

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals  
Appeal From Horry County  
Hon. Larry B. Hyman, Jr., Circuit Court Judge  
Appellate Case Number 2014-000954

**RECEIVED**

JUN 23 2014

**S.C. Supreme Court**

Opinion No. 5198 (S.C. Ct. App. Filed February 12, 2014)

The State,

Respondent/Petitioner,

v.

Robert Palmer,

Petitioner/Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS BY RESPONDENT/PETITIONER**

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals did not err in affirming the trial court's decision refusing to enforce the proffer agreement between Petitioner and the State because Petitioner breached the agreement. Additionally, Petitioner has demonstrated no prejudice from the failure to enforce the agreement and has no relief to which he is entitled.

II. The Court of Appeals did not err in affirming the trial court's denial of Petitioner's motion for directed verdict.

## STATEMENT OF THE CASE

### Procedural History

The State agrees with Petitioner's procedural Statement of the Case.

### Factual Background

Petitioner and his co-defendant, Gorman, were indicted for homicide by child abuse for inflicting fatal injuries to the seventeen-month-old grandson of Gorman. Petitioner and the victim's grandmother lived together for approximately four years. They came into custody of the child after the child's mother had to leave him with them in order to attend to business out of town prior to reuniting with the child's father.

Prior to the mother leaving, the child was taken to the doctor due to ant bites and congestion from allergies. He was given medication and was scheduled to return later for immunizations. The treating doctor indicated the toddler looked normal at the time of the examination and treatment.

On July 14, 2008, Gorman left for work before 6:00am and the child was sleeping and fine. The toddler remained in the care of Petitioner throughout the day. Petitioner fed the child at 9:30am and again around noon. Around 3:30pm, Petitioner laid the victim down again for a nap.

Around 4-4:30pm Gorman arrived home from work and checked on the toddler who appeared to be sleeping. She did not touch the child or closely examine the child. Around 6:00pm, the parties finished dinner and Gorman went to wake the toddler. She found him limp, arms bowed, and frothy saliva coming from his mouth. She called 911 and the child was taken to Conway Medical.

Lt. Rainbolt with the Horry County Fire and Rescue arrived as a result of the 911 call. He testified Petitioner was holding the child on the couch when he arrived and he could tell the child was in grave condition. The child was given over to Erica Rosenthal a paramedic that arrived. Rosenthal testified the child had a right sided gaze and appeared to be having a seizure.

The emergency room nurse and the doctor who saw the toddler, both testified his condition was critical. They both indicated he was posturing due to the head trauma. A CAT scan was done and revealed skull fractures and bleeding in the brain. Dr. Cacace testified it would have to be "tremendous force to the skull" to cause the type of injury seen in the toddler. She testified the injury was not accidental.

Dr. Roberts, a neuro-radiologist with the Medical University of South Carolina (MUSC), testified the toddler suffered blood around the brain, severe swelling of the brain, loss of the gray-white differentiation which indicated dead brain tissue, and severe fractures. (T.406; R. 332). She testified both sides of the skull were fractured by severe traumatic force. (T.409-410; R. 335-336). She indicated the fractures were caused by a force similar to falling out of a three story window or being involved in a motor vehicle accident. (T.416-417; R. 342-343). She indicated the toddler was in a condition from which she would expect no meaningful recovery. (T.411; R. 337).

Dr. Roberts also testified the injury was acute, or very recent. She testified as a result of the injury, the toddler would have lost the ability to function normally. (T.413-415; R. 339-341). She testified a person with the type of injury sustained by the toddler would be immediately and severely symptomatic. She said the child would lose consciousness, have altered breathing, seizures, and would not be able to move or have

other normal functions. (T.419; R. 345). She testified the injuries could only have occurred the day the child presented to the emergency room. (T.420-421; 434-435; R. 346-347; 360-361).

Dr. Abel, the Director of the Violence Intervention and Prevention Division in the pediatric department of MUSC, testified she was called in to examine the toddler. She testified she took some background history from Petitioner and Gorman. She testified she examined the child and his CT scans. She testified the fractures of the child's skull were similar to a cracked pot and indicated it appeared to be caused by severe forceful impact against a hard surface. She testified the blows were to both sides of the head. Dr. Abel indicated the degree of force used was "massive." (T.516; R. 417). Dr. Abel also testified to bruising on the child, including several suspicious bruises in locations making it unlikely the toddler accidentally received the bruises. (T.519-522; R. 420-423). Dr. Abel testified anyone seeing the force being applied to the child to cause the head trauma would "perceive this was tremendous force." (T.534; R. 435).

