who knew the victim well, Detective Whitmire discovered that police had not found some items in the victim's room that they should have found, including an antique watch, an antique bracelet with red stones, and a ring that the victim would always have with her.[8] Detective Whitmire also learned that the victim always kept her wallet and other valuable's on her person, tied close to her chest and under her undergarments, as described by Ms. Miller. Police recovered a wallet inside the bottom of a purse in one of the bags they found on the bed.[9] However, Detective Whitmire found that this strange because the individuals who knew the victim well told Detective Whitmire that the victim refused to take it off of her person. She refused to bathe or sleep without it and she always had her wallet tied to her body with the scarves. One scarf was found pushed up under the second bed where all the blood was. It had blood on it and it was tied as if to go around the body. The second scarf was never found. ***Tr. 364; 506; 523; 527; 529; 572-74***.

Appellant did not have any bruises on his hands when he was arrested. However, he did have minor cuts on his right hand, the top of one knuckle was red (***Tr. 382***), and it would take less force to beat a frail and elderly woman. ***Tr. 385***. Finally, Appellant gave a statement to police (*see*

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[8] Police recovered a ring that the victim was wearing when she was murdered, but that ring was missing stones. So, Det. Whitmire was unsure if this is the ring the people who knew her were talking about. Police never found the watch or bracelet. ***Tr. 572-73***.

[9] A credit card statement (State's Ex. 67) was in this same bag. PNC Bank records (State's Ex. 95) showed that she owed $6,295.63 for a closed credit card account. Her next payment of $731.79 was past due because it was supposed to have been paid on April 24, 2016. ***Tr. 364; 436; 440-43; 574***.

State's Ex. 2), which was published to the jury. ***Tr. 539-40.*** In this statement, he spoke freely for roughly twenty-five minutes and answered the questions asked of him.[10] This only changed when he was told the victim was dead. **Tr. 541-44;** State's Ex. 2. He told them that he met the victim on the bus, that he had helped her off of the bus, and that he helped her check in at the Rodeway Inn, that walked up to the third floor with her and that he adjusted the room's thermostat for her. He also admitted that he came back on the 21st and helped the victim move to Room 211 because she was supposedly afraid of heights, and he admitted his calls to Ms. Miller.

However, he also told police a number of things that were demonstrably false. Of greatest importance, he told police that he did not go back to Room 211 after roughly 12:00 p.m. on Saturday, May 21st and following his conversation with Ms. Miller. However, the surveillance video proved otherwise. Also, he was initially able to provide precise details but struggled to remember his own telephone number after learning that the victim was dead, and he claimed that Ms. Miller told him that the victim was old, feeble, and crazy. *See* State's Ex. 2; *see also* ***Tr. 549-51; 617-18.***[11]

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[10] One thing that he told police was that it only took him seventeen minutes to walk from the Rodeway Inn back to his residence at the Victory Motel. Yet, video surveillance reflected that when he left Room 211 on the night of May 21st, it took him half of an hour to return to his room at the Victory Motel. ***Tr. 549; 657-58.***

[11] As the State argued in closing, other things that he said to police were "interesting," in light of his claims in the statement that he helped the victim and others that weekend:

> When asked in regards to his phone going off, he said he hit the kill switch, he hit the kill button. Perhaps his phone button had a kill button on it, perhaps it said kill. He said he wanted to wash his hands of this woman. He said he was almost – and [you] make your own determination -- he seemed angry. He seemed very impatient. He seemed angry with her.

Tr. 681-82.

The two towels found in Room 211 (States Exhibit 91) were submitted for DNA testing by SLED, where they were separated into three items: item 15.1.1, a cutting from a towel that is labeled as Choice Hotels International Towel; 15.2.1, a cutting from a towel that is labeled as Dolphin Dobby; and 15.2.2, a swab from the scraping the end of the Dolphin Dobby towel. The DNA profile developed from the Choice Hotels International towel matched the DNA profile of the victim. "The probability of randomly selecting an unrelated individual having a DNA profile matching this item is approximately one in 3 octillion." ***Tr. 472-73***.

The DNA profile developed from the Dolphin Dobby towel was a mixture from at least two individuals. The DNA profile of the major contributor matched the DNA profile of the victim and, once again, "[t]he probability of randomly selecting an unrelated individual having a DNA profile matching this item is approximately one in 3 octillion." Since the mixture of DNA found on the Dolphin Dobby towel appeared to be from a male individual, additional YSTR testing, which allows analysts to ignore the female DNA and test the male Y chromosome, was performed. The partial YSTR profile developed from the Dolphin Dobby towel matched the YSTR profile of Appellant. Any paternal male relatives of his could not be excluded as a contributor to this profile, but the probability of randomly selecting an unrelated male having an YSTR profile matching this profile is approximately one in 900. ***Tr. 473-75***. While this probability is much lower than the probability found for the victim,[12] it is nevertheless "powerful evidence of guilt." *See McDaniel v.*

[12] This was a much lower number than the other matches because YSTR testing is only focusing on one chromosome. As a result, the statistic for that testing is always going to be lower than a multilocus standard STR test. And, because an YSTR profile is expected to be the same for a parental line, you would expect to find more than one individual with the same YSTR profile, in contrast from a multilocus standard STR test, in which you would expect only to find one individual with a particular DNA profile. ***Tr. 475***.

Brown, 558 U.S. 120, 132 (2010) (finding that a rational jury could consider the DNA statistical probability of "1 in 132... to be powerful evidence of guilt").

Swabs taken from the newspaper that was found in the trash can were tested for blood. When the test came back positive, the swabs were forwarded for DNA testing. The DNA profile developed from swab of the newspaper matched the DNA profile of Appellant. The probability of randomly selecting an unrelated individual having a DNA profile matching that item is approximately one in 49 octillion. ***Tr. 421; 470***. Appellant's sunglasses that were found in the victim's room were swabbed and those swabs were forwarded to DNA for further testing, but no DNA profile was developed from the swabs of the sunglasses. ***Tr. 421-22; 470***.

