STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDALL DEAN MATHENY,

APPELLANT

APPELLATE CASE NO. 2013-001924

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge erred in finding assault and battery of a high and aggravated nature was not a lesser-included offense of criminal sexual conduct with a minor in the first degree as a matter of law and in failing to charge the jury on the offense of assault and battery of a high and aggravated nature where the evidence supported the charge.

II. The trial judge erred in finding that assault and battery in the first degree is not a lesser-included offense of criminal sexual conduct with a minor in the first degree as a matter of law and in failing to charge the jury as to assault and battery in the first degree where the evidence supported the charge.

STATEMENT OF THE CASE

On August 22, 2013, the Spartanburg County Grand Jury indicted Appellant for criminal sexual conduct with a minor in the first degree (2011-GS-42-5554) and two counts of unlawful neglect of a child (2011-GS-42-5555 & 2011-GS-42-5556). R. * (Indictments). The prosecution represented by Susan Reese and Jennifer Jordan called the case for trial before the Honorable Roger L. Couch on August 27, 2013. Roger Poole represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 533, lines 16-24. Judge Couch sentenced Appellant to ten years' imprisonment on each count of unlawful neglect of a child and to twenty-five years' imprisonment for criminal sexual conduct with a minor in the first degree. He ordered the sentences to be served concurrently. Additionally, he ordered Appellant to register on the sex offender and child abuse registries, to wear active GPS monitoring for life, and to complete counseling for batterers. Tr. 538, lines 3-16; R. * (sentence sheets).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

Kayla Blake[1] and Appellant were romantically involved in May 2011. Tr. 161, line 24 – Tr. 162, line 9; Tr. 178, lines 16-22. Kayla, Appellant, and Kayla's two children, Minor 1 and Minor 2, lived with Ashley Directo[2] in a house that had been converted into a duplex. Tr. 162, lines 10-25; Tr. 183, line 13 – Tr. 185, line 14. According to Kayla, Appellant spanked Minor 1 and Minor 2, who were between sixteen and eighteen months old, on their legs, bottoms, and mouths. Tr. 164, lines 2-8. Kayla claimed that although she saw bruising on the children two weeks prior to Minor 2 going to the emergency room, she did not act because she "was scared" of Appellant. However, she admitted that she and Appellant "would get into it with one another" when they disagreed - Kayla was not afraid to defend herself against Appellant. Tr. 173, line 25 – Tr. 176, line 23.

On May 26, 2011, Minor 2 became ill. Tr. 166, lines 1-10. Kayla claimed that while she was cleaning up after supper, she "heard a loud boom and [Appellant] start laughing." Tr. 166, lines 20-21. She claimed she found Minor 2 "pale, stiff," and unresponsive. Tr. 166, line 23 – Tr. 167, line 1. Kayla called 911 for help while Appellant administered CPR. Tr. 167, lines 5-18. Kayla and Minor 2 went to the emergency room while Appellant stayed home with Minor 1. Tr. 167, line 25 – App. 168, line 1.

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[1] This witness is referred to as Stephanie Blake and Kayla Black in portions of the transcript; however, she identified herself as "Kayla Blake" to the court and Appellant refers to her using that name throughout his brief for the sake of consistency and clarity. Tr. 160, lines 21-23; Tr. 161, line 2.

[2] At the time of Appellant's trial, Directo was serving a prison sentence for manufacturing methamphetamine and violation of probation. She had a criminal record for purse snatching and unlawful conduct toward a child because her child tested positive for methamphetamine at birth. Tr. 182, line 18 – Tr. 183, line 5; Tr. 189, lines 6-19.

