EFiled: Jul 15 2024 12:25PM EDT
Filing ID 73661931
Case Number 47,2024

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| RANDON WILKERSON, | ) | |
| | ) | |
| Defendant Below-Appellant, | ) | No. 47, 2024 |
| | ) | |
| | ) | ON APPEAL FROM |
| v. | ) | THE SUPERIOR COURT OF THE |
| | ) | STATE OF DELAWARE |
| STATE OF DELAWARE, | ) | ID Nos. 2104013901, 2104013877, |
| | ) | 2104013945 |
| Plaintiff Below-Appellee. | ) | |
| | ) | |

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

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# REPLY BRIEF

**COLLINS PRICE & WARNER**

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Dated: July 15, 2024

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Appellant Randon Wilkerson, through the undersigned attorney, replies to the State's Answering Brief as follows:

## I. THE SUPERIOR COURT ERRED IN GRANTING THE STATE'S MOTION *IN LIMINE*, DEPRIVING MR. WILKERSON OF HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

As discussed in the Opening Brief, Randon Wilkerson was a longtime user of illicit drugs such as cocaine and methamphetamine. He and others in the residence were partying heavily to celebrate Mr. Wilkerson's birthday. Evidence would have been presented at trial that, unbeknownst to him, the last dose of drugs he took was bath salts, not the methamphetamine he intended to take.

After taking the drug, Mr. Wilkerson became manic and irrationally fixed on the idea that a child rapist was on the loose and everyone around him was involved in a cabal of child predators. He struck and killed Officer Heacook, believing him to be the child rapist Henry Proctor. Henry Proctor was a client of Mr. Wilkerson's girlfriend, who funded drug purchases by prostituting. Mr. Wilkerson then sought help from the Franklins across the street. He had heard that Mr. Franklin possessed firearms. However, Mr. Wilkerson became convinced that the Franklins were in on the child predator ring and assaulted them as well. Fortunately, they were not killed.

The State included in its Statement of Facts some of the statements Mr. Wilkerson made while in the holding cell.[1] The State omitted certain statements he made due to still being under the influence of the drug:

- "I will be a legend for killing a child molester."
- "Help. I did nothing wrong. I only killed that man because he touched on those children. Sick."
- "I have been kidnapped. Well not kidnapped but I killed a child molester."
- "I saved those kids. That wasn't a police officer. They were getting raped."[2]

The Opening Brief describes the evidence that would have been presented at Mr. Wilkerson's trial in support of his involuntary intoxication defense.[3] The trial judge could have decided whether there was some credible evidence to instruct the jury on involuntary intoxication. Instead, the judge granted a pretrial motion excluding the defense and any evidence pertaining to it. Also excluded was the testimony of two well-qualified defense experts whose opinions were not controversial. In doing so, the trial judge deprived Mr. Wilkerson of his constitutionally guaranteed right to present a complete defense.

[1] Ans. Br. at 8-9.
[2] A580.
[3] Op. Br. at 31-33.

***Due process and the right to present a complete defense.***

The State agrees that due process includes the right of the accused to present a complete defense.[4] The State further points out that the right is not absolute, and that judges may exclude evidence that is only marginally relevant, repetitive, or presents an undue risk of harassment, confusion of the issues, or prejudice.[5] The case the State cites for the proposition is inapposite to Mr. Wilkerson's case. In *Williams v. State*,[6] the trial court properly excluded evidence pertaining to justification and choice of evils in an Escape After Conviction case.[7] This Court had already approved a five-part test for considering whether such a defense was available. Applying those legal precepts, the trial court held the evidence the defendant wanted to present was inadmissible.[8]

Mr. Wilkerson's case presents a different scenario. The Superior Court, upon the motion of the State, excluded the entire defense of involuntary intoxication. The parties agree that no Delaware case holds that a person who has already consumed drugs has no access to the defense when he takes an additional drug he had no intention of taking.

