

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County
Honorable J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JARMEL LAMONT RICE,

Appellant.

SUPPLEMENTAL RECORD ON APPEAL

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SC Court of Appeals

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March 5, 2008 Motion Hearing Transcript. I

STATE OF SOUTH CAROLINA)	IN THE FAMILY COURT
)	
COUNTY OF ANDERSON	)	TRANSCRIPT OF RECORD
)	
State of South Carolina,)	
	)	Case No(s) : 2009GS0400988,
Plaintiff,	)	2009GS0400990,
	)	2009GS0400993,
-VS-	)	2009GS0400998,
	)	2007JU0400539,
Jermal Rice,	)	2007JU0400540,
	)	2007JU0400541,
Defendant.	)	2007JU0400542,
	)	2007JU0400543

March 05, 2008
Anderson, South Carolina

B E F O R E:

HONORABLE BARRY W. KNOBEL, Judge.

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ANDREW POTTER, Esquire
Attorney for the Defendant

Recorded by: Jane Cain
Family Court Reporter

Transcribed by: Teresa B. Johnson
Circuit Court Reporter

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Certificate of Reporter

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

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1 THE COURT: Go ahead.

2 MR. POTTER: Your Honor, as mentioned, I
3 had filed a motion in regards to challenging the
4 constitutionality of the waiver statutes set
5 forth in South Carolina Code of Laws. The
6 specific statutes are set forth in my brief in
7 the motion that have been filed with the court.
8 Judge, what we're seeking or what I am seeking is
9 a determination by Your Honor to find that those
10 waiver statutes, in fact, are unconstitutional
11 and that they violate the Eighth Amendment, that
12 they violate the Fourteenth Amendment equal
13 protection clause, as well as due process clauses
14 of the United States Constitution.

15 Your Honor, what I'm asking you to do is
16 follow the path in which the United States
17 Supreme Court has set before us. United States
18 Supreme Court found that the execution of 14 or
19 15-year-old juveniles was unconstitutional. They
20 then took another step down this path with Atkins
21 v. Virginia and made a determination that
22 execution of mentally retarded defendants was, in
23 fact, unconstitutional. The next step they did
24 was Roper v. Simmons, which I'm sure Your Honor
25 is familiar with and I provided that in

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1 materials, dealt with the execution of juveniles,
2 with defendants who are under the age of 18.

3 What South Carolina -- excuse me. What
4 United States Supreme Court did is they gave us a
5 bright line test. They gave us a bright line
6 test saying anyone who is under the age of 18
7 will not be executed. Now, Your Honor, I think
8 it's clear what Roper has determined and what the
9 reasoning that relied behind Roper was. The
10 reason we are not executing defendants who are
11 under the age of 18 is because they have
12 underdeveloped minds, they are immature and --
13 and this is the language directly out of Roper --
14 they are categorically less culpable than your
15 average criminal. That's the language that
16 ultimately I'm going to hang my hat on, Judge.

17 In the materials I have provided for you,
18 there's clear scientific evidence documenting the
19 fact that a child, a juvenile has an undeveloped
20 mind. Their mind is not developed to the point
21 of an adult. The reasoning that Roper found that
22 because of the fact this child -- because of the
23 fact that the child had an underdeveloped mind,
24 we're not going to execute them. They are
25 categorically less culpable than the average

1 criminal, therefore, we're not going to execute
2 them.

3 Our position is the reasoning, the logic,
4 and the foundation that is set forth in Roper can
5 be applied to the waiver statutes as well. The
6 reason why they weren't dealt with on a Supreme
7 Court level is because the only issue before the
8 Supreme Court was the execution of the juvenile.
9 There was no challenge in regards to the
10 automatic waiver statute.

