Shealy, Brenda

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Sent: Friday, December 27, 2013 2:12 PM
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Cc: Salley W. Elliott; Robert M. Dudek
Subject: Curtis Simms, 2013-001219
Attachments: BOA.pdf

Brenda,

Attached is the Brief of Appellant in Curtis Simms' case as we discussed. We are filing the original and copies this afternoon. Please let me know if you need anything else.

Thanks,

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS J. SIMMS,

APPELLANT

APPELLATE CASE NO. 2013-001219

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court erred by excluding the testimony of eyewitness Alan James that the decedent was acting in a disorderly rude aggressive fashion toward Alabama fans, and that he got out of the truck and urinated in public since the decedent's friend, Adam Paxton, earlier testified that the decedent did not get out of the truck, did not relieve himself, and he was not acting in a disorderly fashion since the state opened the door to this fair response highly relevant testimony?

2.

Whether the court erred by refusing to direct a verdict of acquittal on the charge of breach of the peace of a high and aggravated nature since the court improperly attributed criminal liability to appellant for the post game traffic chaos that he did not cause, and the state failed to present evidence showing appellant's guilt of the two aggravators alleged in the indictment?

3.

Whether the court erred by sentencing appellant to ten years imprisonment suspended on the service of three years for breach of the peace of a high and aggravated nature since the maximum sentence for this crime was thirty days imprisonment, and the legislative sentencing language shows the legislature did not intend for the absurd result where appellant was sentenced to more prison time for breaching the peace than he faced for the underlying homicide of which he was acquitted?

STATEMENT OF THE CASE

On February 9, 2011, a Richland County grand jury indicted appellant for involuntary manslaughter and breach of peace of a high and aggravated nature ("BPHAN"). According to the indictments, the charges stemmed from a fight after a football game in Columbia, South Carolina on October 9, 2010. Specifically, the indictment alleged appellant knowingly, willfully, and intentionally disturbed public order and/or public tranquility through his conduct, accompanied by circumstances of aggravation, fighting in the roadway and/or disrupting traffic. This incident occurred on Shop Road at one of the tailgating spots near Williams-Brice Stadium after the University of South Carolina upset the number-one ranked Crimson Tide of Alabama.

As will be seen infra, although appellant wore Alabama clothing to the game, he tailgated with former Carolina football players and his roommates, Dustin and Jordan Lindsey. At the time of the tragic accident, former Carolina football players Mike Davis and Marque Hall were accompanying appellant and the Lindsey twins.

Appellant was tried before the Honorable Diane Goodstein and a jury from January 28, 2013 – February 5, 2013. Appellant was represented by Johnny Gasser and Gregory Harris. Luck Campbell, Joanna McDuffie, and Meghan Walker represented the state. The jury acquitted appellant of involuntary manslaughter, but found him guilty of BPHAN.

On February 5, 2013, Judge Goodstein sentenced appellant to ten years' imprisonment suspended upon the service of five years' imprisonment and three years' probation.

Subsequently on February 15, 2013, appellant filed a motion to set aside sentence or in the alternative to reduce sentence. A hearing on the motion was held on March 12, 2013. Judge Goodstein modified the sentence to ten years' imprisonment suspended upon the service of three years' imprisonment and three years' probation pursuant to her order dated April 25, 2013. However, Judge Goodstein refused to reduce the sentence to thirty days' imprisonment as requested by appellant.

On August 1, 2013, appellant filed a petition for writ of habeas corpus in this Court's original jurisdiction. On September 3, 2013, respondent filed a return. On September 13, 2013, appellant filed a reply.

On November 20, 2013, this Court denied appellant's petition for a writ of habeas corpus; however, this Court certified the appeal from the Court of Appeals and expedited the appeal. In compliance with this Court's December 16, 2013 briefing schedule, appellant now files this brief of appellant.

STATEMENT OF FACTS

Introduction

On October 9, 2010, the University of South Carolina Gamecocks took on the number one ranked University of Alabama Crimson Tide at Williams-Brice Stadium in Columbia, South Carolina. In the jubilant chaos after the Carolina victory, a freak accident occurred resulting in the death of Martin Gasque. The police ultimately charged appellant with involuntary manslaughter -- criminal negligence -- for punching the decedent after a short confrontation just before the decedent's friend, Adam Paxton, tragically ran over him with his large truck in the bumper to bumper traffic on the narrow Shop Road. The jury found appellant not guilty of involuntary manslaughter. However, the jury convicted appellant of breach of the peace of a high and aggravated nature (BPHAN). Strangely, appellant was then sentenced to a significantly longer prison term for the "aggravated" breach of the peace conviction than he could have received for the homicide -- ten years imprisonment suspended on the service of three years imprisonment.

State's evidence

Adam Paxton and the decedent drove to Columbia to tailgate for the football game. R. 508, ll. 15-18. Paxton drove his black truck to the game. R. 508, l. 25 – R. 509, l. 1. The two tailgated in a lumberyard on Shop Road, but did not attend the game. R. 509, ll. 8-16; R. 527, ll. 13-14. Paxton claimed he only "had two beers the whole day" before he tragically ran over the decedent. R. 510, ll. 3-4; R. 526, ll. 4-6; R. 526, ll. 21-23. However, it was undisputed the twenty year old decedent had a blood-alcohol content of .232 at the time of death. R. 510, ll. 10-15; R. 526, l. 25 – R. 527, l. 2; R. 527, ll. 5-6; 581, ll. 3-25.

Paxton maintained he had "no idea" whose beer was in the back of his truck. He said he did not take any beer to the tailgate. He did not even know whose cooler was on the back of his truck. R. 523, ll. 4-20; R. 524, ll. 1-5; R. 526, ll. 7-9.

Paxton maintained he saw no change in the decedent's conduct throughout the day. The only change, Paxton said, was the decedent was "excited" about the Carolina victory. R. 528, ll. 10-16.

After the game, Paxton and the decedent left the tailgate spot and drove to the Woodlands on Shop Road. After dropping off a couple of people at the Woodlands, Paxton and the decedent returned to Shop Road heading north toward Columbia to go to a hotel. R. 511, l. 6 – R. 512, l. 17. Traffic was "[b]umper-to-bumper." R. 512, ll. 18-19; R. 513, ll. 7-9. The two were "barely" making progress on the road. Traffic was worse than usual on Shop Road after a Carolina game. R. 513, ll. 10-12. In addition to the cars on the road, there were people walking beside the road. R. 545, l. 25 – R. 546, l. 7. While they were in traffic, Paxton said decedent "was celebrating for the Gamecocks ... telling people ... congratulations to the Gamecocks. **And that was it.**" The decedent was "very, very excited" about the win. Additionally, the decedent was talking on the phone. R. 513, ll. 13-18. (emphasis added). He was talking to Carolina fans who were walking by the truck, saying "go Gamecocks, congratulations, WooHoo." R. 513, ll. 19-24; R. 532, ll. 2-4.

Paxton denied that the decedent got out of the truck and urinated on the side of the road. R. 543, ll. 14-22. He further denied the decedent was cursing and being belligerent towards Alabama fans as they inched along Shop Road in the post-game traffic. R. 543, l. 23 – R. 544, l. 3.

While the two were "[s]tuck in traffic," cars were trying to get into the line of traffic on Shop Road. When they approached a dirt parking lot, Paxton saw a gray SUV trying to merge, but he refused to allow the SUV, in which appellant was a passenger, to get in front of him. Appellant Simms was dressed in Alabama garb but he was riding with high school friends and former Carolina football players, Dustin and Jordan Lindsey.

Former Gamecocks Mike Davis and Marque Hall were also riding in the car. Paxton said the Lindsey vehicle in which appellant was the front seat passenger blew the horn and the decedent said he simply "threw up his hand and was like, Hey, sorry, we already passed you, you know. Sorry." Paxton claimed the decedent did not make any vulgar gestures with his hands and did not use any profanity. It was undisputed that appellant and the decedent both got out of their vehicles and encountered one another. The former Gamecock players riding in the car thought it was funny when appellant got out of the car – dressed in Alabama football attire – that appellant thought he would be able to have Carolina fans let their car into the Shop Road bumper to bumper traffic. R. 514, ll. 11-19; R. 515, ll. 3-11; R. 515, ll. 15-16; R. 546, ll. 18-23; R. 547, ll. 4-14.

As appellant walked the short distance to the truck, the decedent opened the door and stepped out of the truck. R. 515, ll. 22-24. Paxton did not observe appellant throw any punches at the decedent while he was sitting in the truck.[1] Paxton then lost sight of appellant and the decedent. R. 516, ll. 9-13; R. 552, ll. 22-25; R. 553, ll. 8-10. Appellant

[1] Initially, Paxton told police that the decedent was punched while still seated in the truck. Paxton said this was a mistake. The morning after the accident, Paxton told police this was an error when the police asked him directly if it were true. R. 557, ll. 1-14; R. 558, ll. 1-17; R. 681, l. 22 – R. 682, l. 17.

and the decedent exchanged words, but Paxton could not remember what the two said. He then heard a loud punch. R. 517, ll. 11-23.

Paxton had no idea where the decedent was after hearing the punch. He had no idea what happened. Instead of locating his friend, Paxton, who claimed he had the standard "two beers" the entire tailgating time, "slowly pulled up off to the side of the road." While doing so, he realized that he ran over something. Paxton got out and saw the decedent lying "in the middle of the road." Paxton ran to check on him. Then, several other people came to render aid. R. 518, l. 2 – R. 519, l. 12; R. 562, ll. 8-17. Paxton did not hear anybody screaming for him to stop or banging on his truck. There was defense testimony that appellant was yelling for Paxton to stop, and beating on the side of the truck trying to get Paxton's attention as he continued to slowly run over the decedent. R. 564, ll. 10-14. According to Paxton, running over the decedent was "totally unforeseeable." R. 566, ll. 10-17.[2]

State's witness, James Martin, along with his brother-in-law, father, wife, and grandfather attended the football game. He parked at his usual spot in the Hood Construction lot on Shop Road. R. 200, l. 10 – R. 201, l. 10. After the game, the family continued tailgating. R. 201, l. 24 – R. 202, l. 6. Although other people were also in the parking lot, the area "had thinned out some." It was "probably a half to a third full." R. 202, ll. 7-15. Still, traffic was "pretty heavy." R. 202, ll. 21-22. It was "just typical traffic congestion ... standstill and move." R. 203, ll. 18-23.

[2] Paxton was never charged for his involvement. R. 676, ll. 3-5. Even though he was the driver of a car that ran over and killed a man, he was not administrated a blood alcohol test or field sobriety test. He was allowed to leave the scene.

Martin saw a white SUV waiting to get out onto Shop Road. R. 203, l. 24 – R. 204, l. 3. Martin was to the right of the SUV in a car with his brother-in-law. R. 204, l. 22 – R. 205, l. 3. Martin saw a male get out of the front passenger side of the white SUV. The male approached a black pick-up truck on Shop Road. The passenger of the black truck had his window down, and the two were talking. He saw the man reach into the truck, but could not tell what they were doing. The passenger of the truck opened the door. R. 205, l. 4 – R. 206, l. 2; R. 207, ll. 17-19.

The male from the white SUV punched the passenger. Martin saw the male from the SUV "hit, or attempt to hit, again, a second time," the black truck's passenger, who fell out of the door right beside the truck on the road. R. 209, ll. 9-25; R. 211, ll. 22-25; R. 217, ll. 12-13. Then, the black truck started to slowly roll forward. R. 211, ll. 8-15. The truck "kind of caught him towards the upper part of his leg, roll[ed] over his abdomen, [] and his chest, and his head." R. 212, ll. 3-6. Although Martin did not identify appellant, he described the person in the white SUV as being the larger person in comparison to the passenger of the black truck. R. 218, ll. 11-19.