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[4] Ans. Br. at 25-26.
[5] Ans. Br. at 26.
[6] 2014 WL 708445 (Del. Feb. 19, 2014).
[7] *Id*. at *1.
[8] *Id*. at *2.

As discussed in the Opening Brief,[9] without such clear guidance as this Court issued in *Williams*, a motion *in limine* should not be weaponized to prevent the accused from presenting a defense, no matter how improbable. As the Illinois Court of Appeals held in *People v. Brumfeld*:

> A motion *in limine* should be used with caution, particularly in criminal cases. When used in the manner of its application in this case, it has the potential to deprive a criminal defendant of his day in court. That a defendant may have a tenuous defense is an insufficient justification for prohibit him from trying to establish that defense…the trial court's order granting the State's motion *in limine* before the admission of any evidence deprived the defendant of his fundamental right to defend himself in a criminal trial. Summary judgments are allowed on rare occasions in civil cases, but never in criminal cases.[10]

Mr. Wilkerson had the right to present a defense – even one that was "not very believable or highly improbable."[11] By choking off Mr. Wilkerson's defense and not letting a jury consider it, the Superior Court violated Mr. Wilkerson's due process rights.

***Involuntary intoxication is a valid defense in Delaware.***

As discussed in the Opening Brief,[12] the plain language of 11 *Del. C.* § 423 applies squarely to those individuals unaware of the substance they have taken. There is no prohibition on the defense for those who have ingested illegal

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[9] Op. Br at 23-25.
[10] 390 N.E. 2d 589, 593-594 (Ill. App. 3d 1979).
[11] *Gutierrez v. State*, 842 A.2d 650, 653 (Del. 2004).
[12] Op. Br. at 40-41.

substances prior to taking the substance of which they were unaware. The Commentary imposes no such prohibition.

The Superior Court ignored the plain meaning of the statute as well as the Commentary, choosing instead to put its own gloss on the statute. The Court's finding that to hold otherwise would "raise significant public policy concerns and open a Pandora's Box of criminal defense litigation"[13] was error. Public policy is for the General Assembly. There is nothing wrong with criminal defense litigation; reducing motions filed by criminal defense lawyers is not a legitimate basis upon which to decide a motion. The Court's finding that any defendant could claim his or her drugs were laced with unknown substances[14] may be a concern for the General Assembly or some other case, but not the facts of this case.

Moreover, the Court made its ruling without hearing any trial evidence or testimony at all. Had the Court simply let the trial go forward, it could have then assessed whether the evidence provided some credible evidence of the defense. Instead, the judge short-circuited the process by judicially eliminating the defense pretrial.

The State's argument[15] that because the General Assembly amended the *voluntary* intoxication statute it "evidences a legislative intent to restrict the

[13] Exhibit B at 25.
[14] *Id.*
[15] Ans. Br. at 28-29.

availability of intoxication as a defense"[16] has no merit. Obviously, if the General Assembly wanted to restrict defenses available under the *involuntary* intoxication statute, it would have done so.

As discussed in the briefs so far, cases from other jurisdictions go both ways. Many have been discussed in the briefing to date. The additional cases cited by the State in its Answering Brief are inapplicable to Mr. Wilkerson's case.

The State cites to *People v. McMillen*,[17] a State postconviction case. But the issue there was the application of a statute. During McMillen's case, the involuntary intoxication defense was only available when the intoxication was the result of trick or force. After the trial, the scope of the statute changed to include individuals suffering from unwarned effects of prescription medication.[18] The issue on appeal was whether McMillen could avail himself of the new interpretation and obtain postconviction relief. As the Court held, the involuntary intoxication defense under Illinois law was unavailable when the defendant combined prescription drugs with illegal drugs.[19]

The State further cites to *State v. Hall*,[20] a direct appeal of a murder conviction. The defendant was offered a pill that was "a little sunshine" that would

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[16] Ans. Br. at 29.
[17] 951 N.E. 2d 400 (Ill. App. Ct. 2011).
[18] *Id.* at 404.
[19] *Id.* at 407.
[20] 214 N. W. 2d 205 (Iowa 1974).