Although Kayla was aware of bruises on her children, she claimed she was unaware of Minor 1 having vaginal tears. Tr. 168, lines 4-6. However, she claimed she saw blood on the wipe when Appellant was changing Minor 1's diaper. Appellant told Kayla that Minor 1 "had pooped everywhere and he must [have] wiped her too hard." Tr. 168, lines 7-10. Kayla claimed she lied to police when she was interviewed initially regarding how the children were injured. At the time of Appellant's trial, Kayla had pled guilty to unlawful neglect of her children and received a probationary sentence in exchange for her testimony against Appellant. As a result of the criminal charge, her children were removed from her custody for two years. However, Kayla had regained custody shortly before Appellant's trial. Tr. 168, line 20 – Tr. 169, line 15; Tr. 176, line 24 – Tr. 177, line 13.

Steve Wilson with the Spartanburg County Sheriff's Office responded to the hospital in reference to Minor 2. Tr. 147, line 5 – Tr. 148, line 14. After observing injuries to Minor 2, Wilson questioned Kayla concerning the origin of those injuries. Kayla claimed Minor 2 was injured while playing with his twin sister, Minor 1. Tr. 148, line 19 – Tr. 149, line 8. Wilson and Kevin Bobo, an investigator, went to the home shared by Appellant, Kayla, and Directo. Tr. 150, lines 2-6. Directo gave Minor 1 to the police. Tr. 150, lines 9-25; Tr. 188, lines 15-25. Minor 1 was evaluated at the hospital. Tr. 151, lines 7-12. Minor 1 had bruising on her body and a vaginal tear. Tr. 151, lines 13-18; Tr. 205, lines 21-25.

Appellant, who admitted he cared for the children by bathing them and changing their diapers, informed the police that he was aware of Minor 1 and 2 having bruises on their foreheads. Appellant also informed the police that Minor 1 and 2 "were flipped face first on the pavement while Kayla was pushing them in the stroller earlier that week." Concerning Minor 1's vaginal tear, Appellant explained that when he was changing her diaper, he saw

bleeding. He immediately showed Kayla. Tr. 213, line 23 – Tr. 215, line 18; Tr. 224, line 18 – Tr. 225, line 1. Appellant explained that Minor 1 had diarrhea, which resulted in a mess. While trying to clean Minor 1, Appellant "had [gone] too far to get it out." Appellant "had inserted his middle finger into the child's vagina" while changing her diaper to clean the mess. Appellant covered his finger with a wipe and put it inside of Minor 1's vagina to clean her because she had diarrhea and feces was everywhere. Kayla took over cleaning Minor 1 when the bleeding occurred. Appellant denied doing "anything sexually" to Minor 1. Tr. 248, line 19 – Tr. 249, line 3. Tr. 251, lines 9-16; Tr. 252, lines 3-24; Tr. 259, lines 4-10. Tr. 273, line 8 – Tr. 275, line 10; R. * (State's Exhibit #5).

Appellant testified that he changed Minor 1's diaper when she had diarrhea. He was using a wipe to remove the feces that was inside her vagina. When he realized he caused a tear, he informed Kayla of the injury. Appellant denied any sexual activity with Minor 1 and apologized for hurting Minor 1. Tr. 407, line 24 – Tr. 409, line 2. Appellant admitted he "did wipe her too hard" and "penetrated" her. Tr. 409, lines 9-14; Tr. 450, lines 7-11. He denied the act was sexual in nature or that he received any sexual gratification. Tr. 410, lines 3-14.

Kelli Clune, an expert in forensic nursing, examined Minor 1 at the hospital. She opined that Minor 1's bruises were inconsistent with a single fall. Tr. 342, line 24 – Tr. 343, line 8. Clune noted swelling and redness of Minor 1's vagina. Tr. 362, line 8 – Tr. 364, line 4. She also found vaginal tears. Tr. 364, line 5 – Tr. 367, line 13. Clune opined the tear was caused by an object larger than a finger. Tr. 367, lines 16-19. However, Clune was unable to say what caused the injury. Tr. 372, lines 7-9. On cross-examination, Clune

admitted the interior lacerations may have been caused by a finger in a ripping motion exerting downward pressure. Tr. 372, lines 10-16.

ARGUMENT

I. The trial judge erred in finding assault and battery of a high and aggravated nature was not a lesser-included offense of criminal sexual conduct with a minor in the first degree as a matter of law and in failing to charge the jury on the offense of assault and battery of a high and aggravated nature where the evidence supported the charge.