Dr. Abel further testified if an observer was not present when the force was applied, they may not appreciate that something happened to the child. (T.541; R. 440). Dr. Abel testified the injury to the child occurred sometime the day he presented to the emergency room. (T.553-554; R. 452-453). The testimony by Dr. Abel indicated the injuries to the child likely happened three or so hours before the child presented to the ER with his injuries. (R.530-531). She testified it could be possible for an observer not to be able to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457).

Dr. Schandl, a forensic pathologist with MUSC, testified the toddler had fractures on both sides of his skull. She testified the cause of death was inflicted blunt head trauma. (T.487; R. 393). She testified the manner of death was homicide. (T.488; R. 394).

Detective Troxell interviewed and took statement from both Petitioner and Gorman. Both testified Petitioner was alone with the toddler all day. Both testified Gorman woke up about 4:30am and left for work in the early morning to be there before 6:00am. Gorman testified she checked on the toddler and he appeared fine before she left. Petitioner indicated he woke the child up about 9:30am and fed him. He testified he fed him lunch about noon, and then put him down for a nap about 3:30pm. Petitioner's statement noted Gorman arrived home at about 4:15 pm.

Petitioner indicated when Gorman arrived home they both checked on the toddler and decided not to wake him. (T.687; R.470). According to Petitioner, they only walked to the edge of the door and not all the way into the room. (T.687; R. 567). Petitioner testified they ate dinner before waking up the toddler. He testified she went into the room and found him having a seizure. (T.688; R. 568). Petitioner admitted no one else comes over to assist him during the day when he is caring for the toddler. (T. 693; R. 573). According to Petitioner, neither he nor Gorman did anything to the toddler.

Gorman also gave a statement in which she indicated that the toddler was in Petitioner's care throughout the day. She testified she got up at 4:30am and left for work after checking on the child. She arrived home between 4:00 and 4:30pm and checked on him. He appeared to be sleeping. (T.737-739; R. 617-619). She confirmed they then ate dinner, and after dinner, she went into the toddler's room to wake him up. Gorman

indicated she found the toddler making strange noises with saliva running from his mouth. (T.739; R. 619). Gorman testified she never laid a hand on the toddler. (T.751; R. 631).

Gorman testified the only time she picked up the toddler the day he was admitted to the emergency room was when she picked him up after dinner. (T.798; R. 678). Both Petitioner and Gorman claimed ignorance of what happened to the child.

At trial, Gorman testified similarly to how she testified in her statement. She gave similar details about leaving for the day. Her story, however, changed regarding the sequence of events upon arriving home. She testified, and presented a time card from her employer, indicated she left her job at 3:45pm. She testified it takes about 45-50 minutes to get home. (T.920; R. 790). She indicated when she arrived home, she checked on the toddler. She verified when she came home she only walked to the door and did not attempt to pick him up. (T.921-922; R. 791-792). She then testified she went to the IGA to get food for dinner and to the video store. She produced a check written to the IGA the day the toddler was admitted to the hospital. It indicated it was processed by IGA at 3:52pm, which she testified would be impossible because of the time it takes to get there from work. She indicated it made sense if the clock was off and should have been 4:52pm. (T.923-925; 927; R. 793-795). She testified when she arrived home from IGA she did not check on the child again. (T.929; R. 799). She confirmed after dinner she entered the child's room and found him "breathing funny" with "saliva hanging out of his mouth." (T.931; R. 801). She called for Petitioner, who immediately took the child while she called 911. (T.931-932; R. 801-802).

## ARGUMENT

- I. **The Court of Appeals did not err in affirming the trial court's decision refusing to enforce the proffer agreement between Petitioner and the State because Petitioner breached the agreement. Additionally, Petitioner has demonstrated no prejudice from the failure to enforce the agreement and has no relief to which he is entitled.**

The Court of Appeals correctly found the agreement is not a proffer agreement in the technical sense. Further, Petitioner breached the agreement by failing to be fully forthcoming with the information about the toddler's death and, as a result, the agreement was rendered null and void under its terms. Additionally, the State completed the extent of its part of the agreement in considering the charges it brought against Petitioner. Petitioner has not demonstrated any relief he would be entitled to under the proffer agreement he failed to receive, and as a result has not demonstrated how he was prejudiced by the trial court's refusal to enforce the agreement.

