

The Supreme Court of South Carolina

The State, Respondent,

v.

Quashon Middleton, Appellant.

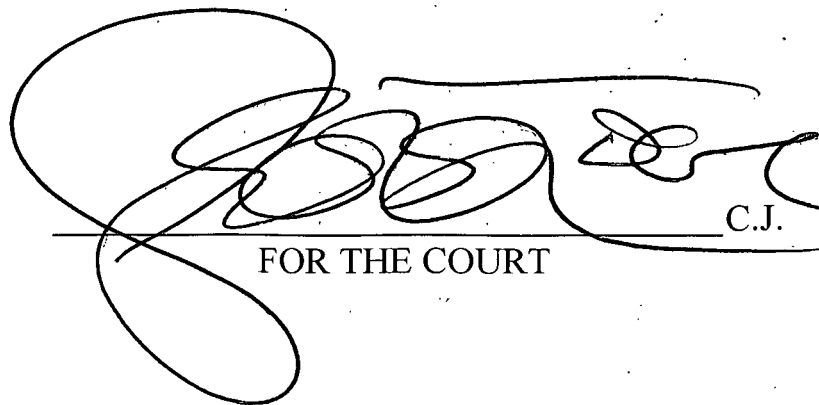
Appellate Case No. 2011-196767

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



C.J.

FOR THE COURT

Columbia, South Carolina

July 25, 2012

cc:

Salley W. Elliott

William M. Blich, Jr.

Susan Barber Hackett

The Honorable Jenny Kitchings



ALAN WILSON
ATTORNEY GENERAL

May 4, 2012

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

Re: State v. Quashon Middleton

Dear Ms. Hackett:

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

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

WMB:erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services (enclosure)

RECEIVED

MAY 04 2012

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal From Colleton County
Hon. Perry M. Buckner, III, Circuit Court Judge

The State,

Respondent,

v.

Quashon G. Middleton,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 2226
Beaufort, South Carolina 29901
(843) 255-5880

ATTORNEYS FOR RESPONDENT

RECEIVED
MAR 23 2012
SC COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

 I. Any error on the part of the trial court for failing to charge the lesser included offense of assault and battery in the first degree as to the victim Ryan Stephens was entirely harmless under the facts and circumstances of this case. 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) 4

Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) 4

Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) 4, 5

State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) 4

State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994) 4, 5

State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998) 4

Sullivan v. Louisiana, 508 U.S. 275 (1993) 5

Yates v. Evatt, 500 U.S. 391 (1991) 5

Other Authorities:

S.C. Code Ann. § 16-3-600 (C) (Supp. 2011) 3, 4

STATEMENT OF ISSUES ON APPEAL

Any error on the part of the trial court for failing to charge the lesser included offense of assault and battery in the first degree as to the victim Ryan Stephens was entirely harmless under the facts and circumstances of this case.

STATEMENT OF THE CASE

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

ARGUMENT

- I. Any error on the part of the trial court for failing to charge the lesser included offense of assault and battery in the first degree as to the victim Ryan Stephens was entirely harmless under the facts and circumstances of this case.**

Appellant contends the trial court erred in failing to charge the lesser included offense of assault and battery in the first degree. Even though the trial court may have misinterpreted the statute, any error in failing to charge assault and battery in the first degree was entirely harmless. The court properly charged the lesser included of assault and battery in the first degree as it related to the other victim, Stephanie Mack, and the jury convicted him of attempted murder based on the same facts as would apply to victim Stephens. As a result, any error in the failure to charge the lesser-included offense played no role in the jury's decision finding Appellant guilty of attempted murder as it related to victim Stephens.

Section 16-3-600 provides:

(C)(1)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 and lascivious intent; or
- (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or

(b) offers or attempts to injure 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.

(3) Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

S.C. Code Ann. § 16-3-600 (C) (Supp. 2011). Further, if there is evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge must instruct the jury on the lesser-included offense. Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005).

Even if improper, this Court can determine an improper charge to be entirely harmless. See Lowry v. State, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) (“an unconstitutional jury instruction will not require reversal of the conviction if the Court determines beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”); Arnold v. State/Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (finding an improper malice charge harmless beyond a reasonable doubt); State v. Jefferies, 316 S.C. 13, 23, 446 S.E.2d 427, 433 (1994) (finding incorrect kidnaping charge which may have confused jury was harmless); State v. Kerr, 330 S.C. 132, 144-145, 498 S.E.2d 212, 218 (Ct. App. 1998) (holding improper and confusing jury charge on impairment in a DUI case was harmless error).

