STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Abbeville County
The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5276 (S.C. Ct. App. filed 10/29/2014)
Appellate Case No. 2015-000013

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DWAYNE EDDIE STARKS,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

The trial judge properly admitted testimony regarding the victim's identification of Petitioner where the victim identified Petitioner as the perpetrator by name before the show-up took place; where the show-up was merely confirmatory; and where the victim's identification was reliable under the totality of the circumstances particularly considering her familiarity with Petitioner as a regular and frequent customer in her store during the two years prior to the robbery. Regardless, any error with respect to the trial judge's admission of the victim's identification was harmless beyond a reasonable doubt in light of the other overwhelming evidence of Petitioner's guilt.

STATEMENT OF THE CASE

Petitioner was indicted in Abbeville County in July 2012 for armed robbery and possession of a weapon during commission of a violent crime. On April 1-3, 2013, Petitioner proceeded to trial before the Honorable Thomas L. Hughston, Jr., and a jury. The jury found Petitioner guilty as indicted, and Judge Hughston sentenced Petitioner to twenty-five years for armed robbery and five years, concurrent, for possession of a weapon. A timely notice of appeal was served and filed.

On October 29, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions. See State v. Starks, Op. No. 5276 (S.C. Ct. App. filed 10/29/2014). Petitioner's request for rehearing was denied on December 12, 2014. Petitioner timely submitted a Petition for Writ of Certiorari to the Court of Appeals, and this Return follows.

ARGUMENT

The trial judge properly admitted testimony regarding the victim's identification of Petitioner where the victim identified Petitioner as the perpetrator by name before the show-up took place; where the show-up was merely confirmatory; and where the victim's identification was reliable under the totality of the circumstances particularly considering her familiarity with Petitioner as a regular and frequent customer in her store during the two years prior to the robbery. Regardless, any error with respect to the trial judge's admission of the victim's identification was harmless beyond a reasonable doubt in light of the other overwhelming evidence of Petitioner's guilt.

Relevant Facts

On February 27, 2012, the victim was working the 6:00 pm to 1:30 am shift at the Shell Gas Station at 810 West Greenwood Street in Abbeville. (R. p. 116-117). Around 11:30 or 11:40 pm, she was coming up front from the cooler area when she noticed a man standing at the register wearing black pants, white tennis shoes, and a green jacket with a hood on his head. (R. p. 117; p. 126, lines 20-23; p. 128, lines 7-8). The victim greeted the man and asked him to take the hood off. (R. p. 117-18). When the man did not respond, the victim stated he would have to take the hood off or leave the store. (R. p. 118). The man then told the victim to give him the money out of the register. (R. p. 118, lines 6-8). The victim, a bit shocked, hesitated a moment, but then noticed that the man had a small black handgun pointed at her. (R. p. 118). The man also had on a grey ski mask. (R. p. 126, lines 20-21).

The man indicated he was not "playing" and that she had better get the money for him. (R. p. 118). At that point, the victim recognized the man as Petitioner, Dwayne Starks, by his voice and by his body and build. (R. p. 120, line 19 – p. 121, line 6). Petitioner had been coming into the gas station two or three times per week, every week, for the past two years the victim had worked there. (R. p. 121, lines 4-13). The victim

knew Petitioner's last name because she went to school with Petitioner's nephew, Dexter Starks, and had heard Petitioner's first name when someone called out his name in the store on a previous occasion. (R. p. 121, lines 19-23).

Petitioner then pushed the victim around to the register and followed her there. (R. p. 119). The victim opened the register and gave Petitioner the money, which was mostly ten, five, and one dollar bills since it was the victim's practice to place the twenty dollar bills in the safe every time she acquired two hundred dollars' worth. (R. p. 119-20; p. 140, lines 7-10). Petitioner then forced the victim to come out from behind the register while he left the store. (R. p. 120). Petitioner exited the gas station and headed left in the direction of another gas station called Cherokee Trail. (R. p. 130, lines 12-16).