First, the Court of Appeals correctly relied on United States v. Gillion, 704 F.3d 284, 292 (4th Cir. 2012) (defining a "proffer agreement" as an agreement "intended to protect the defendant against the use of his or her statements," particularly when "the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement"). The agreement does not protect him from the use of his statements against him; it merely indicates his statements will be considered by the State in determining charges and at sentencing.

Additionally, the Court of Appeals correctly concluded "Palmer failed to demonstrate how enforcement of the agreement would affect him." In effect, the Court

properly found Petitioner demonstrated no prejudice nor did he demonstrate any relief to which he was entitled.

“Our case law unequivocally establishes agreements between defendants and the State should be interpreted ‘in accordance with general contract principles.’” State v. Wills, 390 S.C. 139, 144, 700 S.E.2d 266, 268 (Ct. App. 2010) (quoting State v. Compton, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (Ct. App. 2005)). “The court must enforce an unambiguous contract according to its terms, regardless of the contract’s wisdom or folly, or the parties’ failure to guard their rights carefully.” Compton, 366 S.C. at 678, 623 S.E.2d at 665 (citing Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). “Where language used in an instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Language which is perfectly clear determines the full force and effect of the document.” State v. Gates, 299 S.C. 92, 95, 382 S.E.2d 886, 887 (1989) (internal citations omitted).

In the instant case, the parties entered into a proffer agreement which was neither a plea agreement nor an immunity agreement. The proffer agreement required, *inter alia*:

1. Robert Andrew Palmer shall submit himself to agent(s) of the State for the purpose of the briefing regarding this matter and all other matters materially bearing on this matter. He shall be completely truthful concerning his involvement in this matter, and completely truthful concerning the involvement of all other individuals in this matter. He shall truthfully and completely answer all questions posed by agent(s) of the State bearing materially on this matter, and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by a direct question. Any and all information provided by Robert Andrew Palmer under the terms of the proffer may be recorded in any fashion at the election of the State . . . .

(Proffer Agreement; R. 994). The agreement clearly required Petitioner to provide all information concerning the homicide of the toddler without the State having to ask direct questions. Therefore, when Petitioner failed to provide all the relevant information regarding the time line of the toddler's death, he breached the provisions of the proffer agreement. It was only after the State learned of a different time line from the pathologist and radiologist that Petitioner was open to questioning about the actual events which took place leading to the death of the toddler. (June 10T. 2-3; 5; R. 2-3; 5). Petitioner's counsel, in her motion to enforce the proffer agreement, states: "Mr. Palmer met with [Petitioner's counsel], and a brief summary of **additional details** concerning the new time line was given to Assistant Solicitor Lively and an invitation to re-interview Mr. Palmer was made." (Motion to Enforce Proffer Agreement page 2; R. 996) (emphasis added). The State, therefore, had a right to withdraw from the proffer agreement because under provision 5 "Violation of any term of this Proffer renders all terms null and void." (Proffer Agreement; R. 994).

Further, the proffer agreement only established a single obligation on the part of the State. It read:

The State shall consider the extent and degree of cooperation of Robert Andrew Palmer in the election of charges and at the sentencing of Robert Andrew Palmer, and shall advise the Court of Robert Andrew Palmer's extent and degree of cooperation in connection with this matter. . . .

(Proffer Agreement page 2; R.995). As the trial court found, the State had every right to charge Petitioner as it deemed appropriate. There was absolutely no requirement the State charge Petitioner only with a lesser included offense or that he not be tried as a co-defendant with Gorman. The only requirement was for the State to consider his

cooperation in reaching its decision. There is no evidence this was not done, especially in light of the State's belief that Petitioner was not entirely forthcoming regarding the time frame and the events leading up to the toddler's death. As a result, Petitioner cannot demonstrate how he was prejudiced, or show any provision of the proffer agreement with which the State failed to fully comply.

In his brief, appellant sets forth four ways in which he allegedly was prejudiced. First, he was not allowed to testify against Gorman, and instead, was a co-defendant tried at the same time as Gorman. However, the proffer agreement makes it clear he was only testifying on behalf of the State "upon being called upon to do so." (Proffer Agreement; R. 994). Further, nothing prohibited Petitioner from testifying at trial either for or against Gorman. Therefore, Petitioner did not detrimentally rely on the agreement and was not prejudiced in this manner.

Second, Petitioner contends the State had to elect favorable charges in return for his cooperation. This completely misstates the obligation of the State under the proffer agreement. As stated above, the State merely had to consider his cooperation, and absolutely no restrictions existed on the charges which could be brought against Petitioner. There was never a promise Petitioner would only be charged with a lesser included offense instead of being charged with homicide by child abuse. Petitioner did not detrimentally rely on the agreement, nor was he prejudiced by the State's withdrawal.