11 This dealt with a 17-year-old who was
12 charged with murder, Roper did. What Roper found
13 -- what the Court found in Roper was there are
14 three basic reasons why we are not going to do
15 this. One, juveniles lack of maturity. They
16 have an underdeveloped sense of responsibility
17 that we find in adults. They are more apt to
18 give -- to make bad decisions, to make ill
19 decisions and won't consider their actions and
20 their decisions because they don't have the
21 ability to do so. Again, I'm going to refer to
22 you -- I refer you to the scientific evidence,
23 numerous articles, experts that have determined
24 that fact.

25 Two, juveniles are more vulnerable and

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1 susceptible to negative influence and outside
2 pressure. Your Honor, the co-Defendant involved
3 in this case was an adult or is an adult. At the
4 time this incident occurred, my client was 15
5 years old.

6 Three, the character of the juvenile is not
7 well formed as an adult. The personality traits
8 of juveniles are less fixed. Your Honor, we see
9 these reports coming in from R&E where they will
10 not assign a personality disorder or any type of
11 diagnosis to juveniles. The reason they don't do
12 that is because the mind is still being
13 developed. The personality is still being
14 developed. Assigning the diagnosis of a
15 personality disorder to a child is inappropriate
16 because the personality is still underdeveloped.
17 That's why they won't do that.

18 The Roper argument and reasoning can be
19 applied to the waiver statute because what the
20 waiver statute does -- and Your Honor is aware of
21 this -- is we're going to treat this kid as an
22 adult. We're going to treat a 15-year-old
23 defendant as if he's an adult. That violates --
24 that flies in the face of the reasoning of Roper
25 where the Supreme Court held that a defendant

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1 child is categorically less culpable than your
2 average criminal. When he goes to adult court,
3 he's going to be treated as a criminal, as an
4 average criminal.

5 It is our position that the Roper reasoning
6 said you can't do that. It's our position based
7 upon the Roper decision that the statute, the
8 waiver statutes are unconstitutional. What we're
9 asking you to do, Judge, is stick to the statute,
10 down the path that the Supreme Court has led you.
11 The end of the path is not more executions of
12 children under the age of 18. The end of the
13 path is treating children as children and
14 treating adults as adults. And that is
15 ultimately what our position is. The fact that
16 Roper dealt with multiple executions does not
17 matter. The reasoning and the logic behind why
18 we don't execute children can be applied to why
19 we don't send children to adult court.

20 Now, the other aspect of my argument dealt
21 with Apprendi and Blakely. And I did cite Kent,
22 the Kent factors in my brief. Your Honor, is
23 aware that Kent was decided back in the 60s.
24 Apprendi was a 2000 case, Blakely was 2004 or
25 2005 case, Roper was a post-2000 case. These are

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1 recently developed in Supreme Court. Kent did
2 not have the benefit of scientific research and
3 scientific knowledge that we have today. They
4 didn't have that.

5 What the State is seeking to do on the
6 Appendi aspect of our argument is remand him or
7 refer him to adult court. Right now, what he's
8 charged with, he's looking at a maximum penalty
9 of DJJ commitment until he's 21. Six years from
10 the time of the incident until when he's finally
11 committed --

12 **THE COURT:** Just a moment. Lock the door
13 please. (Pause.) Go ahead.

14 **MR. POTTER:** My client was 15 when these
15 crimes were committed. He's looking at a maximum
16 of six years in detention under the juvenile
17 statutes. If he is waived to adult court, he's
18 looking at a maximum of 30 years just on the
19 armed robbery charge. He's looking at a maximum
20 of 20 years on the ABWIK charge. He's looking at
21 an additional five on the weapons charge.
22 There's a chance he could be spending 55 years in
23 jail if a circuit court judge stacks that time
24 on. That's a significant difference between
25 juvenile court.

1 It's our position under Blakely and Apprendi
2 that due to the fact that we are looking at an
3 enhancement of more time for these charges that
4 he's entitled to a jury trial. He's entitled to
5 have this case determined by a jury..

