STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAMAR BRYANT,

APPELLANT

APPELLATE CASE NO. 2013-000671

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court's refusal to order a mental competency examination was erroneous because it was based on an improper consideration, a mistake of fact, and the State consented to the evaluation?

STATEMENT OF THE CASE

On May 18, 2011, a Georgetown grand jury indicted appellant Tamar Bryant for murder. R. ___. Erin E. Bailey represented the State throughout the proceedings in the case. Ronald W. Hazzard represented appellant. On September 21, 2012, a hearing on whether to order a competency evaluation was held before the Honorable Steven H. John. R. ___ (Sept. 12, 2012, Hearing Tr. 1).[1] On December 17, 2012, a hearing on whether to order a competency evaluation was held before the Honorable Benjamin H. Culbertson. R. ___ (Dec. 17, 2012, Hearing Tr. 1).[2] On March 18-20, 2013, appellant was tried before the Honorable Larry B. Hyman, Jr. Tr. 1. The jury convicted appellant. Tr. 325, ll. 14 – 17. Judge Hyman sentenced appellant to thirty-five years' imprisonment. Tr. 331, ll. 14 – 15. This appeal follows timely filing and service of the notice of appeal.

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[1] In this Initial Brief, references to this transcript will be abbreviated to "September Hearing." These abbreviations will be replaced with citations to the Record in the Final Brief and this footnote deleted.

[2] In this Initial Brief, references to this transcript will be abbreviated to "December Hearing." These abbreviations will be replaced with citations to the Record in the Final Brief and this footnote deleted.

STATEMENT OF FACTS

On March 15, 2011, Deon Myers ("Deon") was shot and killed in a club called the Ghost Den in Plantersville. Tr. 90, l. 3 – 92, l. 16. Despite twenty people being in the club, only three witnesses—all of whom had some bias against appellant—testified for the State. Tr. 90, ll. 23 – 25. The testimony of these witnesses was inconsistent. No forensic evidence linked appellant to the crime. The murder weapon, a rare pistol with a missing handle, was found when the police arrested appellant's co-defendant, Brandon Cheeks ("Brandon"). Tr. 182, l. 22 – 183, l. 13. By far, the strongest evidence against appellant was a videotaped statement in which he confessed to shooting Deon, which was admitted over appellant's objection. Tr. 199, ll. 7 – 16. (State's Ex. 11).

The three witnesses the State managed to find agreed on one fact: the well-known gang member Lavern Holmes ("Lavern") barged into the club with a shotgun threatening Deon. Tr. 91, ll. 7 – 92, l. 8 (Terell Myers). Tr. 123, ll. 5 – 23 (Shaquettia Holmes). Tr. 152, l. 4 – 153, l. 23 (Cameron Green). Terell Myers ("Terell") worked at the club and had known Lavern all of his life. Tr. 90, l. 3 – 91, l. 8. Shaquettia Holmes ("Shaquettia") was Lavern's neice. Tr. 121, l. 25 – 122, l. 3. Cameron Green ("Cameron") was Shaquettia's "distant cousin." Tr. 122, ll. 4 – 8. Shaquettia said she knew Cameron as a child and that they "grew up together." Tr. 128, l. 24 – 129, l. 1. When Cameron was asked if he knew Shaquettia, he said "I'm not familiar with that name."[3] Tr. 158, ll. 7 – 11. Terell and Cameron were cousins. Tr. 103, ll. 7 – 10. Terell was also a cousin of a man named Kawaun Myers ("Kawaun") who was with Lavern that evening. Tr. 102, ll. 22 – 23. Deon was Terell's brother. Tr. 102, ll. 20 – 21. None of these people are related to appellant.

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[3] The witnesses were sequestered. Tr. 39, ll. 12 – 18.

Terell testified first. Terell was working the door at the club. Tr. 90, ll. 13 – 15. Approximately twenty people were in the club. Tr. 90, l. 23 – 91, l. 2. Twenty minutes after Deon arrived, Lavern entered brandishing a shotgun. Tr. 90, ll. 16 – 22. Lavern "went straight to Deon." Tr. 91, ll. 20 – 21. Deon fled to the bathroom. Tr. 91, ll. 20 – 24. Shaquettia got to the bathroom and "stopped everything." Tr. 91, l. 20 – 92, l. 5. Shaquettia "got Lavern Holmes out the door." Tr. 110, ll. 7 – 11.