Third, Petitioner contends the State offered no help at sentencing contrary to the agreement. The State was not obligated to offer any specific help at sentencing or make any type of recommendation at sentencing. Its sole obligation was to make the court aware of the extent and degree of cooperation by Petitioner. This was thoroughly

accomplished both pretrial and by Petitioner's counsel during sentencing.<sup>1</sup> As a result, Petitioner did not detrimentally rely on the proffer agreement and was not prejudiced in any regard by its withdrawal.

Fourth, Petitioner contends the State was able to gain information through their debriefing of Petitioner and their interviews to try to make a case against Petitioner. The proffer agreement specifically allowed the State to use any information obtained during the interviews. Further, the State submitted Petitioner did not provide them any significant information. Finally, the State did not offer any recordings or other statements by Petitioner from the interviews during trial. Accordingly, Petitioner could not have detrimentally relied or been prejudiced in this manner.

Finally, Petitioner has not demonstrated any relief to which he is entitled. As mentioned, the agreement did not entitle him to testify unless the State chose to call him. It did not entitle him to be charged with a specific crime or receive a specific sentence. Accordingly, even if the agreement was enforced, the State could still try Petitioner for the same charges, using the same evidence, and ask for the same sentence considerations as it did in the instant case. As a result, even if the agreement is enforced, then there is no relief which Petitioner can receive which he has not already received.

Therefore, the State submits the trial court did not err or abuse his discretion in refusing to enforce the proffer agreement any further than it had already been performed, and the Court of Appeals correctly determine Petitioner failed to demonstrate how enforcement would affect him.

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<sup>1</sup> The State notes that Petitioner's cooperation only went so far because it was only after the time frame was condensed that he offered to be interviewed for a third time to provide additional details which he was obligated to provide from the beginning. Because of the pretrial motion, the court was well aware of Petitioner's cooperation or lack thereof. (June 10 T.2-5; R. 2-5).

**II. The Court of Appeals did not err in affirming the trial court's denial of Petitioner's motion for directed verdict.**

The Court of Appeals correctly found the trial court properly denied Petitioner's motion for a directed verdict. The evidence provided substantial circumstantial evidence Petitioner was the individual who caused the traumatic injury to the child.

“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused; an appellate court must find the case was properly submitted to the jury.” Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

In relevant part, section 16-3-85 of the South Carolina Code provides:

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:

- (1) “child abuse or neglect” means an act or omission by any person which causes harm to the child's physical health or welfare;
- (2) “harm” to a child's health or welfare occurs when a person:
  - (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment. . . .

S.C. Code Ann. § 16-3-85 (Supp. 2012).

The evidence in this case demonstrated the child died as the result of trauma that was intentionally and severely inflicted. Every doctor indicated it would require severe trauma to cause the type of injury, and it was not contested the toddler died as a result of his head injuries. Further, the evidence indicated the child was only in the custody of two people during the time frame in which the trauma causing his death could have occurred—Petitioner and Gorman. Finally, there is substantial circumstantial evidence indicating Petitioner caused the trauma during a period of time when Gorman was not present or the two acted in concert to cause the trauma; therefore, supporting the decision of the trial court to deny the motion for a directed verdict on Petitioner’s homicide by child abuse charge.

The primary case relied upon by Petitioner to argue the State failed to present substantial circumstantial evidence is State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). Hepburn is clearly distinguishable from the case at hand and was properly distinguished by the majority opinion of the Court of Appeals.

In Hepburn, the South Carolina Supreme Court explained: “There were only two people who could have killed the victim, either Appellant or her boyfriend of five months, co-defendant Brandon Lewis, as they were home with the victim on the night she sustained her fatal injuries.” Id. at \_\_\_, 753 S.E.2d at 403. The Court found, once the co-

defendant's testimony was excluded under an exception to the waiver rule, the State's evidence only demonstrated: "(1) Appellant was asleep at the time the victim sustained her injuries, (2) Appellant was only awoken after [her co-defendant] retrieved the unresponsive victim from her crib, and (3) the victim appeared to be acting normally until after Appellant put the victim to sleep and went to sleep herself." Id. at \_\_\_\_, 753 S.E.2d at 415-416. As a result, the Court distinguished State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004), the opinion the State primarily relies on in the instant case.