A presumptive test for blood was done on swabs taken from the telephone found in the victim's room. Because the presumptive test came back positive, DNA analysis was performed. The DNA profile of the blood found on the phone matched the DNA profile of the victim. A cutting from the bedsheet was also tested. After a positive result from the presumptive test for blood, a DNA test was done and the DNA profile matched the DNA profile of the victim. The probability of randomly selecting an unrelated individual matching this profile in both instances was "one in 3 octillion." An YSTR test was also done on the bedsheet and a partial YSTR profile was developed. However, due to the limited information obtained from the test, and the lack of DNA, no comparison could be offered for this item. ***Tr. 394-95; p. 477-78***.

The cutting from the back of the right upper pants leg of the pants found in the trash can and the swab from the cuff of the same pants leg were tested for the presence of blood. The test results came back positive and they was forwarded to DNA for further testing. The DNA profile of both items produced a positive DNA match to Appellant, and [to] choose one individual at

random, the probability that they would just by chance happen to have the same DNA profile as the evidence is approximately one in 49 octillion." ***Tr. 420; 467-69.***

Several items of evidence that were collected from Appellant following his arrest were likewise sent to SLED for testing, including two swabs from his fingernails and cuttings from his socks. The DNA profile of both fingernail swabs matched Appellant, but one produced only a partial DNA profile. ***Tr. 369-70; 377; 379; 381; 469-70.*** A presumptive test of his socks was positive for blood. The DNA profile developed on further testing matched Appellant's DNA profile. ***Tr. 423-24; 472.***

Doctor Edward Leroy Proctor, a forensic pathologist, performed the autopsy on the victim. Dr. Proctor found evidence of both strangulation and blunt force trauma to the victim's head. ***Tr. 304-05; 310.*** The victim's time of death was established by the investigation of law enforcement and the coroner's office and was determined to be sometime between 8:00 p.m. May 21st and 6:00 a.m. on May 22nd. ***Tr. 305.*** Dr. Proctor observed edema and hemorrhage within the muscles of the neck, as well as what appeared to be fingernail imprints in the neck. He opined that these findings meant that the victim had been strangled with a strong enough force to cause abrasions of the surface of the skin on her neck. ***Tr. 307-08.***

Dr. Proctor's further examination of the victim's body revealed fracturing of ribs four through six in the left chest and ribs two through six in the right chest, fracturing of the anterior external plate; a broken sternum; extensive abrasions, sloughage (grabbing and pulling of the skin until it tears) and contusions about the victim's arms; periorbital edema around the eyes and contusions of the right and left cheeks, swelling of the brain, bleeding of the brain, and petechial hemorrhages (small red spots) on the tissue of the brain itself and other signs of blunt force trauma to the head. ***Tr. 308-14.***

The only patterned area of injury that Dr. Proctor observed was the fingernail imprints on the victim's neck. The rest of the injuries were not patterned and could have been cause by any object, including the fists, elbows, or any instrument held in the hand that could hit someone and cause those injuries. ***Tr. 314***. In Dr. Proctor's opinion, the anoxic brain injury with the petechial hemorrhages, the hemorrhages in the meninges and the swelling of the brain was the mechanism of death. This was caused by the combination of both the blunt force trauma injury and the strangulation, which caused a lack of blood flow to the brain. Death was a consequence of each. ***Tr. 314-15***.

STANDARD OF REVIEW

Appellate courts sit to review errors of law only in criminal cases. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001), and an appellate court is bound by a trial judge's factual findings unless they are clearly erroneous. *Id.* at 6, 545 S.E.2d at 829. The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *State v. Bridges,* 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). *See also State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters); *State v. Kelley*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice"). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Also, generally, a ruling on a motion *in limine* is preliminary and subject to change based on developments during trial. So, an *in limine* ruling does not constitute a final ruling on the admissibility of evidence, *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996), and an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

ARGUMENT

Assuming *arguendo* that the Court finds Appellant's argument preserved for appellate review, the trial judge's refusal to suppress testimony from police officers concerning twelve hours of a surveillance video of the entrance to the hotel room where the victim was murdered, based the upon the State's failure to provide this portion of the video to the defense, was not an abuse of discretion. Appellant admittedly could not establish bad faith on the part of law enforcement in losing or negligently failing to download this portion of the video, and he failed to demonstrate that the missing segment of the video possessed an exculpatory value apparent before it was lost or destroyed and that he could not obtain other evidence of comparable value by other means.

One of the key pieces of evidence against Appellant was surveillance video footage of the entrance to the hotel room where the victim was murdered. Unfortunately, roughly twelve hours of that footage was lost or never downloaded prior to trial, including footage from 12:00 a.m. on May 22, 2016, to 11:00 a.m. that morning when the victim's body was discovered. Consequently, it was never provided to the defense. Appellant contends that the trial judge denied him a fair trial by refusing to suppress testimony from police officers that the missing video had shown that no one entered or left the room during that period of time based the upon the State's failure to provide this portion of the video to the defense.

Respondent submits that Appellant's argument is not preserved for appellate review because he failed to renew his *in limine* objection and the trial judge had not indicated that the earlier ruling was final until after the jury had heard testimony by Det. Peter Woods that Det. Woods had watched the missing segment of video and that it reflected that no one entered or left

the room before the hotel staff found the victim's body. Alternatively, Respondent submits that the trial judge properly refused to suppress the officers' testimony on due process grounds because Appellant admittedly could not establish bad faith on the part of law enforcement in losing the video as required by *Arizona v. Youngblood*, 488 U.S. 51 (1988), and *Illinois v. Fisher*, 540 U.S. 544, 547-49 (2004). Also, he failed to establish under relevant state law construing *Youngblood* and *California v. Trombetta*, 467 U.S. 479 (1984), that the video possessed an exculpatory value apparent before the video was lost or destroyed and that he could not obtain other evidence of comparable value by other means because (1) the video, at best, was evidence that was **potentially** useful to the defense; (2) prior to trial, the prosecution disclosed to the defense the portion of the video that was in its possession, which included the relevant time period from when the victim checked into Room 211 until midnight on May 22nd, or four hours after the prosecution theorized she was murdered;[13] (3) Appellant had the opportunity to fully cross-examine the three police officers who had watched the entire, original video concerning both whether the missing portion of the video depicted anyone entering or leaving Room 211 from midnight until 10:00 a.m. on May 22nd, as well as why the missing segment had not been provided to the defense; and (4) all three officers who had watched the entire video testified that it reflected that no one had entered or left the room during that period. Further, he cannot show prejudice from the trial judge's ruling