James Adams attended the football game with his family. R. 306, ll. 9-16. He tailgated in the Hood Construction lot. R. 306, l. 20 – R. 307, l. 1. After the game, the group returned to their tailgate spot. R. 307, ll. 14-18. "Traffic was so bad" they stayed at the spot for a couple of hours. R. 307, ll. 19-21. He and his brother-in-law, James Martin, left together. R. 307, l. 22 – R. 308, l. 3. Adams observed appellant and the decedent shouting back and forth as appellant approached the decedent. R. 308, ll. 17-24. Appellant reached in the truck. Adams was unsure what was going on, but he heard "a lot of shouting." The decedent opened the door and as he was stepping out, appellant hit

him with a punch knocking him back into the door. R. 309, ll. 13-22; R. 310, ll. 14-15; R. 311, ll. 4 – 15. The decedent was punched a second time. Then, the truck "slowly crept up his groin, up over his body and over his head." R. 310, ll. 1-9. Adams believed the decedent was "knocked out" after the first punch, but he was not sure. R. 311, l. 14 – R. 312, l. 24.

Adams remained at the scene because "we weren't moving any ways. The traffic was bumper-to-bumper and that just added to it." R. 313, ll. 13-19. Adams told the police that appellant was "shoved back a little bit" from the truck door opening. R. 320, l. 17 – R. 321, l. 1. Like his brother-in-law, Adams did not expect this to happen. R. 326, ll. 17-19.

Guy Echenroth and his wife had parked "right off Shop Road." R. 270, ll. 6-20. The two got back to their car around 6:30 p.m. when it was approaching darkness. They got into the line of traffic, which was "bumper-to-bumper both ways on Shop Road," heading toward downtown Columbia. R. 271, l. 20 – R. 272, l. 8; R. 274, ll. 21-25. They were in traffic for at least fifteen minutes before the accident. R. 272, ll. 11-14. A black truck was in front of them. R. 273, ll. 16-20. At approximately 6:45 p.m., Echenroth observed a car pulling from a side parking lot on the right trying to merge into traffic in front of the black truck. R. 274, ll. 4-20.

Echenroth saw a large male, whom he later identified as appellant, get out of the passenger side of the car and approach the black truck. R. 276, ll. 1-23; R. 286, ll. 19- R. 287, l. 4. Echenroth maintained that appellant reached into the truck and punched the passenger. The passenger of the truck tried to open his door. R. 277, ll. 14-20. Appellant threw three or four additional punches. R. 278, ll. 1-4. The passenger was

knocked to the ground on his side and then rolled over on his back. R. 279, ll. 2-11. According to Echenroth, the passenger "was out, cold." R. 279, ll. 12-17. Within three or four seconds, the truck ran slowly over him. R. 280, ll. 1-15. The passenger's "legs were between the tire" and the truck ran over his abdomen and his head. R. 281, ll. 1-5. The body was "inside the line" on the road. R. 281, ll. 16-20. Appellant "pounded" on his wife's window "screaming virtually out of control, call 911, call 911." R. 281, l. 24 – R. 282, l. 9. Then, appellant ran down Shop Road and returned with a police officer. R. 282, l. 5; R. 282, ll. 11-13; R. 282, ll. 14-16.

Rhonda Echenroth, Guy's wife, also testified that she and her husband were on Shop Road heading toward Columbia. R. 342, ll. 10-19. They were behind a large black truck. R. 343, ll. 1-4. Traffic was "stop and go, mostly stopped traffic as it usually is after a game." R. 343, ll. 9-12; R. 352, ll. 2-6. In fact, she described the road as "a parking lot instead of a road." R. 344, ll. 4-5; R. 355, l. 23 – R. 356, l. 3. There were also pedestrians walking on the side of Shop Road. R. 351, ll. 17-20.

Between 7:00 p.m. and 7:15 p.m., she observed appellant get out of his vehicle, approach the black truck, say something to the passenger, and then hit the passenger. The truck door then opened. Appellant "proceeded to hit the passenger and knocked him out and onto the ground." R. 344, ll. 3-12; R. 351, ll. 4-8. She estimated the passenger was hit "four, five, six," times. R. 344, ll. 13-17. After the passenger fell, the truck moved slowly to the right. The passenger "was positioned in the direct line of the back rear tire and the rear tire of the truck rolled over him between his legs and up over his head." R. 345, ll. 2-8; R. 355, ll. 17-22. She observed the passenger "lying within the white line ...

on the right side of the road." R. 345, ll. 11-15. Then, appellant beat on her window telling her to call for help. R. 346, l. 16 – R. 347, l. 6.

Travis Brown attended the football game with his friend Brian Kern and parked on Shop Road. R. 372, ll. 17-23; R. 373, ll. 1-2. After the game, he and Kern returned to the tailgate spot where they stayed for about an hour and a half. R. 373, ll. 12-17. "[T]raffic was all backed up." R. 374, l. 1. As they were pulling out of the tailgate spot onto Shop Road, a young man got out of a car and approached a truck stopped on Shop Road. The door of the truck opened, and he "saw two, maybe three punches." He could not recall if the person "was completely out of the car of if he was still sitting down in the car." The person was knocked unconscious. The truck pulled forward at an angle off the side of the road and ran over the person "laying in the road." R. 374, ll. 15-22; R. 379, l. 20 – R. 380, l. 5; R. 380, ll. 20-24; R. 381, ll. 4-16. Brown did not see anyone reach into the window of the truck. R. 380, ll. 6-19. Brown and Kern pulled past the car that was in front of them and left without talking to the police. R. 375, ll. 14-15; R. 376, ll. 6-8; R. 378, ll. 13-18; R. 382, ll. 7-9.

Kern testified similarly to his friend, Brown. He saw appellant standing in front of a vehicle trying to help that vehicle get out and go left on Shop Road. R. 385, ll. 12-19. Kern described a truck on Shop Road heading toward Columbia. R. 385, ll. 20-25. The decedent then stepped out of the vehicle and turned toward appellant. Appellant punched the decedent in the face twice. R. 386, ll. 2-4.[3] The decedent "went limp as though he'd been knocked out" and fell against the side of the truck and slid down." R.

[3] Kern never observed appellant reach into the window of the black truck. R. 389, ll. 22-40.

386, ll. 11-14. Within seconds of the decedent hitting the ground, the truck started to pull off the road, running over the decedent. R. 386, ll. 15-18. Appellant then yelled at the driver, "What did you do?" R. 386, ll. 20-25; R. 391, ll. 11-16. Appellant panicked, looking for help. Appellant ran down the road, found an officer and returned within thirty seconds. R. 387, ll. 3-10; R. 391, ll. 22-24.

Lauren Coggin went to high school with appellant in Mobile, Alabama. R. 394, ll. 3-8. She and a group of friends travelled to Columbia to tailgate before the football game in October 2010 with appellant and his friends. R. 394, ll. 15-21; R. 416, ll. 1-16. Among the group of friends were twins Dustin and Jordan Lindsey. R. 395, l. 15 – R. 396, l. 6. The group arrived to tailgate during the morning. R. 396, ll. 7-12. The tailgate included adults of different ages and children running around. R. 419, ll. 3-7. Alabama fans and Carolina fans attended the tailgate. R. 419, l. 17 – R. 420, l.1. After the game, the group – including the Alabama fans -- was cheerful. R. 420, ll. 2-5.

After the game was over, the group packed up to leave. R. 397, ll. 5-9; R. 398, ll. 19-24. Dustin Lindsey was driving, Jordan Lindsey was in the middle, and Coggin was sitting on appellant's lap in the front seat. Others were in the back seat. R. 399, ll. 5-20. When they were leaving, traffic "was very backed up." R. 400, ll. 13-15. Directly in front of them on Shop Road was a black truck. R. 425, ll. 14-20; R. 426, ll. 9-11. The passenger in the black truck yelled out. Appellant responded. R. 401, ll. 4-9; R. 426, ll. 20-25.

The passenger, who was taunting appellant and pointed at him, got out of the truck. Appellant got out of the car. Appellant walked to the passenger, and the two exchanged words. "The passenger in the car kind of put his hand out." Specifically, she

saw the passenger make "some sort of move in physical contact with" appellant. Then, appellant punched him. The passenger's head went back and hit the side of the car. The passenger then fell to the ground. Coggin could not tell if he was conscious. R. 403, ll. 1-13; R. 427, l. 24 – R. 429, l. 2; R. 429, ll. 19-21; R. 430, l. 23 – R. 431, l. 3; R. 445, ll. 17-23. When appellant hit the passenger, the passenger was "standing right next to the open door" of the truck. R. 403, ll. 16-21.[4] The passenger fell partly under the truck door in the roadway. R. 404, ll. 12-15; R. 407, ll. 4-6. The truck started moving to the right, and appellant started banging on the truck to tell him to stop. Appellant "then started freaking out and telling somebody to call the cops and just broke down" after the truck ran over the decedent. R. 406, ll. 6-24. Coggin never expected "one friend would veer off the road and run over and kill another friend not knowing where he was in the road." R. 448, ll. 8-24.

Cassie Radford, a Richland County deputy, was working at a tailgating facility called Cock's Corner on the corner of Shop Road and George Rogers Boulevard. R. 161, ll. 9-11; R. 162, ll. 3-8. At 8:30 p.m., her partner, Allen Derrick told her there had been an accident and he started running down Shop Road toward I-77. R. 163, l. 25 – R. 164, l. 6. She ran behind Derrick. Appellant ran toward her, grabbed her vest and told her someone had been hurt and needed help. Radford pushed him off and continued to run. R. 165, ll. 1-23; R. 166, ll. 5-10. When Radford arrived at the scene, she observed an individual lying on the roadway, close to the white line. R. 166, ll. 20-24; R. 184, ll. 3-7;

[4] Coggin testified she never saw appellant strike anybody who was sitting in the truck. R. 437, ll. 11-13.

R. 188, ll. 10-18.[5] When EMS arrived, Radford assisted in getting the ambulance out of traffic. R. 184, ll. 14-17.

James Heywood, a Columbia police officer, responded to the scene. R. 191, l. 19 – R. 192, l. 15. When Heywood arrived, EMS was there providing medical assistance. R. 192, ll. 18-19. Appellant approached Heywood and told him he had "hit the guy." Heywood handcuffed appellant and placed him in the patrol car. R. 192, ll. 20-25.

Steven Taylor, a Richland County deputy, arrived at 8:50 p.m. R. 143, ll. 2-4; R. 145 l.13-16. He observed a blood stain on the roadway. R. 143, ll. 5-8. Taylor secured the scene with crime scene tape and cones and blocked both roadways to limit all traffic from entering the crime scene. R. 152, l. 14 – R. 153, l. 10.[6] When he got the call, "[t]here was a lot of traffic, so it took [him] a little while to get there." R. 143, ll. 20-22. Taylor explained that even during normal football games that do not involve the nation's number-one ranked team, he has to manage a little more than "ninety-five thousand people on any given Saturday." R. 146, ll. 10-12. The major thoroughfares in and out of Williams-Brice Stadium are Shop Road, Bluff Road, George Rogers Boulevard and I-77. R. 146, ll. 15-25. After games, traffic is "bumper-to-bumper" and very congested. There is also a tremendous amount of pedestrian traffic. R. 149, ll. 1-8; R. 149, ll. 19-22. After football games, Shop Road is always crowded. Thousands of people park their cars along Shop Road and walk to and from their cars. R. 150, ll. 6-19. When Taylor arrived at the

[5] Radford, a police officer, cried during her testimony when describing how she found the decedent. Defense counsel objected, calling her performance "ridiculous." R. 167, l. 2.

[6] The crime scene investigator Yvonne Woods claimed she arrived at the scene at 10:30 p.m. on October 9, 2010 to begin processing the scene. R. 452, ll. 11-19. She processed the scene, which "was on the side of the road" and taped off. R. 453, ll. 7-13. Woods left the scene at 11:35 p.m. R. 459, ll. 2-4.

scene, traffic "had started to thin out." It had "thinned out a lot by the time [he] got to the scene." R. 149, ll. 16-18.

