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February 14, 2013

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S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Donta Kevon Reid
Appellate Case No: 2011-204288

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 9 enclosed)
Victim Services

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FEB 14 2013

SC Court of Appeals

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2011-204233

THE STATE,

Respondent,

v.

DONTA KEVON REID,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly denied Appellant's motion to suppress his fourth statement because Appellant's Sixth Amendment right to counsel did not attach when he was appointed counsel at his bond hearing and, thus, the statement was not taken in violation of his Sixth Amendment right to counsel.

II.

The trial court correctly denied Appellant's directed verdict motion on possession of a firearm during the commission of a violent crime because evidence was presented that Appellant had constructive possession of the firearm.

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant for murder, assault and battery with intent to kill, three counts of armed robbery, four counts of possession of a firearm during the commission of a violent crime, and criminal conspiracy. (R. pp.969-986) On November 14, 2011, Appellant proceeded to trial before a jury. Melissa Inzerillo and Ashley Anderson represented Appellant, and Solicitor Kevin Brackett and Assistant Solicitor Willie Thompson represented the State. The jury found Appellant not guilty of murder. The jury found Appellant guilty of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), three counts of armed robbery, three counts of possession of a firearm during the commission of a violent crime, and criminal conspiracy. The Honorable John C. Hayes, III, sentenced Appellant to thirty years' imprisonment for the armed robbery charges, ten years' imprisonment for the ABHAN charge, five years' imprisonment for the criminal conspiracy charge, and three concurrent five-year sentences for the firearm charges to be served consecutively to the others.

On November 23, 2011, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On October 1, 2009, Appellant and three friends, Samantha Ervin, Aileen Newman, and Davontay Henson, planned to commit a robbery. (R. p.428, lines 18-19; R. p.429, lines 16-17 R. p.638, lines 1-25.) While discussing the plans for the robbery, Henson had a gun. (R. p.636, lines 11-25; R. p.638, lines 2-12.) Appellant was in charge of setting up the victim, a friend named Maurice Jackson who Appellant thought sold “weed” and might have some money. (R. p.429, lines 17-19; R. p.543, lines 1-4; R. p.639, lines 7-9.) Ervin drove Appellant, Newman, and Henson to a bridge near Jackson’s house. (R. p.638, lines 21-23; R. p.640, lines 23-24.) The gun was in the truck. (R. p.637, lines 8-13.) Appellant walked to Jackson’s house and used Jackson’s phone to call Ervin to report there were three people on the porch at Jackson’s house. (R. p.432, lines 1-19; R. p.543, lines 10-15; R. p.641, lines 8-9, 17-23.) Appellant then attempted to get the victims to walk with him; however, they declined. (R. p.642, lines 7-14; R. p.643, lines 3-5.) Newman and Henson decided to walk up to the house because Appellant had reported the men were not armed. (R. p.644, lines 4-5.) Newman asked the men if they had any “weed.” (R. p.645, lines 1-2.) Henson then pulled out his gun, and Newman began robbing the men of their belongings while Henson pointed the gun at them. (R. p.645, lines 2-13.) As Henson and Newman were leaving, Newman told Henson he should shoot the victims or do something because they had seen her face. (R. p.170, lines 7-17; R. 237, lines 13-17.) Henson fired the gun and shot two of the men; one died as a result. (R. p.171, lines 11-17; R. p.239, lines 16-25; R. p.741, lines 14-20.)

Appellant was arrested and charged with murder, assault and battery with intent to kill, three counts of armed robbery, four counts of possession of a firearm during the commission of a violent crime, and criminal conspiracy. (R. pp. 969-986)

Pretrial, the court held a Jackson v. Denno¹ hearing to determine the admissibility of four statements given by Appellant to police. (R. p.47.) On October 2, 2009, at 1:45 p.m., Appellant gave his first statement to police. (R. p.57, lines 5-19.) Later that day, at 4:10 p.m., he gave a second statement that provided more details. (R. p.65, lines 2-25.) Appellant then gave a third statement at 11:55 p.m. that night, into the early morning hours of October 3, 2009. (R. p.68, lines 12-16; R. p.71, lines 18-21.) The police spoke to Appellant a fourth time on October 6, 2009, at 9:40 a.m., after receiving information from Samantha Ervin. (R. p.73, lines 11-25.) Appellant spoke freely and did not request an attorney at that time. (R. p.74, lines 15-20.) Appellant moved to suppress the fourth statement, arguing Appellant had already been appointed counsel by a magistrate at that point and the statement was officer-initiated. (R. p.110, lines 14-24; R. p.112, lines 1-15.) The State then argued based on Montejo v. Louisiana, 556 U.S. 778 (2009), that an appointment at an arraignment did not require an officer to assume a defendant had invoked his right to counsel. (R. p.115, lines 7-14.) After a lengthy discussion, the trial judge determined Appellant freely, voluntarily, knowingly, and intelligently waived his Fifth and Sixth Amendment rights as to all four statements and denied the motion to suppress. (R. p.128, lines 4-25; R. p.129, lines 1-17.)