make him feel "goofy." Upon taking the pill, Hall saw the unfortunate victim's head turn into a dog, scaring Hall, who shot him dead.[21] Under Iowa law, Hall claimed that his request for a temporary insanity instruction due to involuntary intoxication should have been granted.[22]

The remainder of the appeal pertained to Hall's claim that because he was *voluntarily* intoxicated, he could not form the intent to commit first degree murder.[23] The Court held that voluntary intoxication does not negate the malice required by Iowa law.[24]

In *Farmer v. State*,[25] a Texas case, the defendant was charged with DUI. He claimed that he thought he was taking Ultram and Soma, but mistakenly took Ambien.[26] His wife was responsible for laying out his pain medications each day.[27] Under Texas law, the concept of "voluntariness" refers to only one's own physical body movements which are voluntary unless the product of independent nonhuman force, a convulsion, or states such as hypnosis.[28] The appellate court had little

[21] *Id.* at 206.
[22] *Id.* at 207.
[23] *Id.* at 208-209.
[24] *Id.* at 209.
[25] 411 S.W. 3d 901 (Tex. Crim. App. 2013).
[26] *Id.* at 902.
[27] *Id.*
[28] *Id.* at 906.

trouble finding that under Texas law, Farmer's taking of Ambien was voluntary, albeit mistaken.

The cases cited in the briefs present a variety of fact patterns and apply differing state statutes. None of them provide justification for the Superior Court's decision to deprive Mr. Wilkerson of his due process right to present a defense.

### *11* Del. C. *§ 303 does not provide a mechanism for the pretrial exclusion of a defense.*

Both the State and the Superior Court erroneously define § 303 as providing a trial judge with the authority to exclude evidence pretrial. It does not. The statute permits the judge, after hearing the evidence at trial, to decide whether some credible evidence of a defense justifies a particular jury instruction. As discussed in the Opening Brief,[29] the "some credible evidence" standard is a low bar to clear. Even "not very believable"[30] and "highly improbable testimony"[31] suffices.

Indeed, the *raison d'etre* of § 303 is to assess evidence *that has already been presented at trial* to determine if a jury instruction is warranted. The State admits as much by citing to *Gutierrez v. State*.[32] In *Gutierrez*, the trial court denied the defendant's request for a jury instruction on self-defense. The denial was made

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[29] Op. Br. at 28-29.
[30] *Gutierrez v. State*, 842 A.2d 650, 653 (Del. 2004)
[31] *Id., citing, People v. Garcia*, 1 P.3d 214, 221 (Colo. Ct. App. 1999).
[32] Ans Br. at 37-38.

*after* the presentation of evidence at trial, not by way of pretrial motion. This Court reversed, holding, "as arbiter of the law, the judge should *consider the evidence* and determine whether, if the jury believes it, the evidence could support the legal conclusion that the defendant acted in self-defense."[33]

The trial court's gatekeeping function under § 303 does not occur pretrial, as the State argues,[34] but after the presentation of the evidence. As this Court held:

> This distribution of authority between the judge and the jury does not contravene Section 303(a). "Credible" can be defined as "*[c]apable* of being believed."12 Under this definition, the judge's role as gate keeper is to ensure (1) that the affirmative defense evidence describes a situation that is within the realm of possibility, and (2) that such situation would legally satisfy the requirements of self-defense. Once the judge determines that the evidence is "credible" in the sense of being possible, he or she should submit to the jury the question of which version of the facts is more believable and supported by the evidence as a whole.[35]

The Superior Court's improper use of § 303 to exclude a defense by granting a pretrial motion *in limine* deprived Mr. Wilkerson of his constitutional right to due process. The State characterizes the proffered evidence as speculative and not within the realm of possibility.[36] But that is not the State's call to make. Nor is it the judge's call to make, until after the evidence has been presented.