When Don Robinson with Richland County Sheriff's Department responded to the scene, a large crowd of people were present and it was "pretty chaotic." "Part of the roadway was blocked off." Traffic "was horrible" as "[e]verything was stopped [and p]edestrians were everywhere." "Crowds of people [were] agitated with traffic problems." The police "were just constantly being berated by people." R. 588, l. 2 – R. 589, l. 2; R. 627, ll. 10-16. Robinson spoke to the Echenroths at the scene. His notes indicated their vantage point to observe the incident "was not that great." However, he claimed at trial that he had "flip-flopped" the witnesses' names – he had confused James with the Echenroths. R. 631, ll. 7-21; R. 633, l. 17 – R. 634, l. 2.

Travis Holdorf, the lead investigator for Richland County, reported to the scene on Shop Road at 9:45 p.m. R. 640, ll. 12-14. He explained "[i]t was all but impossible if you were not law enforcement to get to the scene itself." He had to maneuver on and off the road to the get to the scene because "traffic was still thick" and "backed up" the closer he got to the scene. He said there was "nowhere to move." Traffic was backed up "[b]ecause of the incident." He opined the incident "very much so" disturbed the peace in the community. He explained that "[i]t's pretty hard to shut down Shop Road any day, much less right after a football game." R. 641, ll. 1-19. Holdorf decided to charge appellant with breach of peace, which is "just a disturbance upon the land just a disturbance of normal flow." R. 659, ll. 8-16.

Holdorf made contact with appellant and asked him to go to headquarters. Appellant readily agreed. R. 642, ll. 7-20. Holdorf advised appellant of his rights during

the ride to headquarters. R. 644, ll. 2-21. Appellant agreed to waive his rights and speak to Holdorf. R. 646, ll. 4-5. Appellant admitted to having ten or eleven beers and a couple of shots that day. R. 647, ll. 10-20. When they arrived at headquarters, Holdorf advised appellant of his rights again and obtained a written waiver of those rights. R. 648, l. 1 – R. 650, l. 7.

Holdorf read the statement to the jury. Appellant explained his attendance at the tailgate with his friends and his consumption of alcohol during the tailgate. At the end of the game, appellant got into the passenger seat of Dustin Lindsey's green truck to leave. They were trying to turn right onto Shop Road. "Traffic was bumper-to-bumper." A black truck stopped in front of them. The passenger looked at appellant and said, "What's up?" Appellant and the passenger got out of their cars and "bowed up at each other." When the passenger "bowed up," appellant swung and hit him in the face. The passenger fell back into the door of the truck. The truck then "took off" running over the passenger's head. Appellant ran down the road looking for help. He found two officers and explained what happened. While running down the road in the dark, appellant removed his dark red shirt so that he was wearing a more visible white shirt. At the end of the statement, Appellant added that he hit the decedent but stated that

> The events that took place after the punch was thrown [were] not premeditated. It was a very unfortunate event. I did everything possible to get him immediate medical attention. In no shape or form did I have control of the driver pulling forward.... It could have been the other way around. If I didn't swing first, he could have hit me and I could have fallen forward ... and out of panic, drunkenness, the driver could have pulled over or pulled forwards and run me over.

R. 654, l. 6 – R. 658, l. 22.[7]

The solicitor had Holdorf testify that the Echenorths were "not affiliated" with anyone in this case. They were, like Martin, "independent witnesses, according to Holdorf who were more trustworthy. Holdorf said Allen James did not come in initially to talk to the police. He sent in an affidavit. R. 668, l. 2 – 672, l,. 15.

Stan Smith of the Sheriff's Department attended the game. R. 743, ll. 11-12. After the game, he was "stuck in traffic." R. 743, ll. 14-18. When he learned of the incident, he got out of his car and walked because "traffic stalled." R. 744, ll. 13-15. He "sort of got trapped in by virtue of the emergency vehicles and wounld up being there about two hours." R. 745, ll. 3-5. Smith described the scene as "actually gridlock. Nothing was moved. It took a while to get things moving." R. 750, ll. 10-14. At the scene, Smith observed the body of the decedent on the road way. R. 747, ll. 9-12. He opined that in light of the homicide occurring on the roadway, traffic was stopped. R. 750, ll. 15-20.

The crime scene investigator who processed the black truck found an empty cooler, an open case of Bud Light, and an open case of Busch Light in the interior bed of the truck. However, the investigator did not determine how may unopened cans remained in the cases. R. 477, ll. 6-8; R. 504, ll. 13-25. He found empty beer cans in the back of the truck, but he did not count the number. R. 505, ll. 1-6.

Dr. Clay Nichols performed the autopsy on October 11, 2010. R. 578, ll. 8-10. The decedent was five feet, ten inches tall and weighed 168 pounds. R. 578, l. 22 – R.

[7] In his statement, appellant told Holdorf that he was six feet, three inches tall and weighed 285 pounds. R. 663, ll. 3-9.

579, l. 3. The decedent's blood alcohol level was 0.232. R. 581, ll. 21-25. The cause of death was "post-head-trauma due to motor vehicle collision" and elaborated "where he was a pedestrian and this was due to an altercation." R. 582, ll. 13-18. He described the decedent's injuries as "consistent with his body being run over by a truck after a fight or physical altercation." R. 582, ll. 22-24. On cross-examination, Dr. Nichols clarified that the decedent did not die from a single punch; rather, he died as a result of having his head run over by a tire of a truck. R. 583, ll. 15-24. Alcohol may give some people a "false sense of physical superiority" and "feelings of self-confidence." Alcohol may reduce inhibitions. R. 584, l. 9 – R. 585, l. 11.

At the close of the state's case, appellant moved for a directed verdict of acquittal on both counts.

Impeachment- fair response contradiction testimony

As seen, during the testimony of Adam Paxton, defense counsel argued the state opened the door to contradictory evidence by presenting testimony that "the two of them were merely minding their own business and all Martin Gasque was doing was just celebrating with Gamecock fans, when they know right after the fact they've got a witness [Allen James] within forty-eight hours that that's not true and it impeaches this witness as to both what he [Paxton] was doing and as to what Martin Gasque was doing." Counsel said this would be "text book" impeachment with Paxton and that the subject would also come up in the defense case. R. 537, l. 8 – 540, l. 2.

Later, after the colloquy with appellant about whether he wished to testify the assistant solicitor said : " [I] see Alan James in the courtroom and we have a matter of law to take up prior to calling that witness." The solicitor stated that she understood that defense

counsel Gasser was going to call eyewitness James to testify at the decedent "was flipping people off, cursing at them, almost got in several fights. He saw him get out and use the bathroom on the side of the road and things of that nature." R 766, l. 20 - 767, l. 5.

The assistant solicitor argued that the testimony of eyewitness James should be excluded under Rule 608, SCRE, and asserted that while the rules allow "instances of conduct can be inquired to on cross-examination, but it does not allow any incidents of conduct to be proved by exigent (sic) evidence, which is what we believe Mr. Gasser is trying to do through Mr. James. We ask that the testimony be excluded." App. 767, ll. 6-17.

Defense counsel informed the court that James gave an affidavit to the Sheriff's Department forty-eight hours after the incident. R. 1466-A. James had gone to the stadium to meet some friends who had been at the game all day. James arrived about seven-thirty and noticed the car the decedent was riding in as a passenger. They were "yelling at fans walking up the road. They were nice to Gamecock fans but not to Alabama fans. They almost got into a couple fights and had people flipping them off or cussing at them. I also noticed the passenger getting out and going to the bathroom. They were also revving up the engine with loud mufflers and cutting people off so they could not get into the road." James's proffer, as shown below, unquestionably showed he clearly was talking about the decedent's behavior in contradiction of what his friend Paxton claimed on cross-examination. R. 768, l. 21 – 769, l. 14.

Defense counsel reminded the judge that Paxton testified the decedent was congratulating Gamecock fans, and Paxton claimed nothing unusual happened. Counsel said the events leading up to the fatal encounter "provides part of the context of what's

going on. It's part of the context of the event. In this case, the allegation is part of the fabric of the case. He's [James] just another witness to provide relevant evidence as to what his observations were. Because they asked questions as to observations of Mr. Paxton and observations of the Echenroths. And we're going to ask Mr. James under the same theory. " R. 769, l. 15 – 770, l. 16.

Counsel argued that Rule 608, SCRE was irrelevant given that the testimony was from a witness that "made observations that were different from Mr. Paxton's and different from Echenroths as to what was going on of the participants. So that's the purpose. It's relevant evidence. It's relevant to the facts and circumstances leading up to what occurred and we're offering it for the same reason the state offered their relevant, what they perceive to be relevant evidence." R. 772, ll. 8 - 21.

Defense counsel further explained that if this evidence was excluded "the only thing the jury would have heard, your honor, is the testimony of Mr. Paxton as to what, you know, his testimony as to what he observed as to what was going on and the testimony of the Echenroths..." Counsel noted that the defense had a right to offer different observations and that "what's good for the goose is good for the gander." R. 773, ll. 1 -22.

Counsel also argued that "there has to be some estoppel issue here. He argued that state had offered evidence on this subject and now was attempting to exclude counter evidence from the same subject matter. R. 773, l. 24 – 774, l.11.

The judge responded that testimony was not admissible under Rule 405, (b), SCRE. The judge stated she only allowed the defense to ask witness Paxton on cross-examination about the decedent urinating because it was "straight up impeachment and that's the reason I

allowed it." The judge apparently reasoned that only what occurred at the time of the immediate encounter was admissible. R. 774, l. 17 – 777, l.14

Defense counsel noted that he understood the judge had ruled but he stated that testimony of James was critical because he had watched the conduct of the decedent constantly as to what was happening "for a good period of time." R. 777, l. 21 – 780, l. 7. The judge responded that she did not see the evidence as having any relevance to the alleged victim's peacefulness or aggressiveness. She also said that while going to the bathroom in public "may be crass, it may be rude, itself a violation of federal laws, called exposing one's self especially if it's not in the woods or in your backyard with big bushes which it seems like most men like to find themselves there." R. 780, l.9 – 781, l.3.

The defense then proffered the testimony of Allen James. James testified that on October 9, 2010 he was working at Clothing World, a store he owned with his brother, in Elgin and therefore he could not attend the football game. R. 782, l.7 – 783, l.1. After they closed the store "I decided I was going to go down to the stadium." R. 783, ll.2 - 5. James drove down Interstate 77 to Shop Road. He was going to "Farm Bureau Bank where I have a tailgate spot." R. 782, l.13 – 783, l.24.

James testified when he got on Shop Road there was a black pickup truck in front of him. James remembered that the pickup truck was "a really large truck with large wheels ... but what I really noticed was really just the passenger were being very loud and obnoxious and yelling at people and all kinds of stuff the whole way in. And as I said, they were being very nice to the Gamecocks but very rude to the Alabama or anything like that on their shirt." R. 784, ll.5 -17. James said both the driver and passenger were yelling a lot

and he saw the passenger and get out and use "the bathroom" ... "in front of the highway patrol center there with the driver's license department." R. 784, ll. 9 - 25.

James continued:

> And like I say they were yelling at a lot of people, cutting people off. Obviously it's the driver cutting people off. They were both yelling at people. I saw several people literally almost get in a fight with them or yell at them or argue with them or flip each other off and things like that because they were being very rude to everyone they were passing. It was the driver and a passenger being rude but like I said, the driver was cutting people off, so they couldn't get out . . . so there was traffic both ways and when the cars coming out on our side would get an opening, they would have to go all the way across the road to try to go left to leave and this truck was revving up their engine on purpose stopping them and stopping in front of them so they couldn't get out and it was just upsetting drivers a lot."