In determining whether an improper jury charge is harmless, this Court has stated: “in determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.” State v. Buckner, 341

S.C. 241, 247-248, 534 S.E.2d 15, 18-19 (Ct. App. 2000). As the South Carolina Supreme Court explained:

Harmless error review looks to the basis on which the jury actually rested its verdict. From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must “find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.”

Lowry, 376 S.C. at 508, 657 S.E.2d at 765 (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991)) (internal citation omitted). The South Carolina Supreme Court has further explained: “In making a harmless error analysis, our inquiry is not what would the verdict have been had the jury been given the correct charge, but rather did the erroneous charge contribute to the verdict rendered.” Jefferies, 316 S.C. at 22, 446 S.E.2d at 432 (citing Sullivan v. Louisiana, 508 U.S. 275 (1993)).

In the instant case, the failure to charge the jury on the lesser-included offense of assault and battery in the first degree was entirely harmless because it clearly did not contribute to the verdict rendered. Appellant, while riding a moped, pulled along side a vehicle, which had stopped because a school bus stopped in the adjoining lane to let off students. Mack drove the vehicle in which Stephens was a passenger. Appellant began shooting at the vehicle as he drove from the passenger side around to the front of the car. Stephens climbed on top of Mack so he could drive the car away and in doing so hit Appellant. (T.195-196; 198-199; 215-216; R. ___). The entire incident was witnessed by several individuals on the school bus. (T.124-127; 133-134; R. ___).

The trial court charged the jury on the law of attempted murder, the offense for which Appellant was charged, as to both victims. The court also charged the jury on assault and battery of a high and aggravated nature and assault and battery in the first degree as it related to Mack. (T. 353-355; R. ____). The court only charged the jury on attempted murder as it related to Stephens. The jury, however, convicted Appellant on attempted murder as to both victims.

By finding Appellant guilty of attempted murder as to Mack, the jury clearly rejected the lesser-included offenses of assault and battery of a high and aggravated nature and assault and battery in the first degree. The same set of facts apply to both victims because nothing was different regarding Appellant's actions towards either victim. He shot numerous in the car at both victims. The facts of this case and the jury's verdict as it relates to victim Mack, demonstrate the failure to charge the lesser-included offense played no role in the jury's verdict of attempted murder related to victim Stephens.

Finally, Appellant's assertion the conviction for attempted murder as to victim Mack should be reversed is entirely without merit. The jury had before it the lesser-included offenses and the attempted murder charge. Counsel never maintained at trial the charge given as it related to victim Mack was improper or that his conviction was invalid because of the erroneous charge given as it related to victim Stephens. The jury found, and the evidence clearly supports, a finding of guilty on the charge of attempted murder.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General


JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 2226
Beaufort, South Carolina 29901
(843) 255-5880

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 23, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Colleton County
Hon. Perry M. Buckner, III, Circuit Court Judge

The State,

Respondent,

v.

Quashon G. Middleton,

Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following to be included in the Record on Appeal:

- 1) True-billed Indictment(s);
- 2) Trial transcript pages 1; 8; 97-102; 119-139; 193-209; 212-239; 260-272; 284-298; 307-367; 370-371; 379.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. Additionally, Respondent notes personal data identifiers and other sensitive information should be redacted from the transcript or other documents pursuant to the South Carolina Supreme Court Order dated August 13, 2007.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 2226
Beaufort, South Carolina 29901
(843) 255-5880

By: 
WILLIAM M. BLITCH, JR.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 23, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Colleton County
Hon. Perry M. Buckner, III, Circuit Court Judge

The State,

Respondent,

v.

Quashon G. Middleton,

Appellant.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 23rd day of March, 2012



ELLEN DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

March 23, 2012

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

Re: State v. Quashon Middleton

Dear Ms. Hackett:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

WMB:erd
Enclosures

cc: ~~Honorable Jenny-A. Kitchings~~ (original and one enclosed)
Victim Services (enclosure)

RECEIVED
MAR 23 2012
SC COURT OF APPEALS

The South Carolina Court of Appeals

The State,

Respondent

v.