Relevant facts

During the charge conference, Appellant requested the trial judge instruct the jury on assault and battery of a high and aggravated nature (ABHAN) as a lesser-included offense of criminal sexual conduct (CSC) with a minor in the first degree. Tr. 387, lines 9-11. Although the trial judge recognized that common law ABHAN had been determined to be a lesser-included offense of criminal sexual conduct, the trial judge held that the statutory change to the offense of ABHAN rendered it no longer a lesser-included unless it satisfied the elements test. He further ruled the elements of the statutory offense of ABHAN and the elements of CSC were different; therefore, ABHAN was not a lesser-included offense of CSC. Therefore, the judge refused to charge the jury as to ABHAN. Tr. 389, line 3 – Tr. 392, line 4.

The trial judge instructed the jury on the elements of CSC with a minor in the first degree and offered no lesser-included offenses for the jury's consideration. Tr. 520, lines 1-6. During deliberations, the jury requested a copy of the law on CSC with a minor. Tr. 530, lines 23-25; R. * (Court's Exhibit #2). The judge responded by providing the jury with a written copy of his entire charge. Tr. 531, line 1 – Tr. 532, line 2; R. * (Court's Exhibit #1). Ultimately, the jury returned a guilty verdict for Appellant on the charge of CSC with a minor in the first degree. Tr. 533, lines 16-19.

Discussion

To resolve the issue presented, this Court must determine first whether statutory ABHAN is a lesser-included offense of CSC, and if so, then this Court must determine whether any evidence in the record supported a jury charge on ABHAN. Typically, "[t]he test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." Primus, 349 S.C. at 579-580, 564 S.E.2d at 105 (citing State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000)). "If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense." Id. at 580, 564 S.E.2d at 105 (citing Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997)). Nevertheless, the Court recognizes exceptions to this general rule, such as the anomaly of ABHAN and CSC. Id. (citing State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001)).

As recently as 2002, the Supreme Court reaffirmed its longstanding recognition of common law ABHAN as a lesser-included offense of CSC. In State v. Primus, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005), the Court held ABHAN is a lesser included offense of first degree CSC. The Court acknowledged that because ABHAN had an element not included in first degree CSC, it failed the strict elements test usually used to determine whether an offense is a lesser included of a greater offense. However, the Court recognized this situation presented an exception to the traditional elements test. The Court had repeatedly held ABHAN was a lesser included offense of first degree CSC; therefore, the Court continued to recognize ABHAN as a lesser included offense to sustain a uniform approach to the offenses. Id. Indeed, South Carolina has recognized this exception to the

traditional elements test repeatedly. See State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990); State v. Pressley, 292 S.C. 9, 354 S.E.2d 777 (1987); State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Lambright, 279 S.C. 535, 309 S.E.2d 7 (1983).

In State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005), the Supreme Court held its jurisprudence of consistently incorporating ABHAN into the CSC framework as a lesser included offense of assault with intent to commit CSC (ACSC) survived the codification of the CSC statutes. The Court explained that "the legislature, in enacting the CSC statutes, is presumed to know the common law and could have provided that ABHAN not be treated as a lesser offense of ACSC." Id. at 607 n.2, 552 S.E.2d at 729 n.2 (citing State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997)). Thus, the Court recognized the "anomaly in the law" created by recognizing ABHAN as a lesser included offense of ACSC due to the strict elements test; however, the Court explained "[t]he common law does not always fit into the neat categories we might prefer." The court found "compelling reasons not to abandon [its] longstanding inclusion of ABHAN as a lesser included offense of attempted sexual battery crimes." Id. at 607, 552 S.E.2d at 729.

In 2010, the South Carolina Legislature codified ABHAN. Specifically, the General Assembly explained that ABHAN occurs when a "person unlawfully injures another person" and "great bodily injury results" or "the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1). Further, the statute provided ABHAN "is a lesser-included offense of attempted murder." S.C. Code Ann. § 16-3-600(B)(3).