[13] Respondent has addressed the United States Supreme Court's requirements for a due process violation and the requirements established by the South Carolina appellate courts separately because *Fisher* makes clear that there is no due process violation unless the defendant can establish bad faith in losing the evidence at issue. *Fisher*, 488 U.S. at 57. However, pre-*Fisher* cases by the Court of Appeals and this Court held that a defendant may prevail, even without establishing bad faith, if he can prove that the evidence possessed an exculpatory value apparent before the evidence was destroyed and that he could not obtain other evidence of comparable value by other means. *See, e.g., State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). Respondent would ask the South Carolina Supreme Court to modify its precedent to comport with the United Supreme Court's decision in *Fisher*.

because the officers' testimony is merely cumulative to testimony from James Barfield, and he has not contested the admissibility Mr. Barfield's testimony.

A. Events in the trial court.

1. The *in limine* motion and the trial judge's ruling.

Appellant moved pretrial to suppress testimony of the officers who had viewed the missing segment of video conccerning the contents of the missing segment. He explained that the murder had occurred at the Rodeway Inn and that there was a surveillance "video from across the parking lot at the Days Inn." The investigators' reports state that "they gathered all relevant video, brought it back to their police annex." Officers then "watched from Friday, the 20th, at about 3 p.m. all the way through until the morning of the 22nd, [Sunday] ... morning, at about 11 a.m. when the body [was] discovered." The reports further indicated that the officers had downloaded the video and that they provided it to Appellant. ***Tr. 67.***

However, when defense counsel viewed the video, he discovered that "the actual video that was provided was [from] Friday, 3 p.m. through midnight on the Saturday." (Sic). So, twelve hours of video was missing. ***Tr. 67.*** Appellant added that:

> We have ... a statement from the officer claiming that he did download it. And in their reports they do say that they watched it.
>
> The problem here obviously being a large portion of this case turns upon what is on that video. We have a couple officers saying that they watched it. But we have not had an opportunity to see that. We don't know what it is that they saw beyond what they put in the record. He was not provided that in discovery. It simply no longer exists. For whatever reason, whether it was a download problem, it simply wasn't obtained from the hotel. Whatever it is, it's not there.

Tr. 67-68.

Appellant's understanding was that "the police will try to testify as to what it is that they saw on that video from the midnight portion up to and including when the body is discovered,

those 11 hours." However, he argued that the trial judge should suppress all testimony from the officers "as to what they saw on the portion of the video that we did not receive" because, "out of fundamental fairness, we do not believe it's right testify to something on a video that we were not provided." ***Tr. 68-69.***

In response, the State observed that Rule 1004(1), SCRE, "provides that an original is not required and other evidence of the contents of a writing, recording or photograph is admissible if all originals are lost or have been destroyed unless the proponent lost or destroyed them in bad faith." Also, the State was prepared to call former Det. Jade Roy, who could explain why the missing segment of video "was not preserved." ***Tr. 69.*** When the trial judge asked what Det. Roy would say, the State explained that when the police downloaded the video, "that portion didn't download, and nobody noticed it until [it was] too late." They did not know why it did not download, but they did not act in bad faith. Further, Det. Roy would testify that the missing video reflected that no one entered the room, until hotel staff discovered the victim's body. ***Tr. 70.***

The State further explained that three officers had reviewed the missing segment of video and that it was downloaded "onto the disc drive of the Myrtle Beach Police Department." Unfortunately, this segment "was lost." The officers thought that it was on the server and did not realize that portion had not downloaded until it was too late to retrieve a copy of it. ***Tr. 70-71; 76-77.*** The State acknowledged that police apparently did not review the video after they downloaded it onto the server, but argued that Rule 1004(1), SCRE, and this Court's opinion in *State v. Halcomb*, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009), required Appellant to demonstrate it was lost or destroyed in bad faith and the officers did not act in bad faith. Thus, the officers should be permitted to testify about the video's contents. ***Tr. 71-74.***

The trial judge declined the State's offer to call Det. Roy and assumed that he would testify that the police did not act in bad faith. ***Tr. 75-76***. After Appellant noted that it was the defense that had pointed out the error in the case (***Tr. 77-78***), the following exchange occurred between the State and the trial judge:

> THE COURT: So ... what happened to the original?
>
> MR. DeBUSK: The original was on a DVR which was at the hotel, Days Inn hotel, and it was recycled.
>
> THE COURT: Wait a minute. So they went to the hotel and watched it there and downloaded it from the hotel?
>
> MR. DeBUSK: Yeah. And they actually brought the DVR to the crime scene and downloaded it there, and then returned the DVR, and the DVR was recycled. .... They downloaded it twice, Your Honor. They downloaded it ... Once at the Days Inn onto a USB drive.
>
> THE COURT: Right.
>
> MR. DeBUSK: And then they brought the whole DVR ... to the crime scene lab and downloaded again. And it was between those two, the last portion never -- like I say, it created the folder, but it didn't create the –
>
> THE COURT: So what happened to the DVR that they brought to the crime scene? ....
>
> MR. DeBUSK: It was returned to the hotel and it was –
>
> THE COURT: Even before?
>
> MR. DeBUSK: Well, at that point they thought they had it downloaded.
>
> MR. OSKIN: Your Honor, the DVR –
>
> THE COURT: Yeah. But, I mean, were they acknowledging that you didn't have to have the original? I mean, if this was the original DVR from the hotel, wouldn't that be the best evidence that you would need to maintain as part of the evidence?
>
> MR. DeBUSK: Well, Your Honor, they thought that by saving the digital recording they would have saved all the contents of the DVR.