R. 784, l. 25- 785, l. 18.

James testified: "[T]he passenger [the decedent] in the truck was flipping people off, cussing at people, yelling at people. Like I said they were nice to gamecocks. Anyone with an Alabama shirt, they were being total jerks too. And I'll say that again, the passenger." R. 786, ll. 9 -13. James said he heard cursing and the passenger "flipping people off. " The Alabama fans were identifiable because they were "wearing Alabama gear." R. 786, l. 24 – 787, l. 21.

James observed appellant walking "towards the car and I then saw the fellow step out of the car and then that's when I couldn't see when he went down, but apparently he went down, but that's what I could see." R. 788, l. 22 – 789, l. 3. James said the man who engaged appellant was the same person he saw riding down Bluff Road "flipping off Alabama fans." R. 789, ll. 12 - 16

The solicitor responded that the defense wanted to attack "the character of the victim." She argued under Rule 405, SCRE or Rule 608, SCRE and State v. Day, 314 S.C.

410, 535 S.E.2d 431 (2000) that the evidence was not relevant because appellant did not know of the decedent's behavior before the confrontation. R. 789, l. 25 – 791, l.2. The judge stated she was not changing her ruling, and that this testimony was not admissible. R. 791, l.3 – 793, l. 19.

Defense case

Dustin Lindsey, a native of Mobile, Alabama, lived with his twin brother, Jordan Lindsey, and appellant in Columbia. R. 408, ll. 6-11; R. 799, ll. 10-11; R. 799, ll. 14-15; R. 799, l. 25 – R. 800, l. 5; R. 803, ll. 17-25. The Lindsey twins played football at the University of South Carolina from 2004 through 2009. R. 800, ll. 6-14. Appellant and the Lindsey twins invited numerous friends - fans of the Gamecocks and the Crimson Tide - to join them for tailgating. R. 804, ll. 5-21. Appellant and his friends arrived at the tailgate spot, located at Crawdad Customs across from the Gates on Shop Road, shortly before noon for the 3:30 p.m. game. R. 201, ll. 17-19; R. 350, ll. 6-8; R. 802, ll. 23-25. Dustin drove his friends in his green GMC Sierra. R. 805, ll. 13-15.

Dustin estimated there were between twenty to thirty people at his tailgate, including families with children. R. 808, ll. 14-16; R. 809, ll. 1-12. Although Dustin had a ticket to the game, he decided not to go in. He preferred to stay out with his friends who were unable to get tickets. R. 809, ll. 13-24. The mood was "happy, jovial" with some "occasional talking smack between friends." R. 810, ll. 9-17. Dustin said he drank about ten beers that day. R. 811, ll. 18-25.

Dustin recalled the game ended around 7:30 or 8:00 p.m. R. 812, ll. 24-25. After the game, the group planned to go out. R. 813, ll. 10-16. Dustin was driving his truck and appellant, Coggins, Jordan, Marque Hall and Mike Davis were with him. R. 814, ll. 13-17.

Traffic was "heavy" and Dustin waited to pull out onto Shop Road. In addition to the cars on the road, pedestrians were walking along the roadway. R. 816, l. 25 – R. 817, l. 4. "[T]he moment that [he] saw the opening to pull out, a truck, a black truck pulled in front of [him] where he couldn't get out on the street." R. 816, ll. 16-24. The passenger of the black truck "was hanging out the window screaming slurs." Dustin explained, "Because we were starting out, we were like come on let us out, man. He was like fuck y'all, all kind of shit and then we [] was like come on mother fucker let us out and with his hand gestures and words, it was fuck you and says fuck you back." R. 818, ll. 1-20.[8] On cross-examination, Dustin explained the decedent "was instigating the whole time." R. 884, l. 8.

Appellant opened his door to get out and stop traffic. The moment appellant opened his door, the decedent opened his door too. Appellant was wearing an Alabama polo shirt and hat. Upon seeing the decedent open his door, too, Dustin got out of his truck. R. 819, ll. 5-24. Appellant confronted the decedent. The two "kind of butted chests and then there was a push." Appellant hit him once with his right hand, and the decedent fell. R. 820, ll. 1-6; R. 823, ll. 6-13. During the confrontation between appellant and the decedent, the black truck remained stationary. R. 825, ll. 17-21. When the decedent fell to the ground, he was "[k]ind of straddling the line on the white line." R. 826, ll. 5-9; R. 879, ll. 1-5. However, he never lost consciousness. The "moment" the decedent fell, the truck started rolling to the right over the decedent.[9] Dustin and appellant tried to grab the decedent. Appellant started punching the side of the truck, "freak[ing] out the driver." In fact, the driver "hit the gas and

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[8] Dustin "heard a bunch of fuck you's and stuff of that nature." R. 885, ll. 23-24.

[9] Dustin explained that the truck was taking a right to get off to the right side of the road "[b]ecause it was bumper-to-bumper traffic, still." R. 877, ll. 18-21.

gunned it." When the truck started to roll over the decedent, he "started to lean up, put his hands up to try to block it." Despite people screaming for the driver to stop, he continued going until he was over on the grass. R. 826, l. 12 – R. 827, l. 2; R. 827, ll. 22-24; R. 831, ll. 19-23; R. 832, ll. 12-15; R. 879, ll. 9-25. Appellant ran to find a police officer. R. 831, ll. 14-18. Within a couple of minutes, appellant returned with a police officer. R. 833, ll. 6-13.

Jordan Lindsey's testimony was consistent with Dustin's. When the group decided to leave in the green truck, Jordan was sitting in the front seat along with Dustin, appellant, and Coggin. R. 941, l. 25 – R. 942, l. 3. Everyone in the truck "was just trying to have a good time with each other." R. 959, l. 22 – R. 960, l. 3. Traffic was "bumper-to-bumper" and foot traffic was "pretty heavy" too. R. 943, ll. 9-14. They were the first car approaching Shop Road from their tailgate area. R. 943, ll. 15-17. As the black truck approached, appellant had his window down trying to get the truck to allow them onto Shop Road. R. 944, ll. 4-11. The passenger of the truck flipped the bird to Appellant. R. 944, ll. 15-25. Then, Jordan heard appellant and the passenger start "cussing ... saying fuck you and stuff like that." R. 945, ll. 10-21.

Appellant told the passenger he did not "need to be talking so big." R. 964, ll. 4-17. Appellant opened his door to stop traffic to allow them to exit onto Shop Road. "[A]s soon as he opened his door," the passenger opened his door, too. R. 946, ll. 1-7. Appellant walked toward traffic, and the passenger walked to the end of his door. R. 947, ll. 4-8. Appellant and the passenger bumped chests, then the passenger pushed appellant. R. 948, l. 23 – R. 949, l. 10; R. 964, l. 24 – R. 965, l. 6. In response, appellant hit the passenger. R. 948, ll. 24-25. The passenger fell with his torso "right on the white line," and the black truck started moving at forty-five degrees to go off the road, but was on top of the passenger.

R. 949, ll. 20-25; R. 952, ll. 2-13; R. 965, ll. 10-12. The truck "creeped up the whole time and then once the yelling started, it pretty much gassed it off the road." R. 952, ll. 16-18. Appellant tried to pull the passenger out of harm's way and beat on the side of the truck to warn the driver. R. 952, l. 19 – R. 953, l. 3. Appellant immediately began trying to find help. R. 954, ll. 3-4. Jordan never expected the truck to veer or move off the roadway. R. 953, ll. 22-24; R. 959, ll. 18-21.

Mike Davis played football at the University of South Carolina until his graduation in 2009. R. 897, ll. 5-12. Davis met appellant at the Alabama game. R. 898, ll. 4-10. Davis was on the sidelines during the game. R. 899, ll. 11-12; R. 900, ll. 11-17. After the game, Davis went to the Lindseys's tailgate spot. R. 902, ll. 13-15. The tailgate included football players and their families and friends. It was "family-oriented." R. 902, ll. 7-12. Fans of Alabama and South Carolina were present. R. 903, ll. 3-9. In light of South Carolina's victory, the atmosphere at the tailgate was "ecstatic" and "[e]verybody was happy ... [and] celebrating." R. 903, ll. 14-23; R. 904, ll. 7-13.

Eventually, they got into Dustin's green truck to leave. R. 906, ll. 4-18. Davis was in the middle backseat. R. 907, ll. 16-18. Traffic "was jam packed like always." R. 907, l. 25 – R. 908, l. 2. In the car, they "were all laughing, cracking jokes, talking about other times, talking about what [they] were going to do." Everyone was happy. R. 908, ll. 13-20. As they moved toward a space for them to pull out into traffic, a black truck blocked them. They tried again, but the truck "jumped forward again." R. 909, ll. 1-9. Appellant got out of the car, indicating he was "going to see about holding traffic up." R. 909, ll. 10-18. The group in the car "started laughing because he had an Alabama shirt on ... [because] no one's going to let [him] out" with that shirt on. R. 910, ll. 18-24.

The truck's passenger rolled down his window and made a hand movement. R. 909, l. 19 – R. 910, l. 1. The passenger then got out of his truck and took two or three steps. R. 910, ll. 7-15; R. 911, ll. 1-5; R. 912, ll. 11-13. The passenger "just started going back and forth, back and forth." Davis explained that "as a USC player and being a fan and back at the game, you see stuff like that, you see stuff, arguing." Then, he "started getting really aggressive" with his fists balled up. The passenger started "taunting" appellant, "saying, Oh, you Alabama, you Alabama, you Alabama." R. 911, ll. 1-24; R. 921, ll. 11-13. After the passenger made a movement – a flinch, appellant hit him. R. 912, ll. 1-4; R. 922, l. 12. Davis was clear that appellant hit the passenger only once and never reached into the window. R. 918, ll. 13-17. The passenger fell to the ground and out of Davis's view. R. 913, ll. 1-4.

Traffic was still "bumper-to-bumper." R. 913, ll. 21-22. The truck "turned the wheel and jerked off to the side" of the road. R. 914, ll. 6-20. Appellant was "[t]apping on the car trying to tell him to stop." R. 915, ll. 6-10. Appellant then looked for help. R. 915, ll. 18-22. Davis explained this was the "last thing [he] was expecting." R. 916, ll. 1-2.

Marque Hall played football for the Gamecocks starting in 2004. R. 986, ll. 1-5. He played with Davis and the Lindsey twins. R. 987, ll. 6-14. Hall met appellant through the Lindsey twins. R. 987, ll. 20-22. Hall went to the Lindseys' tailgate spot often because it was a place where players and their families gathered. R. 988, ll. 1-15. He tailgated with the Lindsey twins, appellant, and others after the game. R. 988, l. 23 – R. 989, l. 13. When the Gamecocks won, the mood was joyful with lots of cheering. R. 990, ll. 3-7. After the game, Hall got into the green truck owned by the Lindseys to leave the game. R. 991, ll. 5-

8. Everyone in the green truck was "pretty excited" about going out to celebrate the victory. R. 995, l. 22 – R. 996, l. 5.

When they were trying to pull out onto Shop Road, they "heard a lot of commotion coming down Shop Road," which is "[u]sually kids yelling things like that." Traffic was stopped in front of their tailgate area. Hall saw a black truck with "real aggressive mud tires on it." The passenger in the vehicle was "hazing people a little bit." Then, the passenger and appellant "started having a little bit back and forth" because appellant had on an Alabama shirt. R. 992, ll. 5-24; R. 1000, ll. 2-11. The passenger then stepped out of the truck, and appellant stepped out. Appellant approached the passenger and the two had "a couple of words." When the passenger pushed appellant hard in the lower chest, appellant hit him. R. 993, ll. 1-12.

After appellant hit him, the passenger "just dropped." He was trying to hold himself up and reached for the "flat bed part" of the truck. R. 994, ll. 2-7. The driver then pulled off to the right in a panic. R. 994, ll. 10-11. When the driver pulled off, appellant started banging on the truck and yelling "at the top of his lungs" for the driver to stop. R. 994, ll. 16-21. The truck ran over the passenger. R. 995, ll. 1-2. Appellant then went to get help. R. 995, ll. 18-21.