When she was sure Petitioner was gone, the victim grabbed her cell phone and called 911. (R. p. 128, lines 22-25). She told the dispatcher that she had been robbed and that she "knew who it was." (R. p. 129, lines 5-7). She stated that she told 911 that the robber was "Dwayne Starks" and described the jacket he was wearing.[2] (R. p. 129, lines 8-16). The victim was sure that Petitioner, Dwayne Starks, was the robber. (R. p. 130, lines 2-8). After the 911 call, Lieutenant Wilkie came to the store to speak with the victim. (R. p. 130). Wilkie then left but returned shortly with Petitioner in the police car. (R. p. 131). The victim was scared to make an identification up close but agreed to see if she could identify the suspect while he sat in the patrol car. (R. p. 131, lines 6-23). As the victim stood inside the store behind the register, Corporal Thomason pulled his patrol car up to the store's front window and turned on the dome light inside. (R. p. 67, lines 11-20; p. 132; p. 142, lines 1-7). The victim was able to get a good look at the man's

[2] The victim testified she had not been sure how to pronounce Petitioner's first name. (R. p. 137, line 25 – p. 138, line 2). The 911 dispatcher reported the robber's name as "D'won Starks" rather than "Dwayne Starks." (R. p. 28-29; p. 41, lines 15-16).

face, and she immediately recognized him as Dwayne Starks, the man who robbed her less than an hour and a half earlier. (R. p. 69, lines 1-9; p. 132-33).

Corporal Thomason, who was working the 7:00 pm to 7:00 am shift on the evening in question, responded to the 911 call within a couple of minutes. (R. p. 153-56). Dispatch informed him that the robber was running on foot toward the Cherokee Trail gas station, so Corporal Thomason scanned that area and ultimately pulled in at Sawmill Acres trailer park, which was located behind the Cherokee Trail gas station. (R. p. 156-57). He observed Petitioner, with whom he was familiar, walking between the third and fourth trailers in the trailer park. (R. p. 157-58). Petitioner was at that point wearing a red shirt, a pair of khaki slacks, and white Nike shoes. (R. p. 158-59). Notably, inasmuch as it was around midnight and it was "pouring rain," there was no one else in the area at the time. (R. p. 164). When Corporal Thomason asked Petitioner to stop and come speak with him, Petitioner turned around, put his hands up, and declared that he had not done anything wrong. (R. p. 159). Corporal Thomason performed a weapons frisk on Petitioner and then placed him in investigative detention in his patrol car. (R. p. 159-60). Corporal Thomason did not find a weapon on Petitioner's person but did find a large wad of cash in one of his pockets. (R. p. 160-61). The cash was later collected by Lieutenant Wilkie and was determined to be $146 dollars. (R. p. 213). Petitioner's cash included three twenty dollar bills but the remainder was comprised of ten, five, and one dollar bills. (See State's Exhibit # 32; see also p. 305, lines 14-16).

After securing Petitioner in the patrol car, Corporal Thomason proceeded to search the area for potential evidence of the crime. (R. p. 162). About ten feet from where Petitioner had been initially located, Corporal Thomason found a green stocking

cap, cash, rolled change, and loose change. (R. p. 162-63). In the same vicinity, police also found a gray ski mask in a trash can and a partially inside-out pair of black "breakaway" pants, a type of pants that can be pulled on over other pants. (R. p. 163; p. 181, lines 2-14; p. 203, lines 6-12). Officers also backtracked the path they believed the suspect would have taken, and in doing so found a green jacket with a hood in a dirt path near the roadway. (R. p. 167; p. 205-207).

Petitioner was the major contributor to a DNA mixture found on both the gray ski mask and the black pants, and he could not be excluded as being a contributor of DNA found on the green jacket. (R. p. 275-84).

A surveillance video from the gas station depicting the robbery was entered into evidence at trial and was played for the jury. (See R. p. 291-92; see State's Exhibit # 27). Also, the audio of the victim's 911 call was entered into evidence and played for the jury. (See R. p. 291-92; see State's Exhibit # 24). The jury reviewed both of these pieces of evidence again during deliberations, and, after approximately one hour, returned a verdict of guilty on the charges of armed robbery and possession of a weapon during commission of a violent crime. (See R. p. 332-33). After reviewing Petitioner's extensive prior record dating back thirty years, the trial judge sentenced Petitioner to twenty-five years for armed robbery and five years, concurrent, for possession of a weapon during commission of a violent crime. (See R. p. 338-45).

Discussion

Applicable Law

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012) (citation omitted). If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, an in-court identification is inadmissible. Id at 138, 727 S.E.2d at 425-26.

Under Neil v. Biggers, 409 U.S. 188 (1972), there is a two-prong inquiry used to determine the admissibility of out-of-court identifications. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784 (Ct. App. 2003). First, the court must determine if the identification process was unduly suggestive. Id. (citation omitted). If the court finds that a suggestive procedure has in fact been used, the court should then determine whether the identification was nonetheless reliable, and therefore admissible in evidence, under the totality of the circumstances. Id. (citations omitted). The following factors are normally considered to determine the reliability of an identification: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation." Id. at 503, 589 S.E.2d at 784 (citation omitted).