Deon came out of the bathroom. Tr. 92, ll. 12 – 14. When Deon got "midway" through the club, a short man with a red bandana covering his mouth and nose "came straight in and shot him. He came in and shot him, straight, he, he came straight to Deon and shot him." Tr. 92, ll. 9 – 16. Terell said the short man with a red bandana "did not stop or nothing." Tr. 113, ll. 13 – 16. He had "a small black gun." Tr. 92, ll. 17 – 20. Terell did not recognize the short man with the red bandana. Tr. 92, ll. 23 – 25.

Terell claimed he did not see his cousin Cameron in the club that night. Tr. 103, ll. 7 – 15. The night of the shooting, Terell did not give the police any information about what happened. Tr. 115, ll. 16 – 23. The next day, when the police came to his house, Terell did not volunteer any information about the shooting. Tr. 116, ll. 1 – 10.

Shaquettia was the State's next witness. She was at the bar. Tr. 123, ll. 5 – 13. Cameron had on a red bandana. Tr. 127, ll. 4 – 8. She saw her uncle, Lavern, enter the bar with "a big gun." Tr. 123, ll. 5 – 13. Lavern had on a red bandana. Tr. 127, ll. 4 – 6. Cameron, also wearing a red bandana, entered the bar with Lavern. Tr. 128, ll. 15 – 23. Tr. 139, ll. 9 – 11. Tr. 127, ll. 4 – 6.

Deon went into the bathroom with Lavern following. Tr. 124, ll. 4 – 7. Deon was behind the door and her uncle was holding it. Tr. 124, ll. 8 – 14. Two girls were also in the

bathroom. Tr. 134, ll. 13 – 16. Shaquettia went into the bathroom and told Lavern "to leave him alone and go." Tr. 123, ll. 5 – 13. Shaquettia testified that her uncle took her advice and left. Tr. 135, ll. 18 – 24.

Shaquettia said she knew appellant. Tr. 124, l. 25 – 125, l. 7. Shaquettia said that when her uncle left the club, appellant entered the bathroom and started talking to Deon. Tr. 125, ll. 16 – 23. Tr. 135, ll. 14 – 17. The two girls had already left the bathroom. Tr. 135, ll. 14 – 17. She saw appellant with a gun. Tr. 136, ll. 3 – 6. Appellant and Deon appeared to agree that everything was fine. Tr. 136, ll. 10 – 18. Shaquettia said appellant left, followed by Deon. Tr. 136, l. 19 – 137, l. 1. Shaquettia heard a shot, but did not witness the shooting. Tr. 125, ll. 24 – 25. She originally thought her uncle shot Deon. Tr. 138, l. 24 – 139, l. 5. Shaquettia did not remember appellant wearing a bandana. Tr. 126, l. 25 – 127, l. 3. Shaquettia did not give the police a statement the night of the shooting. Tr. 138, ll. 14 – 23.

Cameron was the last of the State's three witnesses culled from the twenty people in the club. He was charged with Deon's murder. Tr. 163, ll. 9 – 17. Two weeks before trial, Cameron signed a proffer agreement. Tr. 170, l. 23 – 171, l. 1. Cameron testified that he had not read the proffer agreement, that he "wasn't being promised anything," but hoped that he would escape a murder charge. Tr. 171, ll. 2 – 23. Directly contradicting Shaquettia's testimony that they had grown up together and were related, Cameron denied being even "familiar" with her name. Tr. 158, ll. 7 – 11. Also contradicting Shaquettia,

Cameron denied that he wore a red bandana or had one anywhere on his person that night.[4] Tr. 159, ll. 10 – 19.

Cameron gave multiple versions of his story to police and then to the jury. He was arrested the day after the shooting and charged with attempted murder. Tr. 159, ll. 20 – 25. In this statement, he told the police that only he and Lavern were in his car that night. Tr. 160, ll. 9 – 11. He told the police he never entered the club. Tr. 160, l. 17 – 19. He told the police Lavern did not have a shotgun. Tr. 161, ll. 3 – 4.