After the State rested, Appellant moved for a directed verdict on the charges of possession of a firearm during the commission of a violent crime. (R. p.745, lines 4-17.) He argued that because evidence showed Henson was the person who had the gun, the “hand of one, hand of all” theory would not extend to Appellant’s having possession of the gun. (R. p.745, lines 7-17.) The State argued the “hand of one, hand of all” theory would make Appellant liable for the actions of his co-defendant. (R. p.746, lines 1-5.)

¹ 378 U.S. 68 (1964).

The trial court took the motion under advisement. (R. p.747, lines 4-6.) The State later argued the jury should decide whether Appellant was in constructive possession of the firearm. (R. p.762, lines 10-13.) After reviewing State v. Jennings, 335 S.C. 82, 515 S.E.2d 107 (Ct. App. 1999), and State v. Halyard, 274 S.C. 397, 264 S.E.2d 841 (1980), the trial judge denied the motion and determined he would charge the jury it must find Appellant had actual or constructive possession and dominion or control over the firearm as set forth in Jennings. (R. p.766, lines 15-23.)

The trial court charged the jury as follows:

In order to find a defendant guilty of possession of a weapon during the commission of a violent crime, you must first find the defendant guilty of either committing a violent crime . . . or attempting to commit a violent crime As to [Appellant], you must prove beyond a reasonable doubt, that he had both the power and intent to control the disposition or use of the weapon, that is, a form of possession. Possession may be either actual or constructive. Actual possession means that the weapon was in the actual, physical custody of [Appellant]. Constructive possession means that [Appellant] had dominion and control or the right to exercise dominion or control over the firearm. Constructive possession may be established through either direct or circumstantial evidence and possession of a firearm may be a shared - - may be a shared possession.

(R. p.907, lines 3-7, 14-24.)

Ultimately, the jury found Appellant guilty of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), three counts of armed robbery, three counts of possession of a firearm during the commission of a violent crime, and criminal conspiracy. He was sentenced to thirty years' imprisonment for the armed robbery charges, ten years' imprisonment for the ABHAN charge, five years'

imprisonment for the criminal conspiracy charge, and three concurrent five-year sentences for the firearm charges to be served consecutively to the others.

ARGUMENTS

I.

The trial court properly denied Appellant's motion to suppress his fourth statement because Appellant's Sixth Amendment right to counsel did not attach when he was appointed counsel at his bond hearing and, thus, the statement was not taken in violation of his Sixth Amendment right to counsel.

Appellant argues the trial court erred in denying his motion to suppress his fourth statement to police. Specifically, he argues the statement was given as the result of a police-initiated interrogation conducted after Appellant had invoked his right to counsel by requesting and receiving appointed counsel before a magistrate. Therefore, he argues based on State v. Anderson² that the fourth statement was taken in violation of his Sixth Amendment right to counsel. However, because Montejo v. Louisiana³ overruled Michigan v. Jackson,⁴ the case on which Anderson was based, the fact that Appellant received appointed counsel from a magistrate did not operate as an invocation of his right to counsel and consequently, it did not invalidate his ability to waive his rights when giving a statement. Thus, the trial court correctly denied Appellant's motion to suppress the fourth statement.

Appellant argues the instant case is similar to the situation in State v. Anderson, in which this Court found the trial court erred in admitting the defendant's statement because he gave it after his Sixth Amendment right to counsel had attached at his arraignment by requesting an attorney. 357 S.C. 514, 520, 593 S.E.2d 820, 823 (Ct. App. 2004). However, this Court based that ruling on Michigan v. Jackson, which has now

² 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004).

³ 556 U.S. 778 (2009).