At the close of the defense case, appellant renewed his motion for directed verdict concerning the BPHAN charge. The trial judge again denied the motion. R. 775, ll. 17-23.

ARGUMENT

1.

The court erred by excluding the testimony of eyewitness Alan James that the decedent was acting in a disorderly rude aggressive fashion toward Alabama fans, and that he got out of the truck and urinated in public since the decedent's friend, Adam Paxton, earlier testified that the decedent did not get out of the truck, did not relieve himself, and he was not acting in a disorderly fashion since the state opened the door to this fair response highly relevant testimony.

As seen, state's key witness Ryan Paxton testified that he had only had two beers while tailgating on the day of the South Carolina-Alabama football game. Paxton "assumed" that the decedent had been drinking "all day long and into the night" but he said "I wasn't watching him." R. 532, ll. 5- 7.

Paxton denied that decedent got out of his truck and urinated on the side of the road. Paxton also denied that the decedent cursed at Alabama fans and was acting disorderly. R. 543, l.11 – 544, l. 3.

That testimony was directly contradicted by Alan James. James said the decedent got out of the car and urinated in front of the Highway Patrol center. R. 784, l. 9 - 25. He testified the driver, Paxton, was cutting people off and he and the passenger, the decedent, were yelling and "flipping people off." The target of their disorderly conduct was anyone wearing an Alabama shirt or "wearing Alabama gear" R. 784, l. 25 - 787, l. 21.

Defense counsel correctly argued that the proffered testimony of Alan James was relevant, and that the state also opened the door to it. Counsel correctly noted that the

state was not entitled to present the false picture to the jury of what occurred without contradicting evidence that was readily available in witness James also being considered by the jury.

The judge erred by accepting the solicitor's assertion that the defense just wanted to attack the decedent's character. The solicitor continued that theme into her closing argument where she accused the defense of putting forth "the most classic defense ... trash the victim. Blame the victim. In this case, blame the driver, blame the victim." R. 1092, l. 24 – 1093, l. 14.

The solicitor cited State v. Day, 314, S.C. 410, 535 S.E.2d 431 (2000), for the proposition that appellant was not aware of the decedent's rowdy obnoxious and disorderly behavior a little further down Shop Road that was proffered by eyewitness James. Therefore, the solicitor argued it was not admissible. State v. Day concerned the defendant's knowledge of the decedent's *prior acts of violence*. Prior acts of violence by the decedent have distinct evidentiary predicate. Further, the events here happened seconds or minutes earlier, and were not remote. While the decedent's behavior was certainly disorderly according to the James proffer, there was no assertion before he encountered appellant that it was violent. Day was inapposite as were Rule 405, SCRE, and Rule 608, SCRE. The correct focus and analysis of the James proffer, as defense counsel urged, was impeachment and contradiction. The trial judge, respectfully, thought that because she allowed cross-examination of Paxton that was all the defense was entitled to and that was incorrect.

Paxton painted a picture for the jury of the decedent celebrating politely with Gamecock fans. He specifically denied that the decedent was cursing at people, and he

denied the decedent urinated in public. The decedent's state of mind at the time of the encounter with appellant was highly relevant. The decedent was undoubtedly intoxicated given his blood-alcohol content exceeded .232. Regardless of any dispute in the evidence as to when the men first encountered each other, one fact remains constant: the physically smaller decedent got out of the car to confront the larger appellant. This was a true example of the usually trite phrase "liquid courage."

Appellant had the right to impeach Paxton with this contradictory James evidence of what occurred. See State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). In State v. Green, 213 S.C. 170, 175, 48 S.E.2d 641, 643 (1948), this Court noted, (while the rule at that time was one could not impeach his own witness), "that while a party cannot impeach his own witness, *he may prove by other witnesses that the facts or otherwise than as such witness testified them to be.*" (Emphasis added) See, also, Collins, South Carolina Evidence, Section 5.14 at 161 (2000 ed.).

In Smith v. Henry, 2 Bail. 118, 18 S.C.L. 118 (Ct. App. of Law and Equity of South Carolina 1831), the Court reversed based on trial court's improper exclusion of witness testimony contradicting earlier testimony. The trial court had rejected the testimony, as being merely a contradiction of the witness in matter irrelevant to the issue.

The Court noted: "[I]f the question is, in any wise, material to the issue, his answer can be contradicted. The question put to Meacham, and his answer, had a direct and material bearing on the issue of fraud or no fraud: It was, therefore, competent to the defendant to contradict him; and if he had proved by Alderson, what he proposed to do, it appears to me, that the contradiction would have been as complete, as if the witness had

said, Meacham admitted to me that eleven hundred dollars was the cash consideration of the bill of sale. A new trial must be granted." Smith v. Henry, 2 Bail. 118 at 127.

Further, as defense counsel argued, "this was part of the fabric of the case. He's [James] just another witness to provide relevant evidence as to what his observations were. Because they asked questions as to observations of Mr. Paxton and observations of the Echenroths. And we're going to ask Mr. James under the same theory." R. 769, l. 15 – 770, l. 16. In State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000), this Court held that evidence of the defendant's drug use was also admissible under the theory of *res gestae*, citing State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996):

> Here...the temporal proximity of the cocaine use to the robbery and murder is so close that one cannot deny that the cocaine use was so much a part of the "environment" of the crime that omitting the evidence of it would unnecessarily fragmentize the State's case...The use of the cocaine here was inextricably intertwined with the robbery and murder. Under these circumstances, such evidence was properly admitted as part of the res gestae of the crime.

The state stressed the importance of "independent witnesses," and James was that for the defense. While the state would attempt to discount the eyewitness testimony of the former Carolina football players -- the Lindsey twins, Mike Davis, and Marque Hall because they were appellant's friends – James had left working at this own business and he was a sober independent witness with a unique vantage point. He watched the decedent cursing and "flipping off" Alabama fans in the bumper to bumper Shop Road traffic, the decedent being disorderly, and him urinating in front of the police station. His eyewitness testimony was powerful response impeachment, and it should not have been excluded.

2.

The court erred by refusing to direct a verdict of acquittal on the charge of breach of the peace of a high and aggravated nature since the court improperly attributed criminal liability to appellant for the post game traffic chaos that he did not cause, and the state failed to present evidence showing appellant's guilt of the two aggravators alleged in the indictment.

Relevant facts

At the conclusion of the state's case, appellant moved for a directed verdict on both charges. Concerning BPHAN, appellant argued the prosecution failed to present evidence of "conduct that would support the aggravated breach of peace." Using the logic posited by the prosecution, BPHAN would arise "in every occasion involving any - - any circumstance where first responders show up." The fact that "there was one punch or even two punches" did not "rise[] to the level" required for aggravated breach of peace. "I just don't think that rises to the level suggested by our legislature for this charge to go forward as to this charge." R. 760, l. 25 – R. 761, l. 17.

The judge denied appellant's motion. She relied upon "this many people in the public and you add to the fact this conduct." as the evidence to support the charge of BPHAN. She concluded, "I do believe that there are things in evidence on each and every element." to include high and aggravated, just as you take these events on one punch, two punches, six punches and breach of peace high and aggravated, based on the evidence, which I have heard, there is evidence on each and every element." R. 761, l. 18 – R. 762, l. 5. However, at no point did the trial judge link the fight to the breach of the peace.

At the conclusion of the defense case, appellant renewed his motion for a directed verdict regarding the charge of BPHAN. R. 1033, line 7 – R. 1034, line 17. The judge denied the motion for the same reasons stated earlier. R. 104, lines 21-23. Appellant moved for a new trial or in the alternative, a judgment of acquittal as well. R. 1310, lines 10-11; R. 1346, lines 3-12. The judge denied the motion for new trial, or in the alternative, motion for a judgment of acquittal by written order filed on May 13, 2013. R. 1457.

Discussion

In the present matter, the indictment alleged appellant did "knowingly, willfully, and intentionally disturb public order and/or public tranquility through his conduct, accompanied by circumstances of aggravation, fighting in the roadway and/or disrupting traffic such acts constituting the offense of Breach of Peace." R. 1464-1465. Thus, the state was required to present evidence that Appellant (1) knowingly, willfully, and intentionally (2) disturbed public order and/or tranquility (3) through his conduct and (4) fought in the roadway and/or disrupted traffic.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). The prosecution failed to present any direct or substantial circumstantial evidence that Appellant's conduct breached the peace or that his conduct was accompanied by the aggravating circumstances alleged.

Breach of the peace is "not susceptible of exact definition." State v. Randolph, 239 S.C. 79, 83, 121 S.E.2d 349, 350 (1961). "The term 'breach of the peace' is a generic one embracing a great variety of conduct destroying or menacing public order and tranquility." State v. Peer, 320 S.C. 546, 552, 466 S.E.2d 375, 379 (Ct. App. 1996)(citing State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967)). Speaking generally, "it is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence." Id. "The word 'peace' as used in the phrase 'breach of peace' means the tranquility enjoyed by members of a community where good order reigns." Id. Additionally, "[a]lthough it includes acts likely to produce violence in others, actual violence is not an element of breach of peace." Id. (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)). "Whether conduct constitutes a breach of the peace depends on the time, place, and nearness of others." Id. Here, of course, the charge is *aggravated* breach of the peace.

The Court of Appeals found "no actual breach of the peace occurred" where the prosecution failed to produce evidence that the defendant's "actions/speech caused at least a minimum level of nervousness, frustration, anxiety, anger, or other evidence that the peacefulness of the neighborhood had been breached." In the interest of Jeremiah W., 353 S.C. 90, 94, 576 S.E.2d 185, 188 (Ct. App. 2003), aff'd in part and rev'd in part, In the interest of Jeremiah W., 361 S.C. 620, 606 S.E.2d 766 (2004)(specifically affirming the lower court's holding that the defendant's arrest for breach of peace was unlawful). Two police officers employed to provide security services at an apartment complex saw the defendant walking toward the complex. One officer stated she believed there was a trespass warning against him. The second officer attempted to call the defendant over to his car.

The defendant responded by yelling profanity and continuing to walk. The officer then intercepted the defendant, who said "What?" in the officer's face with "his arms bowed out." Adults and children were present outside the complex. The officer arrested the defendant. Id. at 92, 576 S.E.2d at 187.

The prosecution's evidence of the effect of the defendant's conduct on the bystanders included that the bystanders, who were standing on the sidewalk approximately thirty to forty feet away, assembled after the officer got out of his car and walked toward the defendant. Additionally, the defendant never addressed the bystanders, and the bystanders never reacted in any way. Id. at 94-95, 576 S.E.2d at 188. "At most, the officers' testimony amounted to evidence of their own fear of a potential breach of the peace." Id. at 95, 576 S.E.2d at 188. Further, the defendant's act of "bowing up" or using profane language at the officer did not support his arrest for breach of the peace in light of his protections under the First Amendment to oppose or challenge police action verbally.

Two club owners were convicted of breach of peace based upon numerous complaints to the sheriff about the noise and bass vibrations emanating from the club. Peer, 320 S.C. at 549, 466 S.E.2d at 377. The club, which fronted the Laurel Hills subdivision, advertised its bass sound system as simulating earthquakes. Id. Residents of the community testified the "bass resonated throughout the community," rattling walls, doors, and windows. Some claimed they were unable to sleep, work, or even watch television because the noise lasted from 5:00 p.m. until 2:00 a.m. Residents complained of headaches and nervousness. Id. at 550, 466 S.E.2d at 378. The Court of Appeals upheld the trial court's refusal to direct a verdict finding "[t]he nervousness, anxiety, and frustration felt by residents of this community as a result of the unyielding noise and bass vibrations emanating from the Club

coupled with the resolute and nonchalant attitude of the [club owners] presented a reasonable justifiable inference that the [club owners] breached the peace." Id. at 553, 466 S.E.2d at 379.