Quashon Middleton,

Appellant.

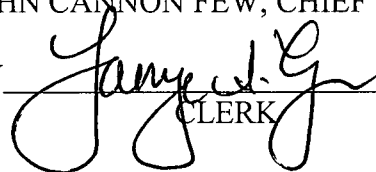
The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2010-GS-15-00960
2010-GS-15-00961
2010-GS-15-00962

ORDER

For good cause shown, the request for an extension to serve and file the Initial Brief of Respondent and Designation of Matter on March 23, 2012 is granted. Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

JOHN CANNON FEW, CHIEF JUDGE

BY


CLERK

Columbia, South Carolina

cc: Appellate Defender Susan Hackett
Assistant Attorney General William M. Blich, Jr.

FILED


Bellamy, Latrea

From: COA Extensions
Sent: Thursday, February 23, 2012 9:26 AM
To: Bellamy, Latrea
Subject: FW: State v. Quashon G. Middleton

*Index
Due 2/23/12*

From: Kimberly McCall [mailto:kmccall@sccid.sc.gov]
Sent: Wednesday, February 22, 2012 3:55 PM
To: Ellen DuBois; COA Extensions
Cc: William Blitch; Susan Hackett
Subject: RE: State v. Quashon G. Middleton

We consent.

From: Ellen DuBois [mailto:EDuBois@scag.gov]
Sent: Wednesday, February 22, 2012 3:10 PM
To: coaextensions@sccourts.org
Cc: William Blitch; Kimberly McCall; Susan Hackett
Subject: State v. Quashon G. Middleton

Clerk's Office
South Carolina Court of Appeals

RE: State v. Quashon G. Middleton

The Initial Brief of Respondent and Designation of Matter in the above appeal are due to be served February 22, 2012. However, due to a heavy workload, I am requesting a 30 day extension.

This is the **Second** extension request in this case, and it is not intended for the purpose of delay. By copy of this email, I am asking that counsel for Appellant, Susan B. Hackett, Esquire, consent to this extension request.

Sincerely,
William M. Blitch, Jr.
Assistant Attorney General

WMB/erd

The South Carolina Court of Appeals

The State,

Respondent

v.

Quashon Middleton,

Appellant.

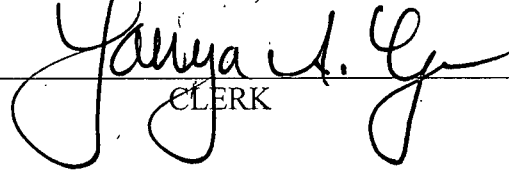
The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2010-GS-15-00960
2010-GS-15-00961
2010-GS-15-00962

ORDER

The request for an extension to serve and file the Initial Brief of Respondent and Designation of Matter on February 22, 2012 is granted. Pursuant to the Supreme Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

JOHN CANNON FEW, CHIEF JUDGE

BY


CLERK

Columbia, South Carolina

cc: Appellate Defender Susan Hackett
Assistant Attorney General William M. Blich, Jr.

FILED
JK 1/30/12

Bellamy, Latrea

From: COA Extensions
Sent: Tuesday, January 24, 2012 7:31 AM
To: Bellamy, Latrea
Subject: FW: State v. Quashon G. Middleton

*1st ext
Due 2/22/12*

From: Kimberly McCall [mailto:kmccall@sccid.sc.gov]
Sent: Monday, January 23, 2012 4:02 PM
To: Ellen DuBois; COA Extensions
Cc: William Blitch; Susan Hackett
Subject: RE: State v. Quashon G. Middleton

We consent.

From: Ellen DuBois [mailto:EDuBois@scag.gov]
Sent: Monday, January 23, 2012 3:32 PM
To: coaextensions@sccourts.org
Cc: William Blitch; Kimberly McCall; Susan Hackett
Subject: State v. Quashon G. Middleton

Clerk's Office
South Carolina Court of Appeals

RE: State v. Quashon G. Middleton

The Initial Brief of Respondent and Designation of Matter in the above appeal are due to be served January 23, 2012. However, due to a heavy workload, I am requesting a 30 day extension.

This is the **first** extension request in this case, and it is not intended for the purpose of delay. By copy of this email, I am asking that counsel for Appellant, Susan B. Hackett, Esquire, consent to this extension request.