⁴ 475 U.S. 625 (1986).

been overruled by Montejo v. Louisiana. Appellant also bases his argument on State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), in which the Supreme Court also centered its reasoning on Jackson and stated:

When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid unless the defendant initiates the contact himself.

Id. at 15-16, 515 S.E.2d at 515 (emphasis added).

In Montejo, the United States Supreme Court overruled Jackson and held, “What matters for Miranda and Edwards is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.” Montejo, 556 U.S. 778, 797 (2009) (emphasis added). The Supreme Court removed the presumption of invalidity put in place by Jackson and remanded the case so Montejo could “be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of Edwards.” Id. The Court stated that, “If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it.” Id. (emphasis added). It is clear by the Court’s reasoning for remand that in light of its overruling of Jackson, the only way Montejo could have invoked his right to counsel was by clearly asserting that right when the officers approached him. Here, Appellant did not assert his right to counsel when he was approached by the officers. (R. p.74, lines 15-20.) Instead, Appellant waived his Miranda rights and agreed to give a fourth statement. Thus, even under the remaining Edwards rule, Appellant’s rights were not violated.

In In re Tracy B., this Court gave a broad overview of the cases involving the Fifth and Sixth Amendment rights to counsel. 391 S.C. 51, 60-66, 704 S.E.2d 71, 75-78 (Ct. App. 2010). This Court noted the Fifth Amendment's provision of the right to have an attorney present during custodial interrogation. Id. at 60-61, 704 S.E.2d at 75 (citing Miranda v. Arizona, 384 U.S. 436, 478-79 (1966)). It further clarified that once an accused has invoked that right, no further police interrogation may be conducted unless initiated by the accused. Id. at 61, 704 S.E.2d at 75-76 (citing Edwards v. Arizona, 451 U.S. 477, 848-85 (1981)). This Court then explained that State v. Anderson "hinge[d] upon the bright-line rule set forth in Michigan v. Jackson that once a defendant invokes his or her Sixth Amendment right to counsel, any subsequent waiver is presumed invalid if secured pursuant to police-initiated conversation." Id. at 62, 704 S.E.2d at 76. It then went on to clarify that Jackson was overruled by Montejo. "Michigan v. Jackson set forth a bright-line rule that 'if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, *any waiver* of the defendant's right to counsel for that police-initiated interrogation *is invalid.*'" Id. at 62 n.6, 704 S.E.2d at 76 n.6 (quoting Michigan v. Jackson, 475 U.S. 625, 636 (1986) (emphasis added)). "Montejo v. Louisiana overruled Jackson, noting the marginal benefits of a bright-line policy designed to prevent coerced confessions were 'dwarfed by' the substantial societal costs of hindering the conviction and punishment of those who violate the law." Id. at 62 n.6, 704 S.E.2d at 76 n.6 (citing Montejo, 556 U.S. at 793.)

This Court recognized in Tracy B. that "the additional protection afforded by Edwards is currently applicable in both Fifth Amendment and Sixth Amendment contexts." Id. at 62, 704 S.E.2d at 76. Thus, "[o]nce an accused has invoked his right to

have an attorney present during custodial interrogation he may not be subjected to further police interrogation ‘unless the accused himself initiates further communication, exchanges, or conversations with the police.’” Id. at 61, 704 S.E.2d at 75-76 (quoting Edwards, 451 U.S. at 484-85 (emphasis added)). Accordingly, this Court in Anderson based its determination on the law at the time, Jackson, and found that because Anderson was arraigned and completed a public defender request, his right to counsel had attached under Jackson and, thus, his Sixth Amendment rights were then violated when the police initiated contact with him. To the extent Montejo has since overruled Jackson, Anderson’s reliance on the Jackson rule is no longer valid and therefore, Anderson is not applicable to the facts of this case because Appellant’s right to counsel did not attach simply by being appointed counsel at a bond hearing.

Although Appellant attended a bond hearing before a magistrate at which he requested and was appointed counsel, he did not inform the officers of his appointment of counsel when the officers approached him at the jail a few days later in response to new information received from Samantha Ervin.⁵ Appellant did not request an attorney during his custodial interrogation; instead he agreed to waive his Miranda rights and spoke freely and voluntarily to the police when he gave his fourth statement. The fact that he had been appointed an attorney at his bond hearing was of no moment. See Montejo, 556 U.S. at 797 (“What matters for Miranda and Edwards is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.”) Accordingly, the trial court correctly denied the motion to suppress.