6 When the State files a waiver motion, the
7 ultimate decision on waiver is with Your Honor.
8 One person. The standard is a balancing test
9 under Chris Miller, which I know you are familiar
10 with Chris Miller. Reading that case, I'm not
11 necessarily sure how you are supposed to balance
12 those factors, Judge. Does one factor weigh more
13 than the other? Do you give one more greater
14 weight than two? We don't know that. We know
15 that in the Chris Miller case, that there was the
16 ability to rehabilitation. That was found by the
17 Supreme Court. However, the waiver was not a
18 deterrent.

19 Honestly, I don't know the equation that's
20 supposed to be applied or used by the Court to
21 determine whether or not it goes up or not. The
22 standard, when you are looking at a fact from six
23 years to 30 years, should be, at the very least,
24 a reasonable doubt that should be determined by a
25 jury.

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1 Your Honor, the purpose of your position --

2 THE COURT: Let me stop you. Assuming
3 waiver -- assuming any waiver case when a case is
4 waived to General Sessions, wouldn't jury trial
5 apply at that level?

6 MR. POTTER: Yes, but at that point in
7 time, he's not -- the maximum penalty of six
8 years is gone.

9 THE COURT: But a juvenile who is waived to
10 General Sessions court is still considered
11 innocent.

12 MR. POTTER: Correct.

13 THE COURT: So the protections apply
14 regardless of -- notwithstanding your argument
15 concerning the maximums, I understand your
16 position concerning that, but in terms of your
17 argument with regarding to the right to trial,
18 the protections would still apply in General
19 Sessions court.

20 MR. POTTER: But under Apprendi and
21 Blakely, we're looking at enhancement factors.
22 Okay. That's a different factor as opposed to
23 just an innocence of guilt factor. Apprendi and
24 Blakely dealt with a situation where the statute,
25 where a defendant was charged under the statute.

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1 He was looking at an excess time based upon prior
2 record and things of that sort. Those have to be
3 submitted to the jury and the jury has to make a
4 finding on the reasonable doubt. It's the same
5 here except it's on a waiver level as opposed to
6 a trial level. That's the argument.

7 Ultimately, Your Honor's position, in the
8 purpose of juvenile court, is to act as the
9 child's parent. We constantly hear acting in the
10 best interest of the child. What is in the best
11 interest of this child? What is in the best
12 interest of this teen? Sometimes the best
13 interest of the child means going to R&E,
14 sometimes it means commitment. However, any
15 decision rendered by this court is to act on the
16 best interest of the child. When Your Honor is
17 asked to waive a child up, the Court is not
18 taking in the best interest of the child. It's
19 our position that we're entitled to a jury based
20 upon that fact.

21 The main argument we've got is the
22 constitutionality of the statute is grounded in
23 Roper. The main argument on the
24 constitutionality of the statute, the fact that
25 they are not constitutional is grounded in Roper.

1 I don't want to echo myself, but that is the crux
2 of our argument. The language from Roper clearly
3 states a child, juvenile defendant is
4 categorically -- I don't know of any other
5 stronger language that the court could have used
6 -- categorically less culpable than an adult.
7 Now, we're going to treat this child as an adult
8 even though he is categorically less culpable
9 than an adult. The waiver statute violates the
10 Eight Amendment equal protection under due
11 process. That's our position.

12 **THE COURT:** Let me ask you several
13 questions before the Solicitor gets started. I
14 don't want to put this in the context of --
15 again, you submitted in your materials articles
16 and other substantial documentation. Unless the
17 State concedes or stipulates that this is, in
18 fact, fact that I am to accept everything in
19 support of your motion in viewing the number of
20 arguments you've submitted, wouldn't you agree
21 that this argument would be premature without
22 testimony from expert witnesses as to the --

23 **MR. POTTER:** Judge, that's already been
24 determined. That's case law. That's what Roper
25 has determined. That is law of the land. And

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1 the argument from the State saying that is not
2 law of the land is contradicting what's been
3 found already in Roper.