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[33] *Gutierrez*, 842 A.2d at 652 (Emphasis added).
[34] Ans. Br. at 37.
[35] *Gutierrez*, 842 A.2d at 653 (Emphasis in original).
[36] Ans. Br. at 38-39.

The State's criticism of the proffered defense[37] notwithstanding, the evidence was still admissible. This Court has defined "some credible evidence" as evidence capable of being believed. Sworn testimony is some credible evidence because the jury must assess the credibility of each witnesses' sworn testimony.[38] As such, even if some testimony laid out in the proffered evidence[39] were excluded as hearsay, for example, there would have been ample testimony supporting the defense. At the conclusion of the evidence, the judge would have acted as a gatekeeper to determine whether an involuntary intoxication instruction was warranted. Due to the Court's legal error, Mr. Wilkerson never got his chance to present his defense.

***Involuntary intoxication is a statutory defense, not an affirmative defense.***

The State presents an argument not presented to the Superior Court that Mr. Wilkerson has a burden of proof of establishing involuntary intoxication by a preponderance of the evidence pursuant to 11 *Del. C.* § 304.[40] For support, the State cites *Small v. State*,[41] an appeal in a capital murder case. This Court found that it was prosecutorial misconduct for the prosecutor to repeatedly refer to

[37] Ans. Br. at 38-39.
[38] *Brown v. State*, 958 A.2d 833, 838 (Del. 2008).
[39] Op. Br. at 31-32.
[40] Ans. Br. at 47-48.
[41] 51 A.3d 452 (Del. 2012).

mitigation evidence in the penalty phase as excuses.[42] This Court unambiguously held that mitigating circumstances are not excused. In doing so, this Court listed examples of excuses being affirmative defenses such as duress, insanity, and involuntary intoxication.[43]

This Court's inclusion of involuntary intoxication in the list of affirmative defenses was an oversight and a misstatement of the law. Section 304(a) states, "when a defense *declared by this Criminal Code* or by another statute to be an affirmative defense is raised at trial, the defendant has the burden of establishing it by a preponderance of the evidence."[44]

Each affirmative defense in our Code is declared to be an affirmative defense in Chapter 4 of Title 11:

- Duress as Affirmative Defense; Defense Unavailable in Certain Situations[45]
- Entrapment as Affirmative Defense; Defense Unavailable in Certain Situations[46]
- Immunity as an Affirmative Defense[47]
- Insanity[48]

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[42] *Id.* at 459-460.
[43] *Id.* at 460.
[44] 11 *Del. C.* § 304(a).
[45] 11 *Del. C.* § 431.
[46] 11 *Del. C.* § 432.
[47] 11 *Del. C.* § 475.
[48] 11 *Del. C.* § 401(a). (In any prosecution for an offense, *it is an affirmative defense* that, at the time of the conduct charged, as a result of mental illness or serious mental disorder, the accused lacked substantial capacity to appreciate the

- Guilty but Mentally Ill[49]
- Extreme Emotional Distress[50]

Those are the only affirmative defenses in our Code. All other defenses, including involuntary intoxication, are statutory defenses that do not impose a burden of proof on the defendant. The State's reliance on *Small v. State* and its mistaken listing of involuntary intoxication as an affirmative defense is misplaced.

***The two defense experts were qualified to testify; the Superior Court erred in excluding their testimony.***

Perhaps the strangest and most results-driven holding in the Court's Memorandum Opinion is the exclusion of the two defense experts. They are entirely uncontroversial. Dr. Ewens is a board-certified toxicologist. He merely compared the list of test panels for bath salts offered by the Delaware Division of Forensic Sciences and NMS, the private lab. (The tube of Mr. Wilkerson's blood shattered during transit to NMS.) The only "opinion" offered by Dr. Ewens is that NMS has more tests for bath salts than DFS, so Mr. Wilkerson's having taken bath

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wrongfulness of the accused's conduct. If the defendant prevails in establishing the affirmative defense provided in this subsection, the trier of fact shall return a verdict of "not guilty by reason of insanity.")(Emphasis added).