Sincerely,
William M. Blitch, Jr.
Assistant Attorney General

WMB/erd



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 11 2012
SC Court of Appeals

January 10, 2012

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

Re: The State v. Quashon G. Middleton

Dear Ms. Hackett:

This letter is to confirm that our office received Appellant's Initial Brief and Designation of Matter in the above-referenced case and to advise you that I will be representing the State in this appeal. Please forward all future correspondence regarding this matter directly to me.

I look forward to working with you on this case.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

cc: The Honorable Tanya Gee
Victim Services

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUASHON G. MIDDLETON,

APPELLANT

INITIAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES2

STATEMENT OF ISSUE ON APPEAL4

STATEMENT OF THE CASE5

ARGUMENT6

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6
(1993)..... 10

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)..... 10

In re McGee, 278 S.C. 506, 299 S.E.2d 334 (1983)..... 10

In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998)..... 10

Paschal v. State Election Comm’n, 317 S.C. 434, 454 S.E.2d 890 (1995)..... 10

State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006)..... 9

State v. Germany, 211 S.C. 297, 44 S.E.2d 840 (1947) 11

State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996) 9

State v. Hill, 29 S.C.L. (2 Speers) 150 (S.C. App. L. 1843)..... 10

State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925) overruled on other grounds by State v.
Foust, 325 S.C. 12, 479 S.E.2d 50 1996)..... 10, 11

State v. Mims, 286 S.C. 553, 335 S.E.2d 237 (1985)..... 10, 11

State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)..... 9

State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989) 13, 14

State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002)..... 9

Statutes

2010 S.C. Act No. 273 12

S.C. Code Ann. § 16-3-600(C)(1)(a) 11

S.C. Code Ann. § 16-3-600(C)(1)(b)..... 8, 10, 11

S.C. Code Ann. § 16-3-600(C)(3)..... 9

STATEMENT OF ISSUE ON APPEAL

The trial judge's requirement that the evidence must show an unlawful touching or injury in order to instruct the jury on the lesser-included offense of assault and battery in the first degree was error in light of the clear statutory language defining the offense and the Legislature's intent.

STATEMENT OF THE CASE

A Colleton County Grand Jury indicted Appellant for the attempted murder of Ryan Stephens pursuant to indictment 2010-GS-15-960, the attempted murder of Stephanie Mack pursuant to indictment 2010-GS-15-962, and possession of a weapon during a violent crime pursuant to indictment 2010-GS-15-961. R* Indictments. The state, represented by Amanda Haselden, called the cases for trial on July 25, 2011. Tr. 8 lines 7-12. David Mathews represented Appellant. The jury returned its verdict finding Appellant guilty of attempted murder of Mack and Stephens and possession of a weapon during the commission of a violent crime. Tr. 370 line 15 – Tr. 371 line 7. Judge Buckner sentenced Appellant to imprisonment for thirty years on each count of attempted murder and five years for possession of a weapon during the commission of a violent crime. Tr. 379 lines 2-17.

Appellant filed a timely notice of appeal.

ARGUMENT

The trial judge's requirement that the evidence must show an unlawful touching or injury in order to instruct the jury on the lesser-included offense of assault and battery in the first degree was error in light of the clear statutory language defining the offense and the Legislature's intent.

Relevant Facts

Around three o'clock in the afternoon of September 28, 2010, Stephanie Mack was driving down Brittlebank Road in Colleton County with Ryan Stephens as her passenger. Tr. 194 lines 13-23; Tr. 214 lines 11-20. They came to a stop as a school bus in the on-coming lane stopped to drop off a child. Tr. 195 lines 2-4; Tr. 215 lines 10-12. Appellant, riding on a moped, drove up behind Mack and Stephens and brandished a gun. Tr. 195 lines 7-22; Tr. 215 lines 12-14. Appellant then began shooting in the direction of Mack's car. Tr. 195 lines 4-9; Tr. 215 lines 16-17. Mack then switched seats with Stephens. Tr. 198 lines 9-15; Tr. 206 line 23 – Tr. 207 line 10; Tr. 215 lines 19-20; Tr. 223 lines 20-21; Tr. 229 lines 12-14. While Appellant continued to shoot, Stephens sped off hitting Appellant's leg. Tr. 198 lines 16-22; Tr. 215 lines 22-24. Mack and Stephens then drove to Stephens' home. Tr. 199 lines 11-12; Tr. 217 lines 2-4.