THE COURT: I know they thought that. But what if the Defense wanted to investigate the DVR and wanted to -- I mean, it's like ... any other recording.

Tr. 78-79.

The State stated that it had provided the defense with the portion of the video that encompassed the time period when the murder occurred under the State's theory, and explained that the missing eleven hours was relevant because it reflected that "no one else went in or out of the room during that time until the body was discovered by housekeeping, or by hotel staff." The trial judge then took Appellant's motion under advisement. ***Tr. 80.***

The trial judge denied the motion the following morning. He stated that he had researched the issue and although he disagreed with the State's position, the State was correct. He observed that both the Supreme Court and this Court had held that "to establish a due process violation, the Defendant must demonstrate, one, that the State destroyed the evidence in bad faith, or two, that the evidence possessed and exculpatory value apparent before the evidence was destroyed, and the Defendant cannot obtain other evidence of comparable value by other [means]." He specifically cited to *State v. Breeze*, 379 S.C. 538, 665 S.E.2d 247 (Ct.App. 2008), and *Cheeseboro*, *supra*. Appellant declined the trial judge's offer to present any additional evidence to demonstrate either that the State destroyed the video or lost it in bad faith, or that the video possessed an exculpatory value which was apparent before it was lost or destroyed and that he could not obtain other evidence of comparable value by other means. ***Tr. 82-83.***

2. Appellant did not timely renew his objection.

The State thereafter presented three officers – Det. Peter Woods, former Det. Jade Roy, and Detective Tiffany Whitmire - each of whom testified that he or she had viewed the missing segment of surveillance video and that the video in question showed that no one either entered or left Room 211 of the Rodeway Inn - the room where the victim was staying and where her body

was found - from midnight on May 22nd until hotel staff entered the room and found her around 11:00 a.m. that morning. *See* ***Tr. 178-81; 248-54; 564-72.*** Appellant did not renew his objection until after the first of these witnesses, Det. Peter Woods, of the Myrtle Beach Police Department, had testified.

Following Det. Woods' testimony and outside the jury's presence, Appellant stated, "We intended to do it before Detective Woods testified, but we would just like to make sure that for the record we renew our objection to anyone being able to testify." ***Tr. 196-97.*** The trial judge ruled that he had denied the motion *in limine* and that the objection was preserved. ***Tr. 197.***

The State indicated that "next witness and the witness after the one down from there ... are also going to testify about it. Appellant stated that he could either renew his objection when these witnesses testified or the judge could allow his same objection to "carry forward." The trial judge stated, "I'm going to overrule your objection, I'll allow it." ***Tr. 197-98.***

B. Discussion.

Initially, Respondent submits that the present argument is not preserved for appellate review. Generally, a ruling on a motion *in limine* is preliminary and subject to change based on developments during trial. So, an *in limine* ruling does not constitute a final ruling on the admissibility of evidence, *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996), and an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. *Schumpert*, 312 S.C. at 507, 435 S.E.2d at 862. *See also State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999); *State v. Floyd*, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988). This general rule has two exceptions. First, when the trial judge "makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." *State v. Forrester*, 343 S.C.

637, 642, 541 S.E.2d 837, 840 (2001). The second exception is when the trial judge's actions "clearly indicate[] that his ruling was a final, rather than preliminary." *State v. Wiles*, 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009). In *Wiles*, the trial judge commented to the jury on the evidence subject to the *in limine* ruling "before any evidence was admitted" and both parties referenced it in opening statements. *Id.* Respondent submits that the exception recognized in *Wiles* is inapplicable here because the trial judge's statement indicating that his ruling was final only came after evidence subject to the earlier ruling had been introduced without objection.

Alternatively, Respondent submits that the trial judge's ruling must be affirmed on the merits. Detective Tiffany Whitmire, the lead investigator for the Myrtle Beach Police Department in this case, offered perhaps the clearest explanation for what happened to the missing segment of video and why police were unable to provide it to the defense. She had watched the thumb drive obtained by Det. Woods on his computer, and the thumb drive contained the video footage for Sunday May 22nd "I thought it was downloading on his computer, so I sat down there to view it instead of taking it to my desk. .... When I finished with that video, I left the hard drive in because I thought it was downloading on that computer." ***Tr. 565.***

> Q Let's before we leave the subject of the video, we know and have the section for Friday and Saturday, the 20th and 21st. What happened to the section for Sunday, the 22nd?
>
> A Yes, sir. As I –
>
> Q And that is the section that was on Detective Woods' hard drive?
>
> A Yes, sir. As I said, when it was plugged into that computer, I thought it was downloading. When we were working this case, we had a large number, almost everyone in our division, working on this case. So each person had an individual task and were responsible for different portions.
>
> So I thought that the person assigned to that was downloading that video. And that's why I actually watched it at that computer and left it there. I knew Detective Roy

had downloaded the DNA down in our crime scene lab. After that point, I'm not sure exactly what day I transmitted the case.

What we do to transmit a case is we take everything that we have in relation to a case, and in a case of this size we have to use like a larger hard drive. And we move all those files from our system and copy them to the hard drive and bring them to the solicitor. And then it's provided to everyone reference the case.

When I was doing that transmittal, we had had another homicide four days after this one that I was also assigned. And I was working both of those homicides. And when I transmitted the case and moved everything over, I did not take the time to go through every single folder. I looked at the main folder and that there was data in it, and I moved it over to the hard drive. In hindsight I really wish I would have opened each of those folders, because I would have noticed in time to go get that data from the Days Inn.

I did not find out that that data for Sunday was not on the drive until the solicitor called me and asked me where it was on my days off. I drove into the office to copy it and provide it because I thought we had it because I'd watched it. And that's when I realized it did not download, and we did not have it.