Deon died in the interval between Cameron's first and second statement. Tr. 162, ll. 14 – 18. The police upgraded Cameron's charge to murder. Tr. 163, ll. 9 – 12. Cameron denied that he changed his statement admitting only that he "gave more detail" and he "just wanted to clear [his] name." Tr. 163, ll. 18 – 21. Tr. 172, l. 22 – 173, l. 1. In his second statement, he told police there were four people in the car with him and that Lavern had a shotgun. Tr. 163, l. 22 – 164, l. 5. In this second version, Kawaun, Brandon Cheeks ("Brandon"), and appellant joined Cameron and Lavern in the car. Tr. 153, ll. 7 – 25.

Cameron told his "third story" to the jury. Tr. 167, ll. 17 – 18. In this version, either appellant or Brandon brought the handgun. Tr. 150, ll. 2 – 5. On the way to a party, they stopped at a house in Graves Station. Tr. 150, l. 18 – 151, l. 1. Appellant went into the house and returned with the shotgun. Tr. 151, ll. 10 – 13. After stopping for gas, they went

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[4] Cameron admitted that Lavern wore a red bandana. Tr. 176, ll. 14 – 21. He said appellant had a black bandana. Tr. 178, ll. 17 – 20. The color of the national gang known as the "Bloods" uses red as its identifying color. See http://en.wikipedia.org/wiki/Bloods. In his recorded statement, appellant identified Lavern as a Blood because he "had a red flag." (State's Ex. 11). Appellant also identified Kawaun as a Blood because he often wore red and also thought that Brandon used to be in a gang. (State's Ex. 11). Appellant said he did not associate with Cameron enough to say whether he was in a gang. (State's Ex. 11). Appellant denied he was in a gang or was trying to get into a gang. (State's Ex. 11).

to the club. Tr. 151, ll. 17 – 24. Cameron parked the car and everyone got out except Kawaun. Tr. 152, ll. 4 – 13.

Cameron and Lavern went to the door. Tr. 152, ll. 4 – 13. He did not know where Brandon and appellant were. Tr. 152, ll. 11 – 13. Lavern went in before Cameron. Tr. 152, ll. 4 – 13. Cameron went no further than the door because he did not pay. Tr. 152, ll. 12 – 22. Despite seeing the shotgun in the car, seeing Lavern with the shotgun after leaving the club, and walking to the door with Lavern, Cameron claimed he did not see Lavern with the shotgun when Lavern entered the club.Tr. 169, ll. 7 – 14.

Cameron supposedly stayed outside the club during the shooting. Tr. 153, ll. 2 – 13. He saw appellant and Brandon run from the club with Lavern following. Tr. 153, ll. 14 – 23. Lavern "let off a shot with the shotgun." Tr. 153, ll. 14 – 23. After they left the club in the car, Lavern supposedly questioned appellant about why he shot Deon, with appellant apologizing and saying "My bad." Tr. 154, ll. 1 – 7. Cameron dropped everyone but appellant off at a place that was not their residence. App. 154, ll. 14 – 25.

At the time of the shooting, Cameron and Kawaun were in their early twenties. Tr. 166, ll. 5 – 15. Lavern was in his mid-to-late thirties. Tr. 166, ll. 16 – 25. Appellant was only seventeen years old at the time of the shooting and when he gave his statement to police. Tr. 331, ll. 4 – 5. In his statement, appellant said he did not know the origin of the shotgun. (State's Ex. 11). He said that he, Lavern, Cameron, and Brandon entered the club. (State's Ex. 11). Lavern and appellant were wearing bandanas, but not any of the others. (State's Ex. 11). Deon ran into the bathroom when he saw Lavern with the shotgun. (State's Ex. 11). Appellant took the pistol from Brandon after Deon entered the bathroom. (State's Ex. 11). Appellant went into the bathroom and talked with Deon about cigarettes

(State's Ex. 11). When they left the bathroom, Deon stopped to look for a gold chain and when Deon looked up, appellant shot him. (State's Ex. 11). No gold chain was entered into evidence.