The paramedic who arrived at the scene reported that Appellant stated he had been run over and the people in the car had been shooting at him. Tr. 160 lines 2-6. Appellant was in significant pain according to the paramedic. Tr. 156 lines 6-10. He had a deformity to his right leg indicating a possible fracture. Tr. 158 lines 22 – Tr. 159 line 1. Appellant was transported to the emergency room. Tr. 160 lines 19-21; Tr. 163 lines 3-4.

When law enforcement arrived at Stephens' home, Mack and Stephens provided statements explaining what happened. Tr. 200 lines 7-9; Tr. 216 lines 22-24. Although Mack knew Appellant was the person on the moped, she did not tell the police initially. Tr. 200 lines 10-11. Mack testified that neither she nor anyone in her car shot at Appellant. Tr. 201 lines 5-6. Stephens testified that he did not have a gun in the car and did not shoot at Appellant. Tr. 230 lines 16-19.

The South Carolina Law Enforcement Division (SLED) tested the gunshot residue (GSR) kits collected by local law enforcement. According to Kathleen Woodward with SLED, "[t]he quantities of metals found in [Appellant's] kit d[id] not indicate the presence of gunshot residue." Tr. 288 lines 18-21. However, the GSR kit from Mack's right and left palms provided "quantities of metals that may be associated with gunshot residue." Tr. 288 line 23-25; Tr. 289 lines 2-3. Similarly, "the quantities of metals found on the right palm of [Stephens'] hand may be associated with gunshot residue." Tr. 289 lines 7-9. Likewise, the metals found on Stephens' left palm and back of his left hand "may be associated with gunshot residue." Tr. 289 lines 11-14.

The prosecutor asked Mack "Were you hurt in any way?" Tr. 199 line 17. Mack responded "No, ma'am." Tr. 199 line 18. The prosecutor followed up with "any glass hit you?" and Mack responded "I had a couple of cuts from the glass." Tr. 199 lines 19-20.

At the conclusion of the evidence, the trial judge placed on the record that he had met with the attorneys concerning the changes in the law by virtue of the statute passed in June 2010. Tr. 308 lines 6-9. The judge explained that it was his belief that he should charge the lesser-included offenses of assault and battery of a high and aggravated nature and assault and battery in the first degree as to Mack. Tr. 308 line 21 – Tr. 309 line 1.

Judge Buckner went on to state that there was “no battery involved” with Stephens. Tr. 309 lines 2-3. He recalled that defense counsel asked Stephens if he had been injured and Stephens responded negatively. Tr. 309 lines 3-7.¹ Judge Buckner explained his reasoning as follows:

The statute defines assault and battery in the first degree if the person unlawfully injures another person, and then other things. Although [defense counsel] does point out that there is an offering, or attempting to injure another person, the first part of the statute for assault and battery in the first degree says in A – the person commits this if the person unlawfully, A, injures another person and the act either applies to one or two. And then it says B, offers or attempts to injure another person with the present ability to do so.

Tr. 309 lines 12-21. The judge concluded that he would not charge the jury as to assault and battery in the first degree as to Stephens because there was no touching. Tr. 309 lines 22-24. Later, when discussing the jury instructions again, the trial judge explained that defense counsel requested the charges on the lesser-included offenses as to Stephens, but the judge “declined to do so because of the evidence at the trial in which he said he had no injury.” Tr. 312 lines 21-25. Judge Buckner explained he would charge the jury as to assault and battery in the first degree concerning Mack because she testified “she had cuts and bruises.” Tr. 310 lines 2-12.

After the judge charged the jury, defense counsel renewed his request for the court to instruct the jury on assault and battery in the first degree as to Stephens. Tr. 365 line 24 – Tr. 366 line 4. Judge Buckner again declined to charge assault and battery

¹ The trial judge stated that “both attorneys agreed that that evidence came out during the trial of the case.” Tr. 309 lines 6-7. Respectfully, a review of the record revealed no such testimony by Stephens. Regardless, whether Stephens testified he suffered an injury is inconsequential because the statute for assault and battery in the first degree does not require an unlawful touching. See S.C. Code Ann. § 16-3-600(C)(1)(b).

concerning Stephens because there was no evidence “of any touching for battery.” Tr. 366 lines 17-24.