In Smith, the Court of Appeals explained:

The statute makes clear that child abuse may be committed by either an act or an omission which causes harm to a child's physical health. Additionally, harm to a child's health occurs when a person either inflicts, or allows to be inflicted physical injury upon a child. Given the evidence on the severity and number of injuries to Jordyn, the fact that both Smith and Celeste were the only adults with Jordyn during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have been obvious to these two adults, along with the evidence of possible cover-up, we find there was sufficient evidence of an act or omission by Smith wherein he inflicted or allowed to be inflicted physical harm to Jordyn resulting in Jordyn's death.

Smith, 359 S.C. at 492, 597 S.E.2d at 894 (internal citations omitted).

According to the testimony of Petitioner and Gorman, Petitioner was home the majority of the day alone with the toddler. Gorman merely looked in on the toddler in the morning and when she arrived home that evening. She did not go into the room or near the child. She testified he appeared to be sleeping, but she did not verify the condition of the child.

In the instant case, Dr. Abel and others testified the injury had to happen the day the toddler was taken to the emergency room. The doctors all testified the injury was severe and caused by blunt force trauma intentionally inflicted to the child. Further, they testified the child suffered fractures to the skull on both the left and right sides, as well as significant bleeding on the brain, and death of brain tissue.

Dr. Abel further testified if an observer did not see the force applied or identify the symptomology, they may not appreciate that something happened to the child. (T.541; R. 440). She testified it could be possible for an observer to differentiate a child that is sleeping from one that is unconscious as a result of a head trauma if they were not aware of the trauma. (T.558; R. 457). Further, she specifically testified:

[T]he signs of head trauma are changing consciousness, sometime seizures, sometimes breathing abnormalities. They, they don't all happen at once, so a child could have a head injury and be quietly breathing and apparently sleeping but actually unconscious and it would not be possible for a person who didn't know that they had had the head injury to realize it until later, until something more started happening.

(T.559; R. 458).

As a result, the jury had evidence from which is could reasonably conclude the trauma was inflicted by Petitioner prior to Gorman getting home and, if Gorman did not notice anything wrong from the doorway when she looked in on the toddler, then she would not have known something happened to the child until she went to pick up the child. Gorman testified she did not enter the room, but instead merely observed the child appearing to be asleep. Gorman testified when she went into the room to pick up the child was when she noticed something wrong. Prior to this time, Petitioner was the only one home throughout the day with the child.

Additionally, the jury could reasonably conclude the trauma occurred during the time both Petitioner and Gorman were present. According to Dr. Roberts, if the trauma occurred before Gorman arrived home, then the child would have been immediately symptomatic and would not have been breathing normally. Gorman testified the child appeared to be sleeping and breathing normally when she arrived home. The medical testimony indicated the trauma could have occurred after Gorman arrived home. According to the defendants' statements, they remained home until calling 911. The trauma which occurred in this case was so severe, even if only one person inflicted the trauma, the other knew it was occurring and did nothing to stop it. As a result, this case would be remarkably similar to Smith in that the trauma occurred while both adults were present and Petitioner either inflicted the trauma or allowed the trauma to occur.

Finally, the jury had evidence to support a conclusion the injury occurred when Gorman went to the store prior to dinner. As the majority of the Court of Appeals found, her testimony indicated she checked on the toddler when she arrived home and everything appeared normal. As stated above, according to Dr. Roberts, if the trauma occurred before Gorman arrived home, then the symptoms of the trauma would have been immediately noticeable. Gorman then went to the grocery store and returned. She testified she did not check on the child when she returned and next saw the child when she found him seizing and foaming at the mouth. Accordingly, the evidence when viewed in the light most favorable to the State provides substantial circumstantial evidence Petitioner inflicted the harm to the toddler.<sup>2</sup>

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<sup>2</sup> It should also be noted that in their briefs and at oral argument before the Court of Appeals, the parties each argued the evidence demonstrated the other co-defendant committed the crime. The fact they could each find evidence supporting the other's guilt exemplifies why the trial court properly denied the motion for directed verdict and allowed the case to go to the jury.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 23, 2014

STATE OF SOUTH CAROLINA

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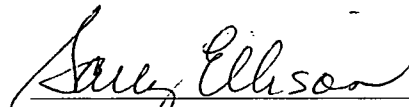
Petitioner/Respondent.

**PROOF OF SERVICE**

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
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I further certify that all parties required by Rule to be served have been served.  
This 23<sup>rd</sup> day of June, 2014.

  
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