4 When Roper was argued, there was omnibus
5 briefs file. There's an article specifically
6 cited in there where one of the doctors signed an
7 affidavit submitted to the Supreme Court
8 (inaudible). The Supreme Court has already
9 determined that a child's brain does not develop
10 -- it does not develop to the point where he is
11 an adult before the age of 18. That issue has
12 been determined by the Court. Any argument from
13 the State against that goes against what our
14 Supreme Court has already said.

15 **THE COURT:** Are you aware of the state
16 having challenged -- there are South Carolina
17 Family Courts are nonjury courts. There are
18 other states that allow juries to hear these
19 cases or cases in Family Court proceedings, not
20 in this state. As you know, the judge acts as a
21 magistrate in determining whether a case should
22 be waived.

23 **MR. POTTER:** Judge, in regards to the
24 waiver process --

25 **THE COURT:** I curious if you are aware of

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1 a case.

2 MR. POTTER: Right. In regards to waiver
3 process, I'm unaware of a case dealing with that.
4 I'm aware of some cases out of Nebraska dealing
5 with the waiver statute. But with regards to the
6 actual waiver process, I'm unaware of anything.

7 However, as I mentioned before, the
8 reasoning and logic behind Roper can easily apply
9 to this case. That's the next obvious logical
10 step. The Court is saying we're not going
11 execute children because they are culpably --
12 they are less culpable than the average criminal,
13 then the next logical progression is we're not
14 going to try a juvenile in adult court because
15 he's categorically less culpable than your
16 average criminal.

17 Why treat the child as an adult in adult
18 court when we've got a finding under Roper that
19 he's not an adult? The whole reasoning for the
20 waiver statute is because we want to get tough on
21 crime. We're upset because kids commit violent
22 crimes. Understandably so. However, it clearly
23 shows that they are not categorized in the same
24 manner as an adult. That is reason why we are
25 here today. That is the reason why the courts

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1 have been set up to act in the child's best
2 interest.

3 A 15-year-old kid can't buy cigarettes. Why
4 can't he? Can he be waived so that he can buy
5 cigarettes?

6 THE COURT: What about a 17-year-old?

7 MR. POTTER: Well, that issue is not here.
8 That issue will be addressed. I plan on
9 challenging on that waiver statute. I haven't
10 found a case to do that. My argument is Roper
11 says no. A 17-year-old is not the same as an
12 adult under the scientific evidence that Roper
13 has found. Categorically less culpable than the
14 average criminal.

15 THE COURT: I'm just curious now so I'm
16 just asking hypothetically. You've got a 17-
17 year-old who committed a crime the day before his
18 or her birthday and the next day they are 18.
19 You see any difference in that argument?

20 MR. POTTER: No. Your Honor, if he's 17 --
21 the Supreme Court has given us a bright line
22 intensive. 18 is it. That is it. The Supreme
23 Court said they are not going to consider a 17-
24 year-old who is 364 days old. They are not going
25 to consider that. He's still ineligible for

1 execution. The bright line test is 18. So as I
2 mentioned before, the path has --

3 THE COURT: You are saying aside from
4 execution, which obviously is the ultimate
5 punishment, you are saying the Supreme Court in
6 that case, you are saying that the Supreme Court
7 indicates aside from the execution, the
8 punishment stage of it, there's a bright line
9 test that that juvenile can not be tried as an
10 adult?

11 MR. POTTER: That's my position, Your
12 Honor, but we're not there yet. We're dealing
13 with a 15-year-old. Those cases are
14 distinguishable. We're dealing with a 15-year-
15 old.

16 THE COURT: It still goes back to the
17 argument of (inaudible) through that period of
18 time.

19 MR. POTTER: Correct. And Supreme Court in
20 Roper said we're not even going to consider a
21 juvenile who is sophisticated. We're not even
22 going to consider that. The bright line test was
23 18. The next logical step is let's treat
24 children as children and adults as adults.

25 THE COURT: All right. Anything else?

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1 MR. POTTER: No, Your Honor.