A trial judge should only exclude identification evidence if there is "'a very substantial likelihood of irreparable misidentification.'" Perry v. New Hampshire, __

U.S. __, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted). Indeed, the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983). The decision to admit an eyewitness identification is within the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

Prong One of the *Neil v. Biggers* Analysis – Whether the Circumstances Surrounding the Pre-trial Identification were Unduly Suggestive

This case involves a victim who knew the perpetrator prior to the crime and who identified Petitioner by name as the perpetrator prior to the allegedly suggestive show-up procedure. In State v. Liverman, a case involving a witness who knew the defendant prior to the crime and identified him by his nickname prior to a show-up, this Court stated, "**[w]e concur with those jurisdictions that consider the show-up identification procedure, normally considered unduly suggestive, as merely confirmatory.**" 398 S.C. at 141-42, 727 S.E.2d 422, 427. As in Liverman, the show-up procedure in this case was merely confirmatory rather than unduly suggestive, and the victim's identification was therefore "sufficiently reliable" so as to be admissible at trial because it had an "independent origin."[3] Id. at 142, 727 S.E.2d at 428. The trial judge was not required to analyze the second prong of Neil v. Biggers where the identification was merely confirmatory and therefore not unduly suggestive, so any error in the trial judge's alleged

[3] Although the State agrees with the ultimate result reached by the Court of Appeals, it disagrees with the Court of Appeals' conclusion that the single-person show-up was "unnecessarily suggestive" under the circumstances of this case, as discussed above. (App'x, p. 2). To the extent the Court of Appeals' conclusion in this regard could be considered in conflict with Liverman, this Court's clarification would be helpful to guide the bench and bar.

failure to specifically state a finding with respect to each of the five factors is immaterial. See State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447-48 (2000) ("Only if [the procedure] was suggestive need the court consider the second question - whether there was a substantial likelihood of irreparable misidentification.") (citations omitted) (brackets in original).

As to Petitioner's confusion over the appropriate pre-trial procedure to follow when a witness who identified the defendant in a show-up procedure demonstrates prior knowledge of the accused, in the State's view, Liverman leaves no doubt about the proper procedure: the trial judge should hold a pre-trial Neil v. Biggers hearing to determine whether or not a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. The first step, of course, is to determine whether or not the identification process was unduly suggestive. After considering evidence regarding the witness's prior familiarity with the defendant and the circumstances surrounding the witness's opportunity to observe the defendant at the time of the crime,[4] the trial judge should determine whether or not the identification was merely confirmatory. If so, he should admit the identification for the jury's consideration, since it would fall under the category of not "unduly suggestive." If not, he should proceed to consider the second prong of the Biggers test - an analysis of reliability under the totality of the circumstances. Contrary to Petitioner's assertions, Biggers and Liverman are not in conflict; Liverman simply explains how to analyze

[4] In People v. Rodriguez, 79 N.Y.2d 445, 451 (1992), which was cited by this Court in Liverman, the court suggested that a trial judge consider the following factors in determining whether or not an identification was merely confirmatory: (1) the number of times the witness viewed the defendant prior to the crime; (2) the duration and nature of the encounters; (3) the period of time over which the viewings occurred; (4) the time elapsed between the crime and the previous viewings; (5) whether the two had any conversations; and (6) whether the witness told police prior to the show-up that he recognized the defendant.

prong one of the Biggers test in cases where a witness asserts prior knowledge or familiarity with the accused.

Prong Two of *Neil v. Biggers*: Reliability Under the Totality of the Circumstances

Even assuming the show-up in this case was unduly suggestive, the victim's identification was nevertheless reliable under the totality of the circumstances. As mentioned previously, the following five factors are to be considered: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention at that time; (3) the accuracy of the witness's description of the criminal; (4) the level of certainty demonstrated by the witness at the pre-trial confrontation; and (5) the amount of time between the crime and the pre-trial confrontation. Here, first, the victim had a good opportunity to observe Petitioner at the time of the crime since she was in close proximity to him for at least a couple of minutes in a well-lit gas station. (See R. p. 117-21; see State's Exhibit # 27). Second, as a victim of a crime, she had a high degree of attention focused on Petitioner. (See R. p. 133, lines 16-19). See e.g., State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-42 (Ct. App. 1999) (a victim in fear for his life has a heightened degree of attention). Third, she gave an accurate description of Petitioner - including his name - to the 911 dispatcher, which became clear when police discovered the items of clothing Petitioner attempted to discard in the trailer park. (See R. p. 41, lines 11-17; p. 126-29; p. 156, line 18 – p. 157, line 2; p. 166, line 12-18; p. 157-67; p. 275-84). Fourth, the victim expressed a high degree of certainty at the time of the pre-trial confrontation. Almost immediately after seeing Petitioner's