In City of St. Louis v. Sage, 254 S.W.2d 252, 254 (Mo. App. 1953), the St. Louis Court of Appeals explained that "[t]he peace of an individual cannot be disturbed, unless the individual is within the peace." "Unless he is in 'repose of mind and peaceful intent' his peace cannot be disturbed." Id. Sage and others gathered in the backyard of a friend's home to watch a film. Neighbors were upset with the showing of the film and assembled in adjoining backyards. One set of assembled neighbors set off a railroad flare during the showing of the film. At the conclusion of the film, some neighbors, who were admittedly irritated and angry, told the film watchers to take their communistic materials and go elsewhere. Sage shouted back, "Well, at least we are not damn Nazi like you are." At this remark, the neighbors charged after Sage, but were stopped by police. Id. at 253. The police ultimately arrested Sage for breach of peace. The court dismissed the charge finding the prosecuting witnesses were "members of a mob of irritated and angry citizens" who were shouting insults at Sage; thus, the prosecuting witnesses were not "within the peace." Id. at 254.

South Carolina law would permit this Court to determine the evidence was legally insufficient to support the conviction for BPHAN, but sufficient to support a conviction for the lesser-included offense of breach of the peace. See State v. Muldrow, 559 S.C. 264, 559 S.E.2d 847 (2002). This Court found the statute required the prosecution prove that a defendant used a representation of a deadly weapon in order to sustain a conviction for armed robbery. Muldrow's note to the store clerk in which he stated "Give me all your cash

or I'll shoot you," failed to satisfy the statutory requirement that the robbery occur "while using a representation of a deadly weapon." Id. at 269, 559 S.E.2d at 849-850. Concerning the appropriate conviction for Muldrow, this Court explained that "[w]here the evidence is insufficient to sustain a conviction on the greater offense but is legally sufficient to support a conviction on the lesser, the Court on appeal may direct the entry of judgment on the lesser offense."

Hours prior to the start of the big game, people, including appellant and the decedent, arrived from near and far to eat, drink, and watch some football. Tables, tents, and chairs littered the areas surrounding the stadium. As seen, some set up television sets with satellite dishes to watch the game outside the stadium. During the game, fireworks exploded for each score by the Gamecocks. The bands played to excite the fans, who cheered and jeered during the four-hour nail biter. When the Gamecocks won, the stadium and surrounding areas erupted.

Every witness described a loud and boisterous environment on Shop Road after the football game - as it is after every game. The atmosphere was electric on the night of October 9, 2010, outside Williams-Brice because the Gamecocks upset the number one team in the country. The fans were on fire and the scene was chaos. Most attendees had been drinking alcohol; some, like the decedent, to great excess. People were walking in the roadways. Tens of thousands of football fans, who had gathered in a small section of town to watch the football game, tried to leave using one of two major thoroughfares. The streets were overrun with cars, trucks, and people. Traffic was bumper to bumper. Some fans continued to tailgate after the game. Surprisingly, some people who had not been in the area all day battled the traffic to join in the celebrations.

Without question, the decedent was drunk. Paxton admitted the decedent had been drinking almost all day. According to the pathologist, the twenty-year old's blood alcohol level was 0.232. The decedent was hanging out the truck's window yelling at passersby. The jury did not hear the proffered testimony of eyewitness James but the fact the decedent chose to get out of the truck to confront the larger appellant is strong evidence his unruly behavior was caused by drinking in excess. In light of the surroundings exemplified by the conduct of the decedent, appellant's act of punching the decedent could not be an aggravated breach the peace because the community was not at peace – it was in chaos. Unfortunately, happiness with a major victory was not enough, and taunting and cursing at the losing fans took place.

The state failed to present evidence that appellant was fighting in the roadway, which was one of the aggravating circumstances alleged in the indictment. The witnesses testified the decedent exited the black truck and walked several steps before he pushed appellant. The black truck was in the roadway, therefore, the decedent had to walk out of the roadway in order to push appellant. The witnesses also testified that when decedent fell after he was punched, he landed on the white line on the side of the roadway prior to the truck running over him. This further indicated that the punch occurred off the roadway in order for the decedent to fall to the white line.

Appellant's conduct of punching the decedent did not disrupt traffic. Traffic after football games on Shop Road is always bumper-to-bumper, as the evidence clearly demonstrated. Every witness testified that prior to appellant punching the decedent, the traffic was at a standstill. Although the roadway was blocked to enable police to investigate the homicide, traffic continued to move.

Appellant's conduct of punching the decedent was not the cause of the disruption of traffic, if such a disruption occurred. Any disruption of traffic was the direct result of Paxton running over and killing his friend. Appellant *was not the proximate cause of the decedent's death as confirmed by the jury's verdict on the involuntary manslaughter charge*; therefore, he could not be the proximate cause of the disruption of traffic resulting from the death.[10]

Proximate cause is the direct cause, the immediate cause, the efficient cause. It is the cause that without which the result would not have occurred. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 447, 494 S.E.2d 827, 834 (Ct. App. 1998). "'The touchstone of proximate cause in South Carolina is foreseeability. Foreseeability is determined by looking to the natural and probable consequences of the act complained of.'" Id. (quoting Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996)). The "'wrongful or illegal act of an independent third person'" is not foreseeable because it is "'an unnatural and abnormal intervention in the ordinary train of events and consequences not reasonably to be anticipated.'" Id. at 447-448, 494 S.E.2d at 834 (quoting Crowley v. Spivey, 285 S.C. 397, 407, 329 S.E.2d 774, 780-781 (Ct. App. 1985)).

Appellant could not foresee that Paxton run over his friend. Although this was undoubtedly a tragic mistake on Paxton's part appellant would be remiss if he did not point out that Paxon was never charged officially by police for violating the law, any law. In his

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[10] Judge Goodstein found the jury acquitted appellant of involuntary manslaughter, having determined that his conduct was not the proximate cause of the decedent's death. "We now know the jury found the Defendant's conduct was not the proximate cause of [] Mr. Gasque's death." R. 1452; R. 1454.

testimony, he admitted to violating several laws of South Carolina when he ran over the decedent.

Paxton claimed he only drank two beers all day in this environment. It is widely known that law enforcement scoff at the idea of "everyone says they only had two beers." Despite running over his friend Paxton was not investigated for DUI or felony DUI. S.C. Code Ann. § 56-5-2930; see also S.C. Code Ann. § 56-5-2933(making it unlawful for a person to drive a motor vehicle while his alcohol concentration is 0.08 or more). If a person drives a motor vehicle while under the influence of alcohol and does any act forbidden by law or neglects any duty imposed by law while driving, and the act or neglect is the proximate cause of death of another, the person is guilty of felony DUI. S.C. Code Ann. § 56-5-2945.

Paxton admitted to driving the black truck that took his friend's life. South Carolina criminalizes reckless vehicular homicide, which is defined as "driving of a vehicle in reckless disregard of the safety of others" resulting in death. S.C. Code Ann. § 56-5-2910(A). Other examples also illustrate Paxton's criminal conduct. State law requires all drivers to exercise due care "to avoid colliding with any pedestrian ... and shall give an audible signal when necessary and shall exercise proper precaution upon observing or any obviously confused, incapacitated or intoxicated person." S.C. Code Ann. § 56-5-3230; see also, Lester v. McFaddon, 288 F.Supp. 735 (D. S.C. 1968)(holding that motorists having a duty to exercise reasonable car to avoid injuring a pedestrian who is upon or along a highway, and the fact that the motorist may have the right-of-way over the pedestrian does not relieve him of the duty of care). Paxton failed to exercise due care as revealed by his testimony – he moved his truck in the direction of the decedent and appellant although he

did not know where the two were, but knew they were very close to the right side of his truck.

An examination of the case law in this case shows a directed verdict should have been granted on the charge of aggravated breach of the peace. In State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000), this Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, in State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) the Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. This Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. The Odems

Court used the traditional circumstantial evidence jury charge in making its directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), this Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, this Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

On October 9, 2013, the Court of Appeals granted a directed verdict to Karl Lane on the charge of burglary in the first degree. State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (2013). On April 21, 2011, Mark McSwain discovered several firearms were stolen from his safe. Id. at ___, 749 S.E.2d at 166. McSwain's neighbor saw a car carrying two people pull into McSwain's driveway at 3:20 p.m. that day. One of the individuals approached the front door of the home, returned to the car, and then approached the back

door. The neighbor described the car as red or burgundy with a paper tag and the front passenger panel was covered in gray primer. Id. After police left the scene, McSwain noticed a folded piece of paper in the grass beside the driveway. The paper was from the unemployment office, where Lane had visited the day of the burglary and was located about three miles from McSwain's house. Id. at ___, 749 S.E.2d at 167.

The prosecution presented evidence that at times Lane drove a car matching the description provided by McSwain's neighbor and was driving the car the day of the burglary, that the folded piece of paper belonged to Lane, and that Lane did not want to talk to the police the day after the burglary. However, the Court found the evidence did not meet the standard of substantial circumstantial evidence. "At most, the evidence the state presented raise[d] only a mere suspicion that Lane committed the crime." Id. at ___, 749 S.E.2d at 168.

The state failed to present evidence that appellant was fighting in the roadway, which was one of the aggravating circumstances alleged in the indictment. There was evidence the decedent exited the black truck and walked several steps before he pushed appellant. The black truck was in the roadway, therefore, the decedent had to walk out of the roadway in order to push appellant or confront him. Again, the decedent got out the truck to confront appellant. The witnesses also testified that when decedent fell after he was punched, he landed on the white line of the roadway prior to the truck running over him. This further indicated that the punch occurred off the roadway in order for the decedent to fall to the white line.

Appellant's conduct of punching the decedent did not disrupt traffic. Traffic after football games on Shop Road is always bumper-to-bumper, as the evidence clearly

demonstrated. Every witness testified that prior to appellant punching the decedent, the traffic was at a standstill, "a parking lot." Although the roadway was blocked to enable police to investigate the homicide traffic continued to move.

Appellant's conduct of punching the decedent was not the cause of the disruption of traffic, if such a disruption occurred. Any disruption of traffic was the direct result of Paxton running over and killing his friend. Appellant was not the proximate cause of the decedent's death as confirmed by the jury's verdict on the involuntary manslaughter charge; therefore, he could not be the proximate cause of the disruption of traffic resulting from the death.[11]

[11] Judge Goodstein found the jury acquitted appellant of involuntary manslaughter, having determined that his conduct was not the proximate cause of the decedent's death. "We now know the jury found the Defendant's conduct was not the proximate cause of [] Mr. Gasque's death." R. 1452; R. 1454.

3.

The trial court erred in sentencing appellant to a term of years greater than thirty days where the statute authorized a sentence no greater than thirty days for an individual who was convicted of BPHAN, and, alternatively, the Court must decide the maximum allowable sentence for BPHAN.

Relevant facts

With respect to BPHAN, The solicitor in this case argued that "**anything** can be a circumstance of aggravation." R. 1046, ll. 21 – 22. (emphasis added). After appellant was convicted of this vague crime, Judge Goodstein sentenced appellant to ten years' imprisonment. R. 1192, ll. 2 – 8. She suspended the ten-year sentence upon the service of five years' imprisonment and three years' probation. R. 1192, ll. 2 – 8.

Subsequently on February 15, 2013, appellant filed a motion to set aside sentence or in the alternative to reduce sentence. R. 1423-32. A hearing on the motion was held on March 12, 2013. R. 1308. Judge Goodstein modified the sentence to ten years' imprisonment suspended upon the service of three years' imprisonment and three years' probation pursuant to her order dated April 25, 2013. R. 1452-55. However, Judge Goodstein refused to reduce the sentence to thirty days' imprisonment as requested by petitioner. R. 1452-55.