A person is guilty of criminal sexual conduct with a minor in the first degree if the actor engages in sexual battery with a victim who is less than eleven years of age. S.C. Code Ann. § 16-3-655(A)(1). "'Sexual battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h).

The question is whether the tradition of ABHAN as a lesser included offense of CSC survived the codification of ABHAN. The answer is yes. An application of the strict elements test demonstrates statutory ABHAN – just like common law ABHAN – is not a lesser included of CSC. Nevertheless, the analysis does not end there. Tradition, justice, and fairness demand that ABHAN be treated as a lesser included of CSC. Further, when the legislature codified ABHAN, the legislature was aware of South Carolina's longstanding jurisprudence of treating ABHAN as a lesser included of CSC. Had the legislature sought to change this, it could have done so easily.

Turning to the second question presented, this Court must determine whether there was evidence in the record to support a jury charge on ABHAN. A jury charge to a lesser included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence

must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

"[I]n the context of a trial court's decision not to charge a requested lesser included offense, [the appellate court] review[s] the trial court's decision de novo." The appellate court must reverse and remand for a new trial "if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690-691 (Ct. App. 2011). This Court recognized "three types of cases in which the evidence can support an inference," one of which occurred when "there is evidence the defendant committed a nonsexual ABHAN, such as in a fight and in addition to evidence to support CSC, there is evidence the two never had sex." Id. at 77-78, 719 S.E.2d at 691 (citing State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983)).

The evidence presented clearly supported a charge on ABHAN. Clune testified that Minor 1 suffered a vaginal tear and other vaginal injuries caused by the exertion of considerable force by another person. Appellant admitted he caused the vaginal tear when he was cleaning Minor 1. Thus, the evidence supported a charge of statutory ABHAN because the state presented evidence that Appellant caused great bodily injury to Minor 1. Further, Appellant's statements to police and Appellant's testimony supported a finding of

ABHAN instead of CSC because Appellant caused the injuries while cleaning Minor 1's vagina while she had diarrhea. The trial judge erred in finding as a matter of law that statutory ABHAN is not a lesser included of CSC and as a result refusing to charge the jury accordingly. This Court must correct this legal error and clarify for the bench and bar that the tradition of treating ABHAN as a lesser included of CSC survived the 2010 codification of ABHAN.

II. The trial judge erred in finding as a matter of law that assault and battery in the first degree is not a lesser-included offense of criminal sexual conduct with a minor in the first degree and in failing to charge the jury as to assault and battery in the first degree where the evidence supported the charge.

Relevant facts

The factual circumstances surrounding this issue are very similar to those concerning the first. During the charge conference, Appellant requested the trial judge instruct the jury on assault and battery in the first degree as a lesser included offense of CSC with a minor in the first degree. Tr. 387, lines 9-11. The trial judge ruled, as a matter of law, that assault and battery in the first degree was not a lesser-included offense of criminal sexual conduct because they had different elements. Thus, the judge refused to charge the jury as to assault and battery in the first degree. Tr. 389, line 3 – Tr. 392, line 4.

Discussion

This issue turns on whether assault and battery in the first degree is a lesser included offense of CSC. In 2010, the South Carolina Legislature created the offense of assault and battery in the first degree defined as follows:

> A person commits the offense of assault and battery in the first degree if the person unlawfully: (a) injures another person, and the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd or lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or (b) offers or attempts to injury another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

S.C. Code Ann. § 16-3-600 (C)(1). The statute proclaimed that assault and battery in the first degree is a lesser included offense of assault and battery of a high and aggravated

nature and attempted murder. S.C. Code Ann. § 16-3-600(C)(3). As discussed above, CSC with a minor in the first degree occurs when an actor engages in sexual battery with a victim who is less than eleven years of age. S.C. Code Ann. § 16-3-655(A)(1). "'Sexual battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h).