Officer John Ohler arrested Brandon after a chase. Tr. 182, ll. 1 – 10. Officer Ohler searched Brandon. Tr. 182, ll. 19 – 21. He found a black "do-rag", a "couple of bags of marijuana," and the murder weapon. Tr. 182, l. 22 – 183, l. 13. The pistol was a .22 caliber, as was the bullet removed from Deon's head. Tr. 253, ll. 2 – 19. When the police searched Cameron's car after the incident, they found a red bandana and a black "do-rag." Tr. 223, ll. 13 – 15. Tr. 225, l. 24 – 226, l. 6.

ARGUMENT

The trial court's refusal to order a mental competency examination was erroneous because it was based on an improper consideration, a mistake of fact, and the State consented to the evaluation.

Relevant Facts

Appellant was seventeen years old at the time of the shooting and when he gave his statement to law enforcement. Tr. 331, ll. 4 – 5. On September 21, 2012, defense counsel asked Judge John to order a competency evaluation. September Hearing Tr. 2, l. 13 – 3, l. 9. Defense counsel told the trial court that he had been unable to get appellant to understand that his recorded statement would be used as evidence against him. September Hearing Tr. 2, l. 19 – 3, l. 9. Appellant continued to insist there was "no evidence against him." September Hearing Tr. 2, l. 19 – 3, l. 9. Defense counsel described his continued insistence that there was no evidence against him as "a wall." September Hearing Tr. 4, ll. 12 – 18. Appellant's family told defense counsel they agreed an evaluation was needed, but would not provide defense counsel with specifics or "say why." September Hearing Tr. 3, ll. 14 – 21. After asking appellant nine questions, Judge John found no need to order a mental evaluation. September Hearing Tr. 4, l. 24 – 7, l. 2.

On December 17, 2012, defense counsel raised the issue of appellant's competency again before Judge Culbertson. December Hearing Tr. 3, l. 25 – 4, l. 13. Defense counsel told Judge Culbertson that he was having trouble communicating with appellant about his defense. December Hearing Tr. 4 , l. 7 – 6, l. 19. Appellant did not appear to understand the severity of the situation and the potential impact of a videotaped confession on his chances at trial. December Hearing Tr. 4, l. 7 – 6, l. 19. Defense counsel said that in his twenty

years of experience, he had never seen a defendant unable to grasp this problem and refuse to explore a plea. December Hearing Tr. 4, l. 7 – 6, l. 19. Defense counsel indicated that there were "certain things about his past history, certain experience that he, that he has experienced as a child, that he's not very forthcoming. . . ." December Hearing Tr. 4, l. 7 – 6, l. 19. Defense counsel also stated he had reviewed appellant's school records and said, "I do not know if I've ever seen that many Fs in my life, unfortunately." December Hearing Tr. 6, ll. 4 – 10.

Judge Culbertson questioned appellant. Appellant first denied having any mental health issues, but then indicated he had been to the local mental health office for help with paying attention in school. December Hearing Tr. 8, l. 20 – 9, 9. After more questioning, to which appellant provided superficially appropriate answers, Judge Culbertson denied the motion for evaluation. December Hearing Tr. 10, ll. 9 – 14. Judge Culbertson stated that the motion for a competency evaluation was "just a ploy" to delay the trial. December Hearing Tr. 11, ll. 11 – 17.

Argument continued during which the solicitor stated she consented to having appellant evaluated. December Hearing Tr. 12, ll. 2 – 9. The State told the court that she "had concerns about his competency" and these concerns were the reason she had not called the case for trial during that term. December Hearing Tr. 10, ll. 22 – 25. The solicitor also told the judge that defense counsel was "a very accomplished attorney" and that she took his concerns about appellant's competency seriously because she did not "want to try this thing twice." December Hearing Tr. 12, ll. 2 – 9.

Defense counsel then informed Judge Culbertson of the prior hearing before Judge John and that after that hearing, he had learned that appellant's father had committed "a

crime of extreme violence against his mother in his presence." December Hearing Tr. 13, l. 3 – 14, l. 2. Appellant's father received a twenty-eight year prison sentence. December Hearing Tr. 13, l. 3 – 14, l. 2. Judge Culbertson then expressed his frustrations with both attorneys for the delay in trying the case and then ruled that he "agree[d] with Judge John" and did not "see the need for a mental evaluation." December Hearing Tr. 14, l. 3 – 16, l. 5.