Q What was your procedure for videos in investigation at that time?

A It's the same as it is currently right now. When we get video on any case, we get a hard drive, a thumb drive, whatever, we transfer it on, we bring it to the office and we put it in our server or our drive that we use for our case files.

We do that with our videos, our interviews, any data that we do. And we put it in there. And then we return the DVDs or the hard drives we've used or we recycle our hard drives to transmit cases to the solicitor's office.

Tr. 569, line 21 -571, line 24. Her testimony is generally consistent with the trial testimony of Det. Woods (***Tr. 178-84; 188***) and Det. Roy (***Tr. 244-46; 250-52***), although Det. Woods' testimony is somewhat confusing.

The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. *Youngblood*, 488 U.S. at 57-58. In *Fisher*, the United States Supreme Court explained the due process right of an accused under *Youngblood* where the prosecution destroys or loses "potentially useful evidence" before his trial.

We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. See *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Youngblood,* by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S., at 57, 109 S.Ct. 333. We concluded that the failure to preserve this "potentially useful evidence" does not violate due process "*unless a criminal defendant can show bad faith on the part of the police.*" *Id.,* at 58, 109 S.Ct. 333 (emphasis added).

The substance seized from respondent was plainly the sort of "potentially useful evidence" referred to in *Youngblood,* not the material exculpatory evidence addressed in *Brady* and *Agurs.* At most, respondent could hope that, had the evidence been preserved, a *fifth* test conducted on the substance would have exonerated him. See *Youngblood,* 488 U.S., at 57, 109 S.Ct. 333. But respondent did not allege, nor did the Appellate Court find, that the Chicago police acted in bad faith when they destroyed the substance. Quite the contrary, police testing indicated that the chemical makeup of the substance inculpated, not exculpated, respondent, see *id.,* at 57, 109 S.Ct. 333, n., and it is undisputed that police acted in "good faith and in accord with their normal practice," *id.,* at 56, 109 S.Ct. 333 (internal quotation marks omitted) (quoting *California v. Trombetta,* 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), in turn quoting *Killian v. United States,* 368 U.S. 231, 242, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961)). Under *Youngblood,* then, respondent has failed to establish a due process violation. We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police. Indeed, the result reached in this case demonstrates why such a *per se* rule would negate the very reason we adopted the bad-faith requirement in the first place: to "limi[t] the extent of the police's obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it." 488 U.S., at 58, 109 S.Ct. 333.

We also disagree that *Youngblood* does not apply whenever the contested evidence provides a defendant's "only hope for exoneration" and is " 'essential to and determinative of the outcome of the case.' " App. to Pet. for Cert. 15–16 (citing *Newberry, Supra,* at 315, 209 Ill.Dec. 748, 652 N.E.2d, at 291). In *Youngblood,* the Arizona Court of Appeals said that the destroyed evidence "could [have] eliminate[d] the defendant as the perpetrator." 488 U.S., at 54, 109 S.Ct. 333 (quotation marks and citations omitted). Similarly here, an additional test might have provided the defendant with an opportunity to show that the police tests were mistaken. It is thus difficult to distinguish the two cases on this basis. But in any event, the applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the

> defendant's defense, but on the distinction between "material exculpatory" evidence and "potentially useful" evidence. 488 U.S., at 57–58, 109 S.Ct. 333. As we have held, *supra,* at 1202, the substance destroyed here was, at best, "potentially useful" evidence, and therefore *Youngblood's* bad-faith requirement applies.

See Fisher, 540 U.S. at 547-49 (Emphasis in original).

Thus, *Fisher* makes clear that the appropriate due process inquiry is whether the prosecution lost or destroyed the evidence in bad faith. *Id.*[14] Both the State's *in limine* proffer and the officers' testimony before the jury reflect that the missing segment of video was lost as the result of inadvertence and negligence, rather than bad faith. Also, Appellant did not argue that officers acted in bad faith (*see* ***Tr. 68, lines 8-10***)[15] but conceded "obviously we are not going to be able to show any bad faith." ***Tr. 84, lines 4-5***. *See* ***also Tr. 67-69; 77-78; 83-85***. He also declined the trial judge's offer to present evidence supporting a conclusion that the video was lost or destroyed in bad faith, choosing instead to argue that suppression was required as a matter of

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[14] As the Court explained in *Youngblood*,

> Part of the reason for the difference in treatment [of *Brady* and *Trombetta/Youngblood* violations] is found in the observation made by the Court in *Trombetta*, *supra*, 467 U.S., at 486, 104 S.Ct., at 2532, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, see *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Youngblood, 488 U.S. at 57-58.

[15] Rather, he stated, "For whatever reason, whether it was a download problem, it simply wasn't obtained from the hotel. Whatever it is, it's not there." ***Tr. 68, lines 8-10***.

"fundamental fairness" because police failed to provide the missing segment to him. Thus, he may not present this Court with contrary argument. *E.g.*, *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory in support of motion or objection at trial and a different theory on appeal). *See also Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506-07 (2010) ("An argument not made to an intermediate appellate court and ruled on by that court is not preserved for review in the Supreme Court").

Yet, even if he had not conceded the absence of bad faith and the question was properly before this Court, the trial judge's factual finding that there was no bad faith is supported by the record and is not clearly erroneous, *see Wilson*, 345 S.C. at 5-6, 545 S.E.2d at 829, because the only evidence is that officers did not intentionally fail to download the video onto the server at the Police annex and that the thumb drive was lost. At worst the record demonstrates that they were merely negligent, which does not support a finding of bad faith. *See Youngblood*, *supra* (no bad faith where police merely negligent). In the absence of any evidence of bad faith, the due process inquiry under *Youngblood* and *Fisher* is at an end and Appellant cannot prevail. *See Fisher*, 540 U.S. at 547-49; *Lambert v. Blackwell*, 387 F.3d 210, 267 (3rd Cir. 2004) (no evidence of bad faith).[16]