Law and Analysis

There is no question that assault and battery in the first degree is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(C)(3). 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.”

The trial judge refused to instruct the jury as to assault and battery in the first degree concerning Stephens because there was no touching or injury. This reasoning is erroneous. South Carolina defines assault and battery in the first degree as

offer[ing] or attempt[ing] to injure 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)(b). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Prior to June of 2010, assault and battery was a common law offense. In the 1800s, South Carolina defined assault and battery as “any touching of the person of an individual in a rude or angry manner, without justification.” State v. Hill, 29 S.C.L. (2 Speers) 150 (S.C. App. L. 1843); State v. Mims, 286 S.C. 553, 554, 335 S.E.2d 237, 237 (1985). Assault was defined “as an unlawful attempt or offer to commit a violent injury upon the person of another, coupled with a present ability to complete the attempt or offer by a battery.” In re McGee, 278 S.C. 506, 299 S.E.2d 334 (1983); State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925) overruled on other grounds by State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). The South Carolina Supreme Court explained that common law

assault differed from common law assault and battery in that “there is no touching of the victim.” Mims, 286 S.C. at 554, 335 S.E.2d at 237. In the 1900s the definition of common law assault and battery evolved somewhat. In Jones, 133 S.C. at ___, 130 S.E. at 751, the Supreme Court explained that “simple assault and battery” was “an unlawful act of violent injury to the person of another, unaccompanied by any circumstances of aggravation.” See also State v. Germany, 211 S.C. 297, 300, 44 S.E.2d 840, 841 (1947). Obviously, Appellant concedes that at common law battery required an unlawful touching. However, the new statutory scheme, under which Appellant was indicted, eliminates the requirement of a touching for some categories of assault and battery.

The statutory definition of assault and battery in the first degree does not require an injury or an unlawful touching. The plain language of the statute requires only an offer to injure or an attempt to injure with the present ability to do so and the offer or attempt is accomplished by means likely to produce death or great bodily injury. The statute simply does not require an unlawful touching or an injury to the victim. Comparing § 16-3-600(C)(1)(b) of the South Carolina Code with the other parts of the statute make clear that the Legislature intended to eliminate the requirement of an unlawful touching as to certain categories of assault and battery. Lawmakers required an injury in order to establish assault and battery in the first degree under the first subsection. S.C. Code Ann. § 16-3-600(C)(1)(a). Had the Legislature intended to require a touching or injury for all categories of assault and battery, it easily could have done so. The wording of assault and battery in the third degree demonstrates most clearly that lawmakers intended to eliminate the necessity of a touching from the statutory scheme encompassing assault and battery. By defining third degree assault and battery as

“unlawfully injur[ing] another person, or offer[ing] or attempt[ing] to injure another person with the present ability to do so,” S.C. Code Ann. § 16-3-600(E)(1), lawmakers codified common law assault. Reviewing the statutory scheme as a whole, it is clear the Legislature intended to subsume all categories of common law assault and common law assault and battery.

In addition to the plain and ordinary meaning of the statute, the Legislature made clear in the Omnibus Crime Reduction and Sentencing Reform Act that it was aware of the common law offenses and specifically sought to abolish them:

The common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault are abolished for offenses occurring on or after the effect date of this act.

2010 S.C. Act No. 273, § 7.B. The intent of the General Assembly in passing the legislation was to “provide consistency in sentencing classifications, provide proportional punishments for the offenses committed, and reduce the risk of recidivism.” 2010 Act No. 273 § 2. Rather than creating separate offenses of assault and assault and battery, the Legislature created multiple degrees of assault and battery encompassing conduct that would have been considered assault under the common law.

Appellant, while riding a moped, fired shots into the vehicle in which Stephens was a passenger. His conduct fits squarely within the lesser-included offense of assault and battery in the first degree. The first element - an attempt to injure another person - is satisfied by Appellant shooting a gun into an occupied vehicle. The second element that the actor has the present ability to cause injury is satisfied by Appellant’s use of a gun. Appellant satisfied the final element because he used a deadly weapon to fire shots into

the car where Stephens was a passenger, which is means likely to produce death or great bodily injury.

The trial judge confused the elements of common law assault and battery with the elements of statutory assault and battery in the first degree when he required the showing of an unlawful touching or injury in order to instruct the jury concerning the lesser-included offense.