Discussion

A. The More Recent Legislative Limitation of Sentences for Breaches of the Peace Makes Appellant's Sentence Illegal

The Legislature, in its South Carolina Omnibus Crime Reduction and Sentencing Reform Act (the "Act"), which became effective before the incident in this case, enacted

a maximum thirty-day sentence *for all* breaches of the peace.[12] See S. C. Code Ann. § 22-3-560, 2010 Act No. 273, § 8, eff June 2, 2010. Section 22-3-560 states, "Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, **all breaches of the peace.**" S.C. Code Ann § 22-3-560 (emphasis added). This section of the Act is clear and unambiguous: it limits the sentence for "all" breaches of the peace to thirty days. Id. No other section in the South Carolina Code provides a sentence for breach of peace.

The state argued at the hearing that "all" meant that a magistrate must bind a BPHAN case over to General Sessions Court. R. 1340, ll. 9 – 25. This argument is incorrect and misleading. "All," when combined with the discretionary language "may punish" clearly means that magistrates can render thirty-day sentences for BPHAN. S.C. Code Ann. § 22-3-560.

The sentence pronounced here was claimed to be valid under the common law. The indictment cited S.C. Code § 17-25-30, which allows for a sentence under the common law. See S.C. Code Ann. § 17-25-30. Section 17-25-30 states, "In cases of legal conviction when no punishment is provided by statute the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution." Id.

This statute is inapplicable by its own terms. Section 17-25-30 only applies where "no punishment is provided by statute." Id. (emphasis added). In the case of breaches of the peace, the Code provides a statutory punishment: thirty days. S.C. Code

[12] The Act became effective in June 2010. The incident in this case occurred in October 2010.

Ann. § 22-3-560. Since section 22-3-560 applies to "all" breaches of the peace, BPHAN's maximum sentence is statutorily provided and the common law does not apply. The later enactment of section 22-3-560 controls. Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (holding that later act trumped prior act when determining parole eligibility for a specific crime).

This result—that the more recent passage of the current version of section 22-3-560 controls—is supported by its history. The 1981 version of § 22-3-560 stated:

> Magistrates may punish by fine not exceeding two hundred dollars or imprisonment in the jail or house of correction not exceeding thirty days, or both, all assaults and batteries and **other breaches of the peace when the offense is not of a high and aggravated nature requiring, in their judgment, greater punishment.**

S.C. Code Ann. § 22-3-560, 1981 Act No. 76, § 8 (emphasis added). Beginning in 1997, Section 22-3-560 underwent a series of legislative changes. In 1997, pursuant to Act No. 80, § 4, the Legislature eliminated the language that allowed greater punishment for high and aggravated breaches of the peace. The 1997 version of Section 22-3-560 referenced a magistrate's authority to punish assaults and batteries "and other breaches of the peace and exception thereto, so as to increase the penalties for violation and provide that an assault and battery on school personnel shall be punished as provided in Section 16-3-612." The law remained silent as to what sentence, specifically, could be imposed for BPHAN, but the Legislature made clear that greater punishment for BPHAN no longer existed.

Later, in 2008, pursuant to Act No. 346, § 1, the Legislature again amended section 22-3-560 "so as to increase the magistrates courts' jurisdiction for all assault and battery offenses against sports officials and coaches...." In both the 1997 and 2008

amendments to section 22-3-560, the Legislature explicitly mandated the maximum punishment that could be imposed for assaults and batteries on school personnel, sports officials, and coaches. In neither of those amendments do we find reference to BPHAN.

Finally and most importantly in 2010, pursuant to the Act, that the Legislature explicitly amended section 22-3-560 to apply the statutory maximum punishment to "**all** breaches of the peace." See 2010 Act No. 273; S. 1154 (emphasis added).

This 2010 amendment is significant, because South Carolina law makes clear that, once a statutory limit is created for punishment of a crime, the courts no longer have discretion to sentence beyond the maximum punishment set forth in the law. See, e.g., State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("...broad discretion is allowed the trial judge in imposing sentence within the legal limits."). In other words, once a sentencing limit is defined by statute, the courts are bound by the statutory punishment.

In ascertaining legislative intent, the courts must consider the plain meaning of the text, as written. "The legislature must have intended to mean what it has plainly expressed...Where the words of a statute are plainly expressive of an intent, not rendered dubious by context, the interpretation must conform to and carry out that intent." Beaty v. Richardson, 56 S.C. 173, 180, 34 S.E. 73, 76 (1899). Here, the trial court was bound by the Legislature's clear intent, manifested in the plain language of section 22-3-560's maximum thirty-day sentence for all breaches of the peace.

The legislative decision in 2010 to limit the punishment for all breaches of the peace is consistent with the purposes of the Act. One of the goals of this legislation was to bring clarity and fairness to sentencing, and to ensure that sentences would be consistent with the nature of the offense. In the 2010 Omnibus Crime bill, the Legislature

chose not to repeal the crime of BPHAN. See § 22-5-150 ("...when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions."). Instead, the Legislature changed the sentencing framework so all breaches of the peace would fall within the limitations of section 22-3-560. This new language is clear, unambiguous, and binding on the courts.

B. The Sentencing Limitation of Section 22-3-560 Applies to Cases in General Sessions

A further examination of the statutory scheme shows that the maximum sentence of section 22-3-560 applies to all breaches of the peace, including BPHAN. An issue may arise that the thirty-day sentence only applies to a breach of peace or a BPHAN adjudicated in magistrate's court, based on section 22-5-150, which states:

> Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons. Persons arrested for any of such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. If found guilty they may be required to find sureties of the peace and be punished within the limits prescribed in § 22–3–560 or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.

S.C. Code Ann. § 22-5-150. Does the last phrase of this section mean that, when tried in general sessions court, BPHAN is not subject to the thirty-day maximum sentence?

The answer is no. The later enactment of the Act, specifically within the context where the maximum sentence is located, governs this issue. See Hair, 305 S.C. 79, 406 S.E.2d at 334. Section 22-3-560 is one of several statutes dealing with criminal conduct tried by magistrates. While section 22-3-560 deals with breaches of the peace and BPHAN, its subsequent sections deal with larceny (§ 22-3-570), receiving stolen goods

(§ 22-3-580), and obtaining property under false pretenses (§ 22-3-590). Of these four statutes, only section 22-3-560 was amended by the Act in 2010. Of the four, only section 22-3-560 contains a sentencing range. For the remaining three sections, reference must be had to the statutory section for the underlying offense in Title 16. The underlying offense sections have graduated levels of the offense, with the least severe making specific reference back to Title 22.

For example, section 16-13-180 criminalizes receiving stolen goods. S.C. Code Ann. § 16-13-180. Under its graduated sentencing scheme, if the value of the property is less than $2,000.00, the crime is a misdemeanor and punished according to Title 22, which means a maximum sentence of thirty days. S.C. Code Ann. § 16-13-180(B)(1). If the value of the stolen goods is between $2,000.00 and $10,000.00, the crime is a felony punishable by a maximum sentence of five years. S.C. Code Ann. § 16-13-180(B)(2). For stolen goods worth more than $10,000.00, the maximum sentence is ten years. S.C. Code Ann. § 16-13-180(B)(3). Larceny and obtaining goods under false pretenses work in similar ways. See S.C. Code § 16-13-30 and 16-13-240.

Since Title 16 provide the sentencing ranges for these crimes, it is unnecessary for section 22-3-560 to do so. Therefore, when these crimes are tried in general sessions court, the sentencing ranges are supplied by Title 16. However, since Title 16 does not codify breach of the peace or BPHAN, the Legislature could not allow for reference from Title 22 and therefore simplified this issue when it enacted the Act in 2010. The Legislature's chosen simplification was to make "all" breaches of the peace subject to a thirty-day maximum sentence. S.C. Code § 22-3-560. The simplest divination of the Legislature's intent is that section 22-3-560 provides the sentence for all breaches of the

peace, whether aggravated or not, and whether tried in magistrate's court or general sessions. Mississippi also provides for the same sentence for disturbance of the peace and disturbance of the peace in a public place. Miss. Code Ann. § 97-35-15 and § 97-35-13.

The absurdity of sentencing individuals convicted of BPHAN to ten years' imprisonment becomes apparent when compared to the maximum sentences permissible for more serious transgressions of the law. Appellant was charged with involuntary manslaughter and BPHAN. If convicted of involuntary manslaughter, the more serious offense, then Appellant faced a maximum sentence of five years. See S.C. Code Ann. § 16-3-60. The state based the charge of BPHAN upon the disruption of traffic caused by the fight. Without question, society views the taking of a life of another as more serious and deserving of harsher punishment than disrupting traffic after a college football game. Thus, the sentencing scheme employed by the trial court is absurd and should not stand.

C. Appellant's Sentence is Illegal Even Under the Common Law

Even if this Court were to find that BPHAN is not governed by the thirty-day maximum of section 22-3-560 and should be sentenced pursuant to section 17-25-30, then appellant's ten-year sentence remains illegal. Section 17-25-30 states, "In cases of legal conviction when no punishment is provided by statute the court shall award such sentence **as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution.**" S.C. Code Ann. § 17-25-30 (emphasis added). Section 17-25-30 was specifically cited in appellant's indictment. App. 108-109. This code section provides sentences for misdemeanors only, not felonies. State v. Hill, 254 S.C. 321, 330-31, 175 S.E.2d 227, 230 (1970) (construing

§ 17-25-30 under its predecessor, §17-553); see also In re McClain, 395 S.C. 536, 537, 719 S.E.2d 675, 675 (2011) (noting in attorney disciplinary proceeding that attorney had been charged with BPHAN and that it was a misdemeanor).

While misdemeanors under this section can carry a maximum sentence of ten years, counsel is unaware of any decision requiring ten years to be the mandatory maximum setting for all common law misdemeanors. See State v. Mims, 286 S.C. 553, 554, 335 S.E.2d 237, 237-38 (1985) (holding that the much more serious crime of assault with intent to kill was a misdemeanor punishable by a maximum sentence of ten years); see also State v. Storgee, 277 S.C. 412, 412-13, 288 S.E.2d 397, 397 (1982) (holding that the much more serious crime of attempted burglary was a misdemeanor punishable by a maximum sentence of ten years). Such a holding would contravene the language of the statute. In fact, a trial court crafting a sentence under this section must take into account "the common usage and practice" and "the nature of the offense." S.C. Code Ann. § 17-25-30. Had the Legislature intended that all common law misdemeanors carry a maximum sentence of ten years, it would have been easy to include such language in this section. The Legislature refused to do so. Looking at other statutes and similar crimes, the logical conclusion is that a ten-year sentence is excessive for this crime and violates section 17-25-30.

Class A misdemeanors carry a maximum three-year sentence. See S.C. Code Ann. § 16-1-100(A). Class B misdemeanors carry a maximum two-year sentence. See S.C. Code Ann. § 16-1-100(B); Class C misdemeanors carry a maximum one-year sentence. See S.C. Code Ann. § 16-1-100(C); see also S.C. Code Ann. § 16-1-20.

Title 16 of the South Carolina Code contains an entire chapter called "Offenses Against the Peace." S.C. Code Ann. § 16-7-10 *et seq.* Article 3 of this chapter is called "Offenses Tending to Breach the Peace." S.C. Code Ann. § 16-7-110 *et seq.* Neither "Breach of peace" nor "BPHAN" are codified under Article 3, which seems the logical place for their appearance in the Code.

A breach of the peace is defined as anything that disturbs "a state of rest, or tranquility." Lyda v. Cooper, 169 S.C. 451, 169 S.E.2d 236, 238 (1939). Crimes that are codified under Article 3 are: "Wearing masks and the like" and "Placing burning or flaming cross in public place," both of which were enacted as anti-Ku Klux Klan measures, and carry a maximum sentence of twelve months' imprisonment. See S.C. Code Ann § 16-7-110, -120, and -140; See also "Slander and libel," which carries a maximum sentence of one year's imprisonment, S.C. Code Ann. § 16-7-150; "Illegal use of stink bombs" which, as a misdemeanor, carries a maximum three-year sentence, S.C. Code Ann. § 16-7-160; and "Entering public building for purpose of destroying records or other property" which carries a maximum three-year sentence. As is seen with these misdemeanor breaches of the peace, the most severe sentence is three years. It certainly seems that the allegations against appellant are far less repugnant and breach the peace far less than the horrifying act of burning a cross to terrify citizens, which only carries a one-year sentence. As such, appellant's ten-year sentence does not comport with the common usage and practice of sentencing for other, far more serious breaches of the peace.