Immediately before trial, Appellant renewed his request for an evaluation before Judge Hyman. Tr. 37, l. 17 – 38, l. 3. Defense counsel dutifully informed Judge Hyman of the prior rulings by Judge John and Judge Culbertson. Tr. 37, l. 17 – 38, l. 3. Judge Hyman asked if anything had changed since the prior hearings and defense counsel responded that was unaware of any changes. Tr. 38, ll. 4 – 15.

At the pre-trial hearing. Appellant's medical records were made a court's exhibit. (Court's Ex. 3). Judge Hyman stated he had "looked through" the records. Tr. 38, l. 23 – 39, l. 1. He asked if the records were made available to Judge John and Judge Culbertson. Tr. 38, l. 23 – 39, l. 1. Defense counsel answered affirmatively. Tr. 39, l. 2. Despite defense counsel's answer, the records were not made an exhibit at either the September or December hearings. Neither Judge John nor Judge Culbertson stated they had reviewed any medical records.

The State did not oppose the motion at the hearing. Judge Hyman denied the motion for an evaluation, stating:

> Okay, and I note that, you know, it would appear that he's had some drug and alcohol abuse in the past. I don't know what the extent of that was, and that he seems to be a very angry young man, **but I see no diagnosis of mental health problems.** I just don't see whether, where he has anything that would or there's anything here that would cause me to rule other than as was ruled on that issue by Judge Culbertson and Judge John, and I would respectfully deny a motion for an evaluation.

Tr. 39, ll. 3 – 11 (emphasis added).

Discussion

The trial judges in this case had "reason to believe" that appellant lacked "the capacity to understand the proceedings against him or assist in his own defense." S.C. Code Ann. § 44-23-410(A). When a trial judge has reason to question a defendant's capacity, "a competency evaluation is compulsory." State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007). See also State v. Blair, 275 S.C. 529, 533, 273 S.E.2d 536, 538 (1981). The conviction of a mentally incompetent person violates due process. Pate v. Robinson, 383 U.S. 375, 378-79 (1966). See also U.S. Const. amends. V, XIV.

The "reason to believe" an evaluation is needed can come from evidence of past and current mental problems and proffer of counsel. See State v. Singleton, 322 S.C. 480, 482-84, 472 S.E.2d 640, 641-42 (Ct. App. 1996). In Singleton, this Court reversed because the trial judge abused his discretion in refusing to order an evaluation. Id. Defense counsel told the court that the defendant heard voices and had hallucinations. Id. The attorney suspected the defendant's behavior stemmed from a poisoning incident in his childhood. Id. The defendant was receiving mental health treatment at the time of the hearing. Id.

In this case, not only defense counsel, but the solicitor asked the court to order an evaluation. December Hearing Tr. 12, ll. 2 – 9. Defense counsel told the trial judge that he was unable to make appellant understand the impact that his videotaped confession would have on his chances of success at trial. December Hearing Tr. 4, l. 7 – 6, l. 19. He also told the court of appellant's extraordinarily poor school record and a violent incident in his childhood. December Hearing Tr. 6, ll. 4 – 10. December Hearing Tr. 13, l. 3 – 14, l. 2. Indeed, as a viewing of appellant's videotaped statement reveals, appellant does not seem to

understand the impact of his words. (State's Exhibit 11). Judge Hyman described the seventeen-year old appellant as "nonchalant" in giving the statement. Tr. 31, ll. 1 – 2. Near the end of the video, appellant asks the officer, "So this is the statement already right here?" (State's Ex. 11 at approximately 30:45-31:00). This question, given after thirty minutes of interrogation by the officer who explained several times that this was the appellant's statement and long after supposedly recounting the events of the incident, betrays an almost childlike misunderstanding by appellant of what was happening to him.