Although the trial judge instructed the jury on the lesser-included offense of assault and battery in the first degree as to Mack, this Court should reverse Appellant's conviction of attempted murder of Mack as well as his conviction of attempted murder of Stephens due to the prejudice Appellant suffered based upon the judge's erroneous ruling. The evidence presented as to Mack and Stephens was exactly the same. Based on the choices presented to the jury, there is simply no way the jury could find Appellant guilty of assault and battery in the first degree concerning Mack, but find him guilty of attempted murder concerning Stephens. By eliminating the lesser-included offenses concerning Stephens, the trial judge forced the jury to return a verdict of attempted murder as to Mack. The record contained no evidence to suggest that the jury should treat the victims differently as the evidence was the exact same concerning both victims. The trial court's instructions amounted to a comment on the evidence. In State v. Roof, 298 S.C. 351, 380 S.E.2d 828, (1989), the Supreme Court reversed the defendant's conviction for murder where the trial judge instructed the jury it may convict the defendant's co-defendant, who had been charged with murder, on the lesser-included offense of accessory after the fact, but did not give the jury that option for the defendant and the evidence presented against the two was the same. The defendant and co-

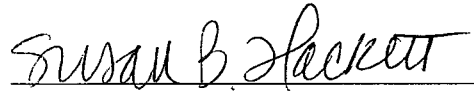
defendant gave identical statements to law enforcement implicating the other in the murder, but inculcating the writer as an accessory. Id. at 352-353, 380 S.E.2d at 829. The co-defendant testified at trial consistent with his written statement. Id. at 353, 380 S.E.2d at 829. At the conclusion of the trial, the judge instructed the jury on murder and accessory as to the co-defendant, but refused to charge accessory as to the defendant. Id. The Supreme Court held that “by giving the accessory charge as to [co-defendant], the court improperly implied that the court itself gave greater weight to [co-defendant]’s credibility.” Id. The jury instruction option “was tantamount to a comment by the court on the dispositive factual issue here – witness credibility.” Id. at 353-354, 380 S.E.2d at 829.

The evidence presented against Appellant concerning Stephens and Mack was identical. The trial judge’s erroneous ruling to charge assault and battery in the first degree concerning Mack, but not Stephens amounted to a comment by the trial judge that Appellant was guilty of attempted murder.

CONCLUSION

Appellant requests this Court reverse his convictions and remand this matter for a new trial based upon the trial judge's failure to charge the jury with the lesser-included offense of assault and battery in the first degree.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

QUASHON G. MIDDLETON,

APPELLANT

**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) Trial transcript pages: 1; 8; 152-163; 193-209; 212-230; 284-298; 308-313; 365-366; 379

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

December 9th, 2011



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

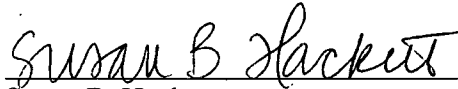
V.

QUASHON G. MIDDLETON,

APPELLANT

CERTIFICATE OF SERVICE

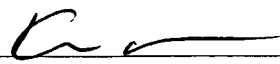
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of December, 2011.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of December, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 17, 2011

The Honorable Tanya A. Gee
Clerk, S.C. Court of Appeals
PO Box 11629
Columbia, SC 29211

Dear Ms. Gee:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

The State v. Quashon G. Middleton

10/14/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator

RECEIVED

OCT 17 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

August 12, 2011

David S. Mathews, Esquire
Colleton County Public Defender's Office
115 Benson St.
Walterboro, SC 29488

Re: The State v. Middleton, Quashon

Dear Mr. Mathews:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Please be advised that pursuant to Rule 602, SCACR and the order of the Chief Justice dated December 12, 1997, if you expect the Office of Indigent Defense to pursue this appeal, you must provide that office with all information required to proceed with this appeal, failing which, this office will consider you counsel of record.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within thirty (30) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,
Tanya A. Gee
CLERK

JA
TAG/lb

cc: Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Salley W. Elliott



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

August 12, 2011

David S. Mathews, Esquire
Colleton County Public Defender's Office
115 Benson St.
Walterboro, SC 29488

Re: The State v. Middleton, Quashon
Case No. 2011196767

Dear Mr. Mathews:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/lb

cc: Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Salley W. Elliott

Pos 7/28/11
pm - 7/29/11

NOTICE OF INTENT TO APPEAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of General Sessions