Appellant is unaware of any South Carolina case law interpreting the assault and battery in the first degree statute as it concerns lesser included offenses. Although an application of the strict elements test would result in finding assault and battery in the first degree is not a lesser included offense of CSC, public policy, fairness, and justice require the exercise of an exception. See Elliott, 346 S.C. at 607-608, 552 S.E.2d at 729-730 (explaining the Court would consider whether offenses were lesser included offenses of greater offenses "on a case-by-case basis, beginning with the elements test"); State v. Northcutt, 372 S.C. 207, 216, 641 S.E.2d 873, 877-878 (2007)(stating that "[w]hen an offense fails to meet the elements test, this Court will nevertheless construe it as a lesser included offense if the offense has traditionally been considered a lesser included offense of the greater offense charged"). In many criminal cases concerning criminal sexual conduct, the dispute between the prosecution and the defense will be whether the assault was sexual, just as the dispute here. Often, a defendant may admit to committing an assault and battery, as Appellant did, but will deny committing any sexual battery. This is why ABHAN has been considered a lesser included offense of CSC for decades. It allows a jury to hold a person responsible for his or her conduct – especially admitted conduct – when the jury

determines the evidence does not support a finding of a sexual battery. Therefore, this Court should hold that assault and battery in the first degree is a lesser included offense of CSC as a matter of law based upon the dictates of fairness, justice, and public policy.

After determining that assault and battery in the first degree is a lesser included offense of CSC, it is necessary to determine whether there was evidence in the record to support a jury charge on assault and battery in the first degree. A jury charge to a lesser included offense is required when the evidence warrants such an instruction. Geiger, 370 S.C. at 606, 635 S.E.2d at 673. South Carolina law mandates a jury instruction on a lesser included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. Watson, 349 S.C. at 375, 563 S.E.2d at 337; Gourdine, 322 S.C. at 398, 472 S.E.2d at 241. In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. This Court explained in Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), that "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

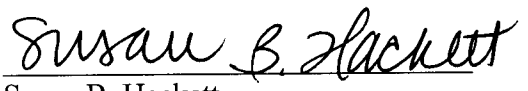
Appellate courts review the trial court's decision not to charge requested lesser included offenses de novo. The appellate court must reverse and remand for a new trial "if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." Gilmore, 396 S.C. at 77, 719 S.E.2d at 690-691.

The evidence presented clearly supported a charge on assault and battery in the first degree. Clune testified that Minor 1 suffered a vaginal tear and other vaginal injuries caused by the exertion of considerable force by another person. Appellant admitted he caused the vaginal tear when he was cleaning Minor 1 after she experienced an episode with diarrhea. Thus, the evidence supported a charge of assault and battery in the first degree because the state presented evidence that Appellant injured Minor 1 through the nonconsensual touching of the private parts of Minor 1, and the jury may have believed Appellant did so with lewd or lascivious intent. The trial judge erred in finding as a matter of law that assault and battery in the first degree is not a lesser included of CSC. This error was compounded by his refusal to charge the jury concerning assault and battery in the first degree. This Court must correct this legal error.

CONCLUSION

Appellant respectfully requests his conviction for criminal sexual conduct with a minor in the first degree be reversed and remanded for a new trial in light of the trial judge's error in refusing to charge the jury concerning the lesser included offenses.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of April, 2014.

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STATE OF SOUTH CAROLINA
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Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

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V.

RANDALL DEAN MATHENY,

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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) Trial transcript dated August 27-29, 2013 pages: 1; 137-153; 157-180; 182-192; 203-238; 241-275; 335-376; 382-392; 396-461; 463-523; 527-533; 538
(2) State's Exhibit #2 (Statement);
(3) State's Exhibit #5 (Statement);
(4) Court's Exhibit #1 (Jury charge);
(5) Court's Exhibit #2 (Note from the jury);
(6) True–billed indictments;
(7) Sentence sheets

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

April 21st, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
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RANDALL DEAN MATHENY,

APPELLANT

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 Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Randall Dean Matheny, #356835 at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29201, this 21st day of April, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of April, 2014.

(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.