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[16] *See also United States v. Hernandez*, 109 F.3d 1450, 1455 (9th Cir. 1997) (recognizing that *Youngblood* modified *Trombetta* by requiring the defendant to demonstrate bad faith, and holding that failure to record the interview of a child molest victim did not deny due process absent bad faith under Youngblood); *Grisby v. Blodgett*, 130 F.3d 365, 371 (9th Cir. 1997) (no showing of bad faith); *Phillips v. Woodford*, 267 F.3d 966, 986 (9th Cir. 2001); *Henry v. Page*, 223 F.3d 477, 480-82 (7th Cir. 2000) (disposition of petitioner's destruction of evidence claim was reasonable application of *Trombetta* and *Youngblood*); *Mitchell v. Goldsmith*, 878 F.2d 319, 322 (9th Cir. 1989) (mere failure to preserve evidence does not violate due process); *United States v. Garcia*, 37 F.3d 1359, 1366 (9th Cir. 1994); *Torres v. Mullin*, 317 F.3d 1145, 1161 (10th Cir. 2002); *United States v. Varner*, 261 Fed.Appx. 510, 517-18 (4th Cir. 2008).

Appellant's suggestion that he did not argue a due process violation that "justified ... exclusion of the police evidence" is refuted by the very next sentence, in which he concedes that he sought suppression of the evidence as a matter of "fundamental fairness." Brief of Appellant at p. 14. This is because a due process violation is one that renders a trial "fundamentally unfair." See *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941) ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial"). *See also Stumpf v. Robinson*, 722 F.3d 739, 748 (6th Cir. 2013) (citing *Lisenba*). His argument that the trial judge had the "inherent authority" to suppress the evidence ignores that *Fisher* established the rule governing the due process right involved in this case.

In several cases that predated *Fisher*, the South Carolina Supreme Court and this Court have indicated that a defendant may prevail on a due process claim even if he cannot establish bad faith. "To establish a due process violation where the State fails to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. *Cheeseboro*, 346 S.C. at 538, 552 S.E.2d at 307." *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App. 2004) (emphasis added).[17] Appellant's argument is based upon this state court authority, which is contrary to *Fisher*. Moreover, his argument lacks merit.

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[17] *See also State v. Mabe*, 306 S.C. 355, 412 S.E.2d 386 (1991). Again, this alternative basis for relief is clearly not required by the "fundamental fairness" requirement of the Due Process Clause. *Youngblood*, 488 U.S. at 57-58. So, the South Carolina Supreme Court may wish to modify its earlier precedent to the extent that precedent holds otherwise.

There is simply "nothing to indicate that the [missing portion of the video] possessed an exculpatory value that was apparent before the evidence was [lost]. Exculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt." *Hutton*, 358 S.C. at 631-32, 595 S.E.2d at 882 (citing *State v. Jarrell*, 350 S.C. 90, 107, 564 S.E.2d 362, 372 (Ct.App. 2002)). Indeed, Appellant's statement that "we don't believe that this is a Brady issue so much as it's Rule 5 in general" (***Tr. 83, lines 19-20***) indirectly conceded this point, since *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*[18]

There is also no evidence that the lost portion of the video contained any relevant evidence that was not presented to the jury. To the contrary, all that Appellant has is *pure speculation* on how the missing portion of the video could have *potentially been useful* to his defense. *See* Brief of Appellant at p. 13 (arguing that the missing video "was undeniably material, and its exculpatory value apparent *if* anyone else appeared to enter the decedent's motel room") (emphasis added). However, all three officers to view this segment of video testified no one entered or left Room 211 after midnight on the 22nd, until hotel staff discovered the body.

His argument that "the court erred by ruling it did not have discretion, where it had the discretion to assure appellant received [a] fundamentally fair trial" takes the trial judge's comments out of context. The trial judge did not say that he did not have discretion to grant the motion to suppress if Appellant had met the standard established by *Cheeseboro* and *Breeze*. Instead, he

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[18] "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (citation omitted). Further, "the materiality inquiry is ... whether 'the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict." *Id.* at 290 (citation omitted).

stated that he had to follow the law as established by this Court and the South Carolina Supreme Court, even though he disagrees with those decisions. *See* ***Tr. 82; 85-86.*** His comments reflect a correct understanding of the law.

Also, the prosecution disclosed to the defense the portion of the video that was in its possession prior to trial. The disclosed portion of surveillance video included the relevant time period from when the victim checked into Room 211 until midnight on May 22nd, or four hours after the prosecution theorized she was murdered. And, Appellant fully cross-examined the three police officers who had watched the entire, original video concerning whether the missing portion of the video depicted anyone entering or leaving Room 211 from midnight until 10:00 a.m. on May 22nd, the manner in which the officers had viewed the video, as well as how the missing portion was lost and why it was not presented to the defense.

Therefore, he "has failed to establish that police had reason to expect that the alleged evidence would play a significant role in [his] defense" when the evidence was lost or destroyed. *Hutton*, 358 S.C. at 63 1-32, 595 S.E.2d at 882. *See also Trombetta*, 467 U.S. at 488 ("Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense"); *Cheeseboro*, 346 S.C. at 539, 552 S.E.2d at 307. Similarly, his cross-examination of the officers and closing argument based thereon provided him with more than "other evidence of comparable value," *id.* at 538, 552 S.E.2d at 307." *Hutton*, 358 S.C. at 631, 595 S.E.2d at 881, since the only evidence presented at trial was the missing segment of video reflected that no one entered Rom 211 from midnight on the 22nd until hotel staff entered later that morning and discovered the victim's body.