[49] 11 *Del. C.* § 401(b).

[50] 11 *Del. C.* § 641 (The fact that the accused acted under the influence of extreme emotional distress must be proved by a preponderance of the evidence. The accused must further prove by a preponderance of the evidence that there is a reasonable explanation or excuse for the existence of the extreme emotional distress).

salts cannot be ruled out.[51] He further opined, uncontroversially, that bath salts and methamphetamine are similar in appearance and the two could be mistaken for one another. Arguably, Dr. Ewens' testimony was not even expert testimony. A witness from NMS could have testified as to the tests NMS has available for bath salts.

Dr. Wilson was a doctorate-level academic in pharmacology (among other disciplines) at Duke University.[52] He taught, lectured, and published in the field of pharmacology since the 1970s.[53] He was merely asked to explain the effects of different drugs, such as cocaine, methamphetamine, and bath salts – testimony he was well-qualified to provide.

Neither defense expert was asked to opine whether Mr. Wilkerson took bath salts or whether there was a scientific probability that bath salts caused Mr. Wilkerson to commit the murder.

The State's expert, Dr. Holstege, disparages the defense experts because they are not clinicians like himself. Like Dr. Wilson, Holstege describes the effects of various drugs on the body. Like Dr. Wilson, Holstege did not examine Mr. Wilkerson or treat him clinically in any way. Holstege declined to list what

[51] A270.
[52] A402-423 (curriculum vitae). Dr. Wilson is now deceased.
[53] *See,* A310.

sources he reviewed before rendering an opinion.[54] Holstege's main point, and it is a good one, is that it is impossible to opine whether bath salts, if taken, caused Mr. Wilkerson's behavior. That is because the dosage of any of the drugs Mr. Wilkerson took is unknown.[55]

In a normal trial, all three well-qualified experts would have testified. They would have been subjected to vigorous cross-examination as to their opinions. But this was not the normal case. The Superior Court injected itself into the jury's factfinding process to exclude the defense experts. In doing so, as discussed in the Opening Brief,[56] the Court found many inventive reasons for excluding the experts, none of which find purchase in D.R.E. 702. The Court found the experts:

- Were not qualified as experts by knowledge, skill, experience, training or education;
- Are not clinicians;
- Did not based their opinions on information reasonably relied upon by experts in the field;
- Did not read the police reports or recordings of Mr. Wilkerson, and did not interview Mr. Wilkerson;
- Did not review Amanda Rooks' audio interview with the police or interview Rooks;

[54] A315.
[55] A317-319.
[56] Op. Br. at 45; Exhibit B at 33-34.

- Dr. Ewens' report is not admissible because it is built upon the variable Rooks' narrative;
- Dr. Wilson failed to review any case-specific information;
- The testimony would only confuse the jury because it is generalized and conjectural.[57]

To find that two Ph.Ds in their fields who have been published and testified extensively are not qualified is egregiously wrong. To require that to testify in this case the experts must be clinicians finds no basis in the law. In fact, if that were the rule, there would be no *Daubert*.[58] None of the experts in *Daubert* examined the patients.

Dr. Wilson based his opinion on peer-reviewed literature. So did Dr. Holstege, presumably. No, the defense experts did not interview Mr. Wilkerson. Neither did Holstege. The defense experts did not read the police reports. It is unknown what Dr. Holstege reviewed. That fact does not exclude any of the experts. For example, in a murder trial, the State often calls an expert in DNA analysis. He or she renders an expert opinion on the DNA evidence. He or she would not be excluded from testifying because he or she did not read the police reports.

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[57] Exhibit B at 33-34.

[58] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993)(setting forth the standard for admission of expert testimony when plaintiffs claimed that the drug Benedictin caused birth defects).