An examination of other states' maximum sentences for aggravated breaches of the peace further demonstrates that appellant's sentence is excessive. Counsel's research

revealed fourteen states that have differing levels of breach of the peace in their statutory schemes. Most states call this crime "Disorderly Conduct." South Carolina also has a disorderly conduct statute which provides for a maximum of thirty days' imprisonment. S.C. Code Ann. § 16-17-530.

The states with codified graduated classification of breaches of the peace are:

1. Colorado: Disorderly conduct is a petty offense punishable by a maximum of six months' imprisonment. Fighting in a public place also receives a maximum sentence of six months' imprisonment, but is a Class 3 misdemeanor. Disturbing a funeral is a Class 2 misdemeanor punishable by a year in prison. Colo. Rev. Stat. Ann. § 18-9-106; § 18-1.3-501(1)(a); § 18-1.3-503(1).

2. Hawai'i: Disorderly conduct is considered a violation for which a defendant may not be imprisoned. If the defendant intended "to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after reasonable warning to desist," then he is guilty of a petty misdemeanor with a maximum sentence of thirty days. Haw. Rev. Stat. § 711-1101(3); § 706-663; § 706-605(4).

3. Illinois: Very specific disorderly statute conduct with a sentencing range of thirty days for simple breach of peace up to a felony conviction carrying a five-year sentence for bomb threats. Ill. Comp. Stat. § 5/26.1; § 5/5-4.5-65; § 5/5-4.5-55; § 5/5-4.5-60; § 5/5-4.5-45; § 5/5-4.5-40.

4. Indiana: Disorderly conduct with "fighting" or "tumultuous conduct" receiving a maximum sentence of 180 days' imprisonment. If a defendant commits disorderly conduct within an airport or at a funeral, the sentencing range is six months to three years. Ind. Code Ann. § 35-45-1-3; § 35-50-3-3; § 35-50-2-7.

5. Kentucky: First and second degree disorderly conduct. Second degree disorderly conduct includes fighting in a public place or creating a hazardous condition. It is a misdemeanor punishable by 90 days' imprisonment. First degree disorderly conduct includes the same conduct, but the defendant must act "with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof." The maximum

sentence for first degree disorderly conduct is twelve months' imprisonment. Ky. Rev. Stat Ann. § 525.055; § 525.060; § 532.090.

6. Louisiana: Disturbing the peace, with several enumerated acts receiving different sentences. "Engaging in a fistic encounter" receives a maximum of 90 days' imprisonment. Disturbing a funeral receives a maximum of six months' imprisonment. La. Rev. Stat. Ann. § 103.

7. Mississippi: Similar to South Carolina, the sentences for the disurbance of the peace and disturbance of the peace in a public place are the same: not more than six months' imprisonment. Miss. Code Ann. § 97-35-13; § 97-35-15.

8. Missouri: The penalty for "peace disturbance" depends upon how many times a defendant has been convicted. A first offense carries a maximum of six months' imprisonment; subsequent convictions carry a maximum of one year. Mo. Rev. Stat. § 574.010; § 558.011.

9. Montana: Disorderly conduct, including fighting or "rendering vehicular or pedestrian traffic impassable," carries a maximum sentence of ten days' imprisonment. Making a bomb threat carries a maximum sentence of one year. Mont. Code Ann. § 45-8-101.

10. Ohio: A person convicted of disorderly conduct, including fighting or "hindering or preventing the movement of persons on a public ... road" is guilty of a "minor misdemeanor," for which they may not be imprisoned. If the defendant persists in the conduct after a warning or commits the crime in the vicinity of a school or at the time of an emergency, the person is guilty of a fourth-degree misdemeanor which carries a maximum sentence of thirty days' imprisonment. Ohio Rev. Code Ann. § 2917.11; § 2929.24; § 2929.21.

11. Oregon: Disorderly conduct in the second degree, including fighting or obstructing traffic, carries a maximum sentence of six months' imprisonment. Disorderly conduct in the first degree, which is making a bomb threat, carries a maximum sentence of one year in prison. Or. Rev. Stat. § 166.023; § 166.025; § 161.615.

12. Pennsylvania: Disorderly conduct includes fighting or creating a hazardous condition. It is a summary offense which carries a maximum

sentence of 90 days' imprisonment. If the defendant intended to "cause substantial harm or serious inconvenience" or persisted in the conduct after a warning to desist, the crime is a third-degree misdemeanor which carries a maximum sentence of one year. 18 Pa. Cons. Stat. § 5503; § 1104; § 1105.

13. Texas: Disorderly conduct, including fighting, is a Class C misdemeanor for which a defendant may not be imprisoned. If the disorderly conduct involves a firearm, then it is a Class B misdemeanor which carries a maximum sentence of 180 days. Tex. Penal Code Ann. § 42.01; § 12.22; § 12.23.

14. Utah: Fighting and obstructing traffic constitute disorderly conduct, which is an infraction, for which a defendant may not be imprisoned. If the defendant persisted in the disorderly conduct after a request to desist, the crime is a Class C misdemeanor which carries a maximum sentence of 90 days. Utah Code Ann. § 76-9-102; § 76-3-204; § 76-3-205.

From this survey of the several states, the longest maximum sentence in a statute for an aggravated breach of the peace located by counsel is five years' imprisonment, which would be solely for making a bomb threat in Illinois. Obviously this statute would not apply to appellant. The maximum sentence appellant could have received for the conduct alleged in this case would be one year (Kentucky and Pennsylvania). The average length of the maximum sentence appellant could have received under these statutes is 128.57 days. The most common maximum sentence is six months, in four states: Colorado, Mississippi, Missouri, and Oregon. The next most common maximum sentence was zero jail time, in three states: Ohio, Texas, and Utah.

For a common law offense, the court also must consider the "nature of the offense." S.C. Code Ann. § 17-25-30. Here, the aggravating circumstances alleged were "fighting in the roadway" and/or "disrupting traffic." Similar offenses to these aggravators carry light sentences. The unlawful willful obstruction of a highway is

punishable by thirty days' imprisonment. S.C. Code Ann. § 57-7-210. Willful or wanton destruction of a highway, highway facility, or highway structure is punishable by thirty days' imprisonment. S.C. Code Ann. § 57-7-70. Camping within a right of way of a highway is punishable by thirty days' imprisonment. S.C. Code Ann. § 57-7-90. Willful damage to a bridge is punishable by ninety days' imprisonment. S.C. Code Ann. § 57-13-110.

Even the Attorney General, in a 2003 opinion, believed that disorderly conduct should supplant breach of peace. Atty Gen'l Op. September 23, 2003. In this opinion, a sheriff asked the Attorney General about breach of the peace. The Attorney General replied that breach of the peace still existed, but suggested that the statutory offense of disorderly conduct "would cover similar conduct." Id. Appellant wholeheartedly agrees. Disorderly conduct is defined:

> Any person who shall (a) **be found on any highway** or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language **on any highway** or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards **of any public road or highway**, except upon his own premises, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars **or be imprisoned for not more than thirty days**.

S.C. Code Ann. § 16-17-530 (emphasis added). Disorderly conduct concerns the exact conduct allegedly committed by Appellant: disrupting the peace on a public roadway. Id. The maximum penalty for disorderly conduct is thirty days' imprisonment. Id. The maximum penalty for BPHAN should be the same.

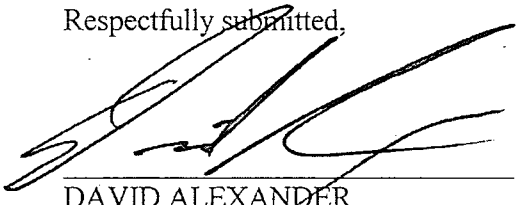
South Carolina's disorderly conduct statute, the breach of peace statutes from other states, and the other South Carolina offenses cited above demonstrate that ten years is an absurd sentence for BPHAN. BPHAN, by its very nature, is a vague statute which is capable of prosecutorial abuse. The Legislature certainly did not intend for solicitors to be able to charge citizens of this state with a vague crime that could result in ten-year prison sentences. The solicitor in this case gallingly argued to the jury, "And anything can be a circumstance of aggravation." R. 1046, ll. 21 – 22. This Court should find that the Legislature obviously did not mean to give such a broad grant of power to the solicitors where "anything" could subject a defendant to such a severe sentence. The Court should determine that the maximum sentence for BPHAN is thirty days, or alternatively, no greater than six months. Such a maximum range would be in line with other jurisdictions and comply with section 17-25-30's command to fashion a sentence that fits the crime.

Because the trial judge did not use the correct sentencing range when she fashioned her sentence, this is an error of law. The Court should determine the sentencing range and, depending on that range, remand the case for resentencing only if there is a possibility that Simms, **who has already been in prison for over ten months,** could receive a sentence in excess of what he has already served. Otherwise, Simms should be released immediately.

CONCLUSION

By reason of the foregoing argument appellant respectfully requests that this Court issue a verdict of acquittal on the breach of the peace of a high and aggravated nature conviction. In the alternative, appellant respectfully requests this Court reverse his conviction, and remand this case to the Richland County Court of General Sessions for a new trial. In the second alternative, appellant respectfully requests this Court re-sentence Appellant in this Court's discretion to a sentence no greater than thirty days or remand the matter for re-sentencing to a term not to exceed thirty days.

Respectfully submitted,



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This 27th day of December, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS J. SIMMS,

APPELLANT

APPELLATE CASE NO. 2013-001219

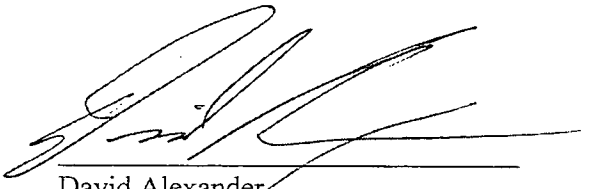
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment 2011-GS-40-0829;
(2) Sentence sheet for 2011-GS-40-0829;
(3) Entire transcript dated January 28, 2013;
(4) Entire transcript dated January 29, 2013;
(5) Entire transcript dated January 30 – February 5, 2013;
(6) Entire transcript dated March 12, 2013;
(7) Memorandum in support of defendant's motion to set aside sentence, or in the alternative, to reduce sentence;
(8) State's response to motion;
(9) Proposed order;
(10) Order granting motion to reduce sentence dated April 25, 2013;
(11) Order denying motion to set aside sentence dated April 25, 2013;
(12) Order denying motion for a new trial;
(13) Court's exhibit #1 (Affidavit of Allen James)

I certify that this designation contains no matter which is irrelevant to this appeal.

December 27th, 2013



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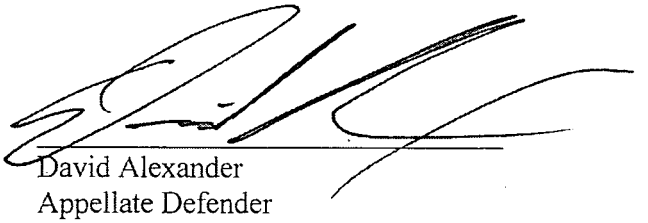
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

December 27th, 2013



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CURTIS J. SIMMS,

APPELLANT

APPELLATE CASE NO. 2013-001219

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and to selliott@scag.gov, and upon Curtis J. Simms, #354242, at Campbell Work Center, this 27th day of December, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.