Appellant's cross-examination of Det. Woods established that the Days Inn clerk told him that everything had downloaded onto the thumb drive. Yet, while he could see the portion of video

that originally downloaded onto a thumb drive, "it somehow was not downloading and the system would cut back. The video I saw consistently was from the 5 p.m. Saturday to 6 a.m. Sunday." Still, he had seen video at the hotel of hotel staff going into the room and police arriving later that morning. When he watched the video at the hotel, "[m]ost of it was on fast forward. ***Tr. 182.*** Also, he only watched from 6:00 p.m. on the 21st until 6:00 a.m. at the Days Inn. ***Tr. 182-83.***

Moreover, Det. Woods testified that the thumb drive contained all of the video "from that first night." Yet, when he played it at the police annex, "it wasn't consistent. ... [T]here was something, I can't understand what it was, which led me to go back and ... take the whole DVR because the thumb drive ... seemed to be jumping for -- I don't have the technical background to tell you why." This was when he first learned that there was a problem with the video. ***Tr. 183; 186.***

He then returned to the Days Inn, retrieved the hotel's DVR, took it back to the annex, and secured it on Det. Whitmire's desk. He also "let it be known that it needed to go to crime scene first thing in the morning." He did not know what subsequently happened to the video. ***Tr. 186-87.*** Det. Woods again testified that in watching the entire video, Appellant was the only person he observed going into Room 211. This was at 7:21 p.m. on the 21st. Appellant left the room roughly forty-five minutes later, at 806 p.m. He "just came out of the room and walked," and Det. Woods thought that he was carrying something in his hand but was uncertain as to what he was carrying. ***Tr. 188-90.***

Det. Woods conceded that he was unaware of any video showing after 6:00 a.m. on Sunday at the time of trial. ***Tr. 184.*** He had watched thirteen hours of video at the police annex in real time (from 5:00 p.m. on the 21st until 6:00 a.m. on the 22nd), and testified that Appellant had walked

from the stairwell to the victim's room "at a leisurely pace" Saturday night. This would only take a few seconds on the video. ***Tr. 184-85.***

On cross-examination of Det. Roy, Appellant elicited that Det. Roy did not watch any of the surveillance video while he was at the Days Inn. He later watched it after it was downloaded by another officer. The thumb drive that contained the missing video was supposed to be downloaded onto the Police Department annex's network drive, and the thumb drive would then be placed into evidence. He had no explanation for what happened to the thumb drive. Det. Roy conceded that the only video now in existence stops at midnight on the 21st. ***Tr. 267-69.***

Further, Appellant elicited that (1) Det. Roy had been an officer for roughly seven years and an investigator for three years; (2) included in the training that he had received as an investigator was the importance of safeguarding and securing evidence because of how important this could be in a trial; and (3) how, without secured evidence, a jury could potentially not get a complete picture of the case. Appellant also established that police have the duty to disclose all of the evidence they have, whether it is important or not. However, a "significant amount" of video in this case, twelve hours of it, was not disclosed. ***Tr. 269-70; 274-75.***

When asked if the jury was not able to view the entire video because of his or Det. Woods' negligence, Det. Roy conceded that "[h]uman error was made." ***Tr. 276.*** Det. Roy watched the video at Det. Woods' desk on Det. Woods' computer. He did not recall how long it took him to watch all of the video, but he admitted that he fast-forwarded through the portions of the video in which Appellant was not present, and he only watched the portions of the video that showed Appellant entering or leaving Room 211 at normal speed. **Tr. 270-74.**

Appellant's cross-examination of Det. Whitmire established that Det. Whitmire interviewed a woman staying "one room down" from Room 211 and that this woman indicated

that she had heard "a loud bang in the early hours of the morning." However, Det. Whitmire did not think this was pertinent information after viewing the missing video. Asked why the jury did not have this portion of the video, she replied, "I honestly don't know. All I can say is that what I testified to, it was plugged into that computer, I thought it downloaded, I did not know until later it didn't, and I take full responsibility as the lead officer for it not being there." ***Tr. 623; 638.***

Further, she testified that the video "was in Detective Woods' desk. Detective Roy was downloading the video." Appellant elicited that Det. Whitmire was not present when the video was downloaded. Also, one of her reports stated that the footage was downloaded directly off the system by Corporal Cozene, but she explained that she had been advised that he was originally supposed to be the officer to download it. He thereafter delegated that responsibility to Det. Roy. She wrote that report because when Corporal Cozene "sent me a request to return the DNA because it was finished. So at that time I thought he had finished the downloading that Detective Roy had started. So that was my fault." ***Tr. 623-24; 634-36.***

Det. Whitmire admitted that she had a duty to protect and carefully preserve evidence for any defendant because the State would be relying on this evidence as are victims of crime and their families. ***Tr. 637-38.*** Also, it would avoid situations like the one in this case. ***Tr. 620-21.*** When Appellant asked if the jury had the evidence, she replied, "I wish we did, but no, you are correct." She likewise conceded that the evidence was important. ***Tr. 638-39.***

Appellant likewise elicited that she did not mention in any of her reports that there had been any problems with the download, including Det. Woods' complaint that the video would "jump back" when it reached 6:00 a.m. because Det. Woods did not mention this to her and she was not aware of the problems. She transmitted the file to the Solicitor's Office on June 21, 2016, and did not discover the problems Det. Woods had or that any of the video was missing until "long

after" she wrote her reports, when notified of this by the Solicitor's Office several months later when she was at home. "And I told them at that time that I provided everything I had and that I provided that video because at that time I believed that I did. I had watched it. I believed I did."***Tr. 625-27.***

The next morning, however, she opened the file on the computer and realized this segment of video was not there. She then searched all of the computer files related to the case but the video was not in any of those files. ***Tr. 627-28.*** She conceded that Appellant was a suspect before she watched the video and that the video was merely evidence confirming what detectives suspected because he had left his identifying information at the Rodeway Inn and could be identified by the clerk there, Ronnie Evans. ***Tr. 629-30.***

Det. Whitmire further admitted that the video from the surveillance cameras in the City of Myrtle Beach likewise did not exist at the time of trial. She explained that:

> Detective, he's now a sergeant, Amick was delegated to download the Milestone Video. It was a newer system at that time. It's an Internet based. And what we do is we go into that system, and we set the times to download and leave it to download, and it puts it into a folder. It generates a main folder that's called Milestone. .... And then the footage goes into there. .... That footage error-ed out. ... I can't tell you why, if it was connectivity, if it was -- it was a newer system. And we still have that problem with that system to this day. But at that time it was a newer system, and we weren't aware of that. And it was -- yes, sir.