It is true that neither defense expert interviewed Amanda Rooks or listened to her interview. Nor did Dr. Holstege. There was no reason to learn about Rooks in order to render their opinions. Dr. Ewens' report is not "built on the variable Rooks narrative."[59] It is not based on the Rooks narrative or any narrative. He merely compared two lists of tests available at two different labs.

Dr. Wilson did not review case specific information. He was a subject matter expert to help the trier of fact understand the evidence.[60] Dr. Wilson would have simply educated the jury as to the varying effects of different illicit drugs.

The Court held that the defense expert opinions were "generalized and conjectural" while at the same time holding their opinions were too specific: "Defendant's 'expert evidence' that the substance [Mr. Wilkerson] ingested was bath salts (as opposed to any other controlled substance, including methamphetamine) is merely speculative.[61] Neither defense expert opined that Mr. Wilkerson took bath salts, as a review of their reports would have made abundantly clear.

The unwarranted exclusion of the defense experts illustrates just how far the Superior Court was willing to go to prevent Mr. Wilkerson's defense from being heard by a jury.

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[59] Exhibit B at 34.
[60] D.R.E 702(a).
[61] Exhibit B at 34.

The State takes up the mantle for the Superior Court.[62] The State repeats that these two Ph.Ds who have testified many times in other jurisdictions are unqualified and that their aim was to "insinuate" that Mr. Wilkerson took bath salts.[63] But the defense experts do not opine whether Mr. Wilkerson took bath salts or even insinuate it.

The well-established standard to determine the admissibility of scientific expert evidence was set forth by this Court:

> (1) the witness is qualified as an expert by knowledge, skill, experience, training or education;
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> (2) the evidence is relevant;
>
> (3) the expert's opinion is based upon information reasonably relied upon by the experts in the particular field;
>
> (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
>
> (5) the expert will not create unfair prejudice or confuse or mislead the jury.[64]

The judge, asking as gatekeeper, must apply these factors in a flexible manner.[65] Exclusion of even marginally relevant opinion testimony is not appropriate; "vigorous cross-examination, presentation of contrary evidence, and careful

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[62] Ans. Br. at 39-46.
[63] Ans. Br. at 42-43.
[64] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 795 (Del. 2006).
[65] *Id.*

instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[66]

Such would have been the case here, had the Court not excluded Mr. Wilkerson's defense. All the experts would have been subject to rigorous cross-examination and the presentation of contrary evidence. Then, the question of how much weight to ascribe to any of the experts' testimony would have been up to the jury, where it belonged. But the Superior Court deprived Mr. Wilkerson of his due process right to defend himself.

***Harmless error is inapplicable when Mr. Wilkerson was deprived of his right to a jury trial.***

The State argues that even if the trial judge erred in denying Mr. Wilkerson his right to present a defense, any error was harmless.[67] Not so. It is axiomatic that harmless error analysis is only conducted *after* a trial. The reviewing court must consider the probability that an error affected the jury's verdict. It must carefully study the record to determine "the probable impact of the error on the entire trial."[68] Reversal is required when the reviewing court "cannot say the error was harmless beyond a reasonable doubt."[69]

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[66] *Daubert*, 509 U.S. at 596.
[67] Ans. Br. at 52-53.
[68] *VanArsdall v. State*, 524 A.2d 3, 9-10 (Del. 1987).
[69] *Id.* at 11.

If the obvious must be stated, Mr. Wilkerson never got a chance to have his case heard by a jury, because the State filed a motion *in limine* to exclude his defense, and because the judge granted it. In fact, the only reason the State has any information at all about Mr. Wilkerson's defense is because Mr. Wilkerson was forced to respond to the State's motion *in limine*. A jury never got to see, hear, and evaluate the evidence. Harmless error analysis has no application to this appeal.

## CONCLUSION

Even when the victim is a police officer, a defendant has the right to present a complete defense. By depriving Mr. Wilkerson of his due process rights, the Superior Court committed error and should be reversed. For the reasons stated here and in the Opening Brief, Randon Wilkerson respectfully seeks reversal and remand for a new trial.

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