⁵ To the extent Michigan v. Jackson found that, “Sixth Amendment principles require that we impute the State’s knowledge from one state actor to another,” it has been overruled. 475 U.S. 625, 634 (1986).

II.

The trial court correctly denied Appellant's directed verdict motion on possession of a firearm during the commission of a violent crime because evidence was presented that Appellant had constructive possession of the firearm.

Appellant argues the trial court erred in denying his directed verdict motion on the charge of possession of a firearm during the commission of a violent crime. Specifically, he asserts the State failed to prove that Appellant possessed, either actually or constructively, a firearm. However, the State presented evidence that Appellant (1) knew the gun was present at his friend's residence while they planned the robbery, (2) left for the scene of the robbery knowing the gun was in the vehicle, and (3) had knowledge the gun would be used in the commission of the robbery. Accordingly, evidence existed to support the trial court's denial of Appellant's motion for a directed verdict, and the trial court correctly submitted to the jury the question of whether Appellant had actual or constructive possession of the firearm.

In reviewing the denial of a motion for a directed verdict, an appellate court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, it must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight. Id. If the State presents any evidence which reasonably tends to prove the defendant's guilt or from which his guilt could be fairly and logically deduced, the trial court must send the case to the jury. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168, 173 (2003). The appellate

court may reverse the trial court's denial of a motion for a directed verdict only if there is no evidence to support the trial court's ruling. State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740, 742 (2003) (emphasis added). "The rule is that unless there is a failure of competent evidence tending to prove the charge in the indictment, a trial judge should refuse a defendant's motion for a directed verdict of acquittal." State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842-43 (1980).

Constructive possession is proven by showing the accused has dominion and control, or the right to exercise dominion and control, over the contraband. State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." Id. at 202, 284 S.E.2d at 775. Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband. State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995). The Supreme Court has resolved the issue of whether a person can be convicted of possession of a firearm even when not in actual possession of it, holding the principles that apply to contraband drugs are also applicable in regard to possession of firearms. Halyard, 274 S.C. at 400, 264 S.E.2d at 842.

In State v. Jennings, this Court upheld the trial court's denial of Jennings' motion for directed verdict based on Halyard. 335 S.C. 82, 86, 515 S.E.2d 107, 108-09 (Ct. App. 1999). Even though no evidence was presented that Jennings actually possessed the shotgun during the armed robbery, this Court found "the evidence was sufficient to create a jury issue in regard to whether Jennings exercised such dominion and control over the shotgun to amount to constructive possession." Id. at 87, 515 S.E.2d at 109. The facts

showed Jennings was the ringleader of the robbery and directed his cousin to reveal the gun during the robbery and hide it afterwards. Id.

In the case sub judice, the evidence showed Appellant was involved in the decision to commit the armed robbery as part of the group who planned it. (R. p.428, lines 18-19; R. p.429, lines 16-17; R. p.638, lines 1-25.) His primary role was to set up his friend as the victim. (R. p.429, lines 17-19; R. p.543, lines 1-4; R. p.639, lines 7-9.) After going to the victim's house, he called back to his co-conspirators to inform them how many people were present. (R. p.432, lines 1-19; R. p.543, lines 10-15; R. p.641, lines 8-9, 17-23.) Appellant rode in the truck with his co-conspirators, aware of the gun's presence. (R. p.637, lines 8-13; R. p.638, lines 21-23; R. p.640, lines 23-24.) He attempted to convince the victims to walk with him back to where he knew Henson would be waiting with the gun; however, the victims did not cooperate. (R. p.642, lines 7-14; R. p.643, lines 3-14.) At that point, he went back to the group and informed them the three victims were not armed. (R. p.644, lines 4-5.) Appellant may not have been the "ringleader" of the armed robbery, as the term is commonly understood, but he was at least an equal participant in orchestrating and committing a violent crime involving the use of a firearm. Although he did not actually possess the firearm, substantial circumstantial evidence existed to submit to the jury the question of whether he constructively possessed the firearm.