Tr. 631, line 11 – 632, line 1.

Appellant even cross-examined Det. Doug Furlong, who had not viewed the missing video, as to the proper procedure for securing video, and he admitted that:

> we could have possibly tried to confirm that that video had transferred over. But at that time, we were going in so many different directions that obviously -- and I hate that that occurred. It's something that we spent a lot of time searching for, but ....

Tr. 287-88.

The missing video was one of the key points, if not the centerpiece,[19] of Appellant's effective, albeit relatively brief, closing argument:

> When you break their case down, that's all they have really fully proven to you, Rickey Wilson was there.
>
> Now, you've heard multiple officers talk to you about a video, video that they downloaded from the hotel next door, from the Days Inn. It was their job, get this video, safeguard it, make sure that they would be able to bring it to court.
>
> What were they actually able to give you. That video stops 1 a.m., ten hours before the body is actually discovered. They don't let you make that decision for you, decision on your own. They lost that video and they want you to just say, well, we don't have it, but trust us, we watched it. That's good enough.
>
> You know, none of us are saying that the police are trying to frame Mr. Wilson, that's not the way we're characterizing this at all. We're not even saying that they lost this intentionally. But the fact of the matter is the State has to prove to you beyond a reasonable doubt that Mr. Wilson is guilty of murder. But all they've done is mishandle things from the get-go.
>
> You've heard about missing items. The lock interrogation, missing, the Milestone video, missing. The final day the video from the Days Inn that would show whether anyone else went in or whether it was only Mr. Wilson, simply doesn't exist, missed it.
>
> Now, as you heard Mr. Oskin say, think of things in terms of threes. Well, there's three right there, three missing items that would have given you a much clearer picture of how this case actually went down.

Tr. 697, line 1 – 698, line 7.

Therefore, the trial judge's ruling must be affirmed because it complied with both *Fisher* and relevant state court precedent, such as *Cheeseboro* and *Hutton*. Yet, even if the trial judge had erred, any error was harmless beyond a reasonable doubt. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not

[19] Respondent submits that the characterization of "centerpiece" is fair, since Appellant informed jurors in his opening statement that police had failed to maintain any of the video after midnight and suggested that the testimony of witnesses as to what was on that missing video was not the same because jurors could not view it for themselves. ***Tr. 108.***

reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Tapp*, 376, 389, 728 S.E.2d 468, 475 (2012).

Here, any error must be viewed as harmless and non-prejudicial for several reasons. First, neither Appellant's motion *in limine* nor his brief before this Court[20] contest to the admissibility of testimony from Mr. James Barfield, the Days Inn employee who had installed and was responsible for maintaining the cameras that provided surveillance of the Rodeway Inn and the Days Inn. Without objection, he testified that, out of curiosity, he had watched all of the video footage of the Rodeway Inn from the point when Appellant "first came on the property" up to the point when hotel staff found the victim. ***Tr. 200-04; 206***. He specifically watched Room 211 and testified that no one went into or left Room 211 other that Appellant and the victim. ***Tr. 207***.

Thus, the officers' testimony about what they saw on the missing segment of surveillance video was merely cumulative to Mr. Barfield's testimony, which was admitted without objection. The admission of improper evidence is harmless when the evidence is merely cumulative to other evidence. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003). *See also Schumpert*, 312 S.C. at 507, 435 S.E.2d at 862 (same); *State v. McFarlane*, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence"). Additionally, there was overwhelming evidence

[20] *See Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (an appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (same). *See also* Rule 208(B)(1)(b), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal").

of Appellant's guilt, such that the error complained of could not have affected the result of his trial. "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless.' " *State v. Brown*, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018) (quoting *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)).

Here, there was the video surveillance footage from the Days Inn cameras (State's Exs. 15 and 41) and the camera at Victory Motel (State's Exs. 17 and 82), which detailed his movements on May 21st. More importantly, the surveillance video of Room 211 reflects that he was the only person to enter or leave the room on the 21st after the victim had entered it. Additionally, Mr. Barfield testified that Appellant was the only person to enter or leave the room other than Virginia Eakers, until hotel staff discovered her body. Further, there was a great deal of circumstantial evidence tending to prove Appellant's guilt. This circumstantial evidence included his small and bed bug infested room at the Victory, the cuts and injured knuckle on his right hand, his blood on both the fingernail clippings and the socks he was wearing when arrested, his blood on the newspaper and pants found in the trash can closest to his room at the Victory, the unusual telephone conversations he had with Ms. Miller, and the false statements that he made to the police.

Finally, there was the mixture of DNA found on the Dolphin Dobby towel. The partial YSTR profile developed from the Dolphin Dobby towel matches the YSTR profile of Appellant. The probability of randomly selecting an unrelated male having an YSTR profile matching this profile is approximately one in 900. ***Tr. 473-75***. While a probability of one in 900 is much lower than the probability found for the victim, it is still "powerful evidence of guilt." *See McDaniel*, 558 U.S. at 132 (finding that a rational jury could consider the DNA statistical probability of "1 in 132... to be powerful evidence of guilt").

CONCLUSION

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

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
No. 07979

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
No. 3710

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON II
Solicitor, Fifteenth Judicial Circuit
PO Box 1276
Conway, SC 29528
(843) 915-8608

By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

August 2, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2018-00146

THE STATE,

Respondent,

vs.

RICKEY WADDELL WILSON,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of August, 2019.

WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

August 2, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Rickey Waddell Wilson*
Appeal from Horry County
Appellate Case No. 2018-000146

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and (1) copy of the Initial Brief of Respondent and Designation of Matter in the above-referenced case, along with Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/ab
Enclosures

cc: Robert M. Dudek (w/two copies of encls.)
The Honorable Jimmy A. Richardson (w/copy of encls.)
Victim Advocacy Division (w/copy of encls.)