In Singleton, the trial judge denied the motion for an evaluation "without explanation." Singleton at 482, 472 S.E.2d at 641. In this case, the trial judge's explanation appears to show that the denial was, in part, based on an improper consideration. Judge Culbertson was clearly upset about the age of the case and thought that the motion was meant to delay the case. The trial judge called the motion a "ploy." December Hearing Tr. 11, ll. 11 – 17. This concern, while certainly valid when administering the court's trial docket, should not play a role in the decision of whether to order an evaluation. The sole focus should be on whether there is any reason to believe that the defendant is incompetent. The suspicion of delay may be present in many cases where a defendant requests an evaluation, but this concern should not allow a trial judge to substitute his judgment as to competency when section 44-23-410 requires evaluation by medical professionals.

Judge Hyman's ruling relied upon the findings of Judge John and Judge Culbertson, so the errors committed by them are inextricable from Judge Hyman's ruling. Additionally, Judge Hyman made a clear factual error in his ruling. He stated that appellant's medical records showed "no diagnosis of mental health problems." Tr. 39, ll. 3 – 11. Appellant's medical records, which stem from an assessment done on February 9, 2010 (over a year

before the shooting), show diagnoses of Oppositional Defiant Disorder (DSM Code 313.81), ADHD (DSM Code 314.01), and a GAF of 65. (Court's Ex. 3, page 3). It notes appellant as being extremely uncooperative and ignoring people who ask questions, which corroborated defense counsel's statements. (Court's Ex. 3, page 3-4). The records show prior mental health treatment in 2008-09. (Court's Ex. 3, page 1). It stated appellant had witnessed his father attack his mother. (Court's Ex. 3, page 1). Appellant suffered from "clinically significant impairment." (Court's Ex. 3, page 4).

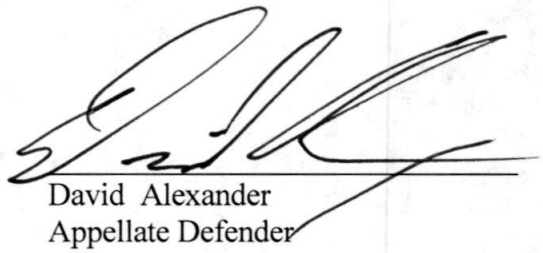
These records show that appellant had mental health problems. Therefore, Judge Hyman's ruling was based, in part, on a mistake of fact. Judge Hyman's ruling was also based on the rulings of the other circuit judges, one of which used the improper consideration of delay to deny appellant's motion. Combined with the proffer of defense counsel and the consent of the solicitor, the circuit court erred in refusing to order a mental evaluation be perfomed by medical professionals.

Finally, this error requires a new trial. In Blair, the Supreme Court remanded for a competency evaluation and a new trial was ordered only if the defendant was held incompetent. In this case, a new trial is required because even if the defendant is found competent, the findings of the examiner(s) may well require a reexamination of whether appellant's statement was knowingly, voluntarily, and intelligently made. The factual inconsistencies and biases of the witnesses, the lack of forensic evidence, the possibility of improper influence by gang members, the possession of the murder weapon by a co-defendant, and appellant's youth and lack of intellectual ability all point to possible intellectual disabilites that—at a minimum required a competency evaluation—and certainly raise the question of the validity of the State's primary evidence in the case.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and this case remanded with instructions to order a mental evaluation and, if required, a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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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(s);
(2) September 21, 2012, hearing transcript;
(3) December 17, 2012, hearing transcript;
(4) Trial transcript pages 1-45; 81-244; 247-332;
(5) Court's Exhibit 3;
(6) State's Exhibit 11 (DVD—to be transported).

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

March 19th, 2014

David Alexander
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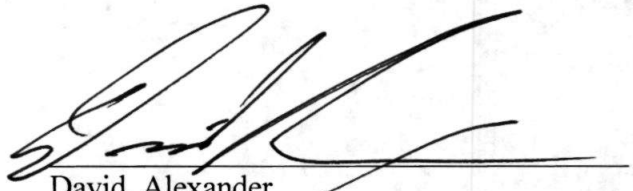
CERTIFICATE OF SERVICE

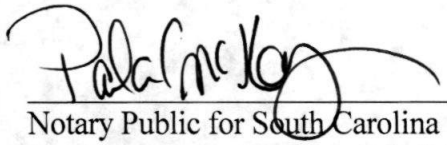
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of March, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of March, 2014.



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