Perry M. Buckner, Circuit Court Judge

Case Nos. 2010-GS-15-0960
2010-GS-15-0961
2010-GS-15-0962

STATE OF SOUTH CAROLINA

Respondent,

-vs-

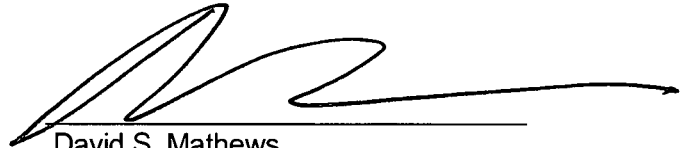
Quashon G. Middleton,

Appellant,

NOTICE OF APPEAL

Quashon G. Middleton appeals his convictions and sentences in these cases. The sentences was imposed by the Honorable Perry M. Buckner on July 27, 2011.

July 28, 2011



David S. Mathews
Colleton County Public Defender
115 Benson Street
Walterboro, South Carolina 29488
(843) 549-1633
Attorney for Appellant

OTHER COUNSEL OF RECORD:

Amanda S. Haselden
Assistant Solicitor, Fourteenth Judicial Circuit
Post Office Box 620
Walterboro, South Carolina 29488
(843) 549-7193
Attorney for Respondent

RECEIVED

AUG 01 2011

SC Court of Appeals

NOTICE OF INTENT TO APPEAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of General Sessions

Perry M. Buckner, Circuit Court Judge

Case Nos. 2010-GS-15-0960
2010-GS-15-0961
2010-GS-15-0962

STATE OF SOUTH CAROLINA

Respondent,

-vs-

Quashon G. Middleton,

Appellant,

AFFIDAVIT OF SERVICE

DUE AND LEGAL SERVICE OF THE Notice of Intent to Appeal in the captioned matter is hereby acknowledged and copy thereof retained this 28th day of July, 2011.

July 28, 2011

Amanda S. Haselden

Amanda S. Haselden
Assistant Solicitor
Fourteenth Judicial Circuit
P. O. Box 620
Walterboro, South Carolina 29488
(843-549-7193)

RECEIVED

AUG 01 2011

SC Court of Appeals

PUBLIC DEFENDER OF COLLETON COUNTY
115 BENSON STREET
WALTERBORO, SOUTH CAROLINA 29488

(843) 549-1633 (Office)
(843) 542-9543 (fax)

July 28, 2011

Honorable Kenneth A. Richstad
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State -vs- Quashon G. Middleton
Indictment Nos. 2010-GS-15-0960; 2010-GS-15-0961; 2010-GS-15-0962

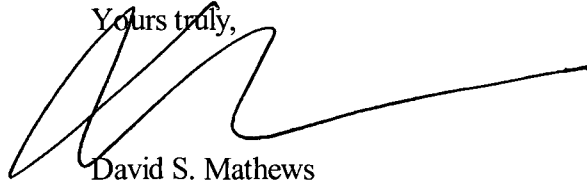
Dear Mr. Richstad:

I enclose herein the original Notice of Intent to Appeal with the Acknowledgment of Service and Affidavit attached thereto in reference to above cases.

A copy of the Notice of Intent to Appeal and Acknowledgment of Service has been filed with the Clerk of Court for Colleton County.

I am forwarding copies of these three enclosures to the Office of Appellate Defense. As I understand, that office will be in charge of future activity on behalf of Mr. Middleton in connection with his appeal.

Yours truly,



David S. Mathews
Colleton County Public Defender

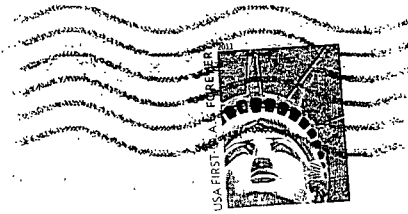
DSM:fsp
Enclosure
CC: Office of Appellate Defense
P. O. Box 11433
Columbia, S. C. 29211

RECEIVED
AUG 01 2011
SC Court of Appeals

Fourteenth Circuit Public Defender
Colleton County Office
115 Benson Street
Walterboro, SC 29488

CHARLESTON SC 294

09 JUL 2011 PM 2 L



Honorable Kenneth A. Richstad
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

29211+1629