2 THE COURT: Solicitor.

3 MR. PHILLIPS: Thank you, Your Honor. We
4 do not stipulate to any articles that were
5 submitted in terms of expertise or being judicial
6 notice that we ask the Court to take. Your
7 Honor, the last part of the discussion that dealt
8 with the commonality between defense counsel and
9 the Court is when you get down to a situation
10 where you are dealing with, one thing is
11 difference in age, the difference between 17 and
12 364 days and 18, that you've got a very different
13 -- there's going to be a bright line test
14 applied.

15 I think that's the reason that the Court was
16 so narrow in Roper. That was just a death penalty
17 case. It was just whether or not a juvenile or
18 someone under 18 years old should be executed.
19 That's the only question the Court dealt with.
20 The reason they didn't deal with any other
21 questions is because under Kent, which was put
22 into effect in 1966 by the court, it has to be
23 applied within the framework of South Carolina
24 statute for juvenile waiver hearings.

25 Again, this is not an automatic waiver.

1 This is a discretionary waiver setting where the
2 Court is being asked to rule on that after having
3 an evidentiary hearing. This is not a situation
4 where because of a juvenile's age and the, uh,
5 charges he was faced with, this is not something
6 that is automatically being sent to circuit court
7 first with the opportunity to be sent back down.
8 We're asking the Court to review under the scope,
9 under the framework of the 20-7-7605 and 20-7-
10 755, as well as Kent, whether this juvenile
11 should be waived to General Sessions court.

12 I think that's critically important to
13 distinguish between Roper and what we have here.
14 We're asking this court to review this juvenile's
15 circumstances. We're not seeking to execute this
16 juvenile of these charges. We're not asking the
17 Court to send him up so we can have him face a
18 death penalty charge. We're asking the Court in
19 a waiver hearing to see if waiver to General
20 Sessions court is appropriate under this
21 juvenile's set of circumstances.

22 The Court must evaluate the factors in Kent
23 and make a determination of whether the waiver is
24 appropriate on a case-by-case basis. We can not
25 execute juveniles. That's true under Roper, but

1 it does not say we can't waive juveniles to adult
2 court after the family court makes appropriate
3 findings and consideration of the Kent factors.

4 Your Honor, with regard to Apprendi, which
5 is the other, I think, the other major issue that
6 the defense raises, Apprendi is very clearly
7 distinguishable from what we have in this case.
8 Apprendi was a case out in New Jersey where the
9 court was addressing whether it was appropriate
10 to enhance a person -- this was -- actually was
11 an adult case -- whether they enhanced a person's
12 sentence based on other factors.

13 It was a hate crime case. The defendant had
14 entered a plea to a weapons charge. After
15 entering the plea, the prosecution filed a motion
16 to enhance the sentence based on New Jersey's
17 hate crime statute. There was -- a process that
18 they used in the enhancement setting, was that
19 they had an eviden-- I don't even know if it was
20 an evidentiary hearing, but certainly, it was not
21 a jury trial and the standard of proof resulting
22 by the preponderance of the evidence was not
23 beyond a reasonable doubt. So the Defendant's
24 rights in that situation were not protected.

25 Clearly, the biggest difference between what

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1 we're seeking to do here and what was done in
2 Apprendi in adult court is that we're not seeking
3 to have this juvenile sentenced or penalized
4 beyond the statutorily prescribed maximum for any
5 of the charges that the law allows us basically.
6 We're not asking the Court to sentence him to any
7 more than what the statute authorizes that sets
8 for the penalty for armed robbery, the kidnaping
9 and the other charges that he's facing. That's
10 not what we're seeking. We're not seeking the
11 death penalty and we are not seeking to punish
12 him beyond the scope of those statutes. Your
13 Honor, that causes me to conclude that Apprendi
14 is clearly distinguishable and not applicable
15 under the facts in this case. I'll be happy to
16 answer any questions that the Court may have at
17 this time.

18 **THE COURT:** All right. Thank you.

19 Any response?

20 **MR. POTTER:** Yes, Your Honor. Judge, armed
21 robbery is dangerous. The maximum sentence is 30
22 years. Apprendi tells what additional factors
23 could determine whether or not the defendant
24 could be sentenced to an enhancement under the
25 original crime. That's what Your Honor's doing.