Furthermore, Appellant was found guilty of armed robbery, even though he was not a direct participant in the portion of the crime that actually involved robbing the victims at gunpoint. The trial court gave the jury a "hand of one, hand of all" accomplice liability charge, instructing as follows:

A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person, which happens as a probable or natural consequence of the acts done in carrying out or in furtherance of the common plan and scheme. . . . If an act has no connection with the common purpose and did not ensue as a probable result of an attempt to execute the common purpose, then the actor alone is responsible for any acts done during the event. The test [is] whether the act was committed in furtherance of the plan and was a probable result of the plan's execution.

(R. p.898, lines 12-25; R. p.899, lines 1-2.) (emphasis added.) Here, the weapon was an integral part of the armed robbery. Pointing a gun at the victims was "committed in furtherance of the plan" to rob them, and using the gun was "a probable result of the plan's execution." Moreover, because the "hand of one, hand of all" theory is sufficient to convict Appellant of armed robbery, it is reasonable to conclude it can also encompass possession of a weapon during the commission of a violent crime.

While South Carolina courts have not definitively addressed this issue, the Fourth Circuit Court of Appeals has. In United States v. Davis, 61 F. App'x 24 (4th Cir. 2003), the Court upheld the imposition of a sentencing enhancement for possession of a firearm by a co-conspirator. The Court based its ruling on United States v. Kimberlin, 18 F. 3d 1156 (4th Cir. 1994), in which it held "that a defendant may be accountable for a gun possessed by another person involved with him in a joint criminal activity without requiring that the government establish that the defendant knew the gun was present because the presence of weapons in such circumstances is reasonably foreseeable." Davis, 61 F. App'x at 26.

Additionally, other jurisdictions have considered this issue. In New Jersey, courts have made no distinction, when determining whether a defendant can be charged with the

Graves Act,⁶ among whether a defendant is in actual possession, in constructive possession, or if he is an accomplice in another's physical possession of a firearm. State v. Mancine, 590 A.2d 1107, 1121 (N.J. 1991). Pennsylvania has also determined that a defendant can be legally responsible for the illegal possession of a firearm under a theory of accomplice liability. See Commonwealth v. Smith, 416 A.2d 494, 496-97 (Pa. 1980); see also Commonwealth v. Knox, 50 A.3d 749, 757-59 (Pa. Super. Ct. 2012).

The Court of Appeals of Georgia upheld the conviction of a defendant for possession of a firearm during the commission of a felony, even though no evidence was presented that he possessed the weapon. Watson v. State, 708 S.E.2d 703, 707 (Ga. App. 2011). The court stated:

Both Davis and Burnett testified that Watson was present from the robbery's inception through its execution. While neither Davis nor Burnett stated that Watson had a weapon or went inside Oliver's house or the garage, the jury could infer from the testimony of both men that Watson was aware of the conspiracy to obtain Oliver's money and cocaine by armed robbery and that he willingly participated in the crimes and shared the criminal intent of those who committed crimes inside the residence by supplying his car and services to them as a get-away driver.

Id. The facts in Watson are similar to the case at hand. Watson merely acted as the driver but did not participate in the actual robbery or handle a weapon. Here, Appellant arranged the robbery by choosing the victims and reporting back to his co-conspirators the number of people present at the home and the fact they were not armed. Like Watson, Appellant did not actually rob the victims or use a weapon. However, Appellant's role in the robbery was enough to make him responsible under the "hand of one, hand of all" theory of accomplice liability, and this was sufficient to encompass the

⁶ The Graves Act is a New Jersey statute that provides enhanced penalties for certain illegal gun offenses in New Jersey.

possession of a weapon charge as well as the armed robbery charge. Thus, the trial court correctly denied the directed verdict motion.

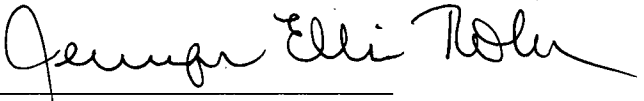
CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

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Honorable John C. Hayes, III, Circuit Court Judge

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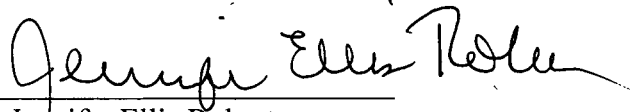
Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 
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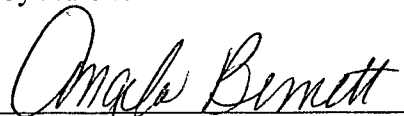
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 14th day of February, 2013.


ANGELA BENNETT
Legal Assistant

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