1 You are considering additional factors, other
2 factors to determine whether or not he could
3 spend 10 to 30 years in the penitentiary versus
4 six years in the DJJ facility.

5 In regards to the issues on Roper, waiver
6 was not addressed in Roper. The defendant was 17
7 years old at the time. I'm assuming it was an
8 automatic waiver statute or a determination that
9 whether or not the definition of a child who was
10 17 were irrelevant or as an adult at 17 were
11 irrelevant.

12 However, the reasoning and the logical
13 foundation behind what the Court ruled in Roper
14 applies with waivers. How can we treat a child
15 as an adult when the court uses the language,
16 again, categorically less culpable than the
17 average criminal. That easily dovetails in.
18 That easily fits to what the waiver statute is
19 talking about. That is why the waiver statute is
20 unconstitutional. It violates due process. It
21 violates equal protection. It is a
22 disproportionate, uh, impact upon this particular
23 defendant.

24 **THE COURT:** Okay. Solicitor, anything
25 else?

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1 MR. PHILLIPS: No, Your Honor.

2 THE COURT: All right. Thank you.

3 Mr. Potter, anything else for the record?

4 MR. POTTER: Nothing on this particular
5 motion. There are some additional issues that we
6 have raised.

7 THE COURT: That was sent to me this
8 morning also?

9 MR. POTTER: Yes, sir.

10 THE COURT: All right. Thank you.

11 MR. POTTER: Whatever Your Honor's ruling,
12 I would ask you to consider doing a written
13 order.

14 THE COURT: Separate written order?

15 MR. POTTER: Yes, sir.

16 THE COURT: All right. Thank you.

17 Solicitor, anything else on the motion?

18 MR. PHILLIPS: No, Your Honor.

19 THE COURT: What else is there aside from
20 that motion?

21 MR. POTTER: Judge, we need a guardian
22 appointed. We're having trouble having my
23 client's mother cooperating as far as showing up
24 for court. I would move that a Guardian ad Litem

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1 be appointed until the conclusion of this case.

2 THE COURT: Let me go off the record to
3 have the attorneys speak.

4 (WHEREUPON, the proceeding is concluded.)

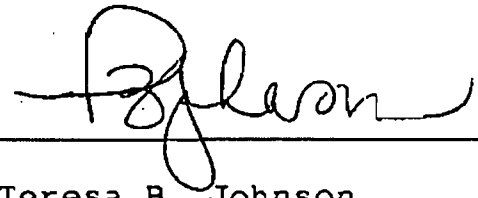
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C E R T I F I C A T E

1 I, the undersigned, Teresa B. Johnson, Official
2 Court Reporter for the Thirteenth Judicial Circuit of
3 the State of South Carolina, do hereby certify that
4 the foregoing is a true, accurate and complete
5 Transcript of Record of all the proceedings had and
6 evidence introduced in the trial of the captioned
7 case, relative to appeal, in the Family Court for
8 Anderson, South Carolina, on this 29th day of August,
9 2011.

10 I do further certify that I am neither of kin,
11 counsel nor interest to any party hereto.

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24



Teresa B. Johnson

Official Court Reporter

CERTIFICATE OF COUNSEL

Counsel for the State certifies that this Supplemental Record on Appeal contains all supplemental material proposed to be included by any of the parties and not any other material and that this Supplemental Record on Appeal complies with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

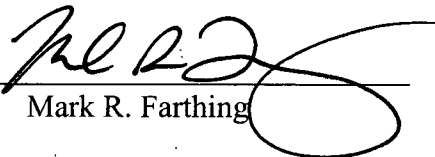
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ATTORNEYS FOR RESPONDENT

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THE STATE,

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Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Supplemental Record on Appeal on Appellant 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
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I further certify that all parties required by Rule to be served have been served.
This 20th day of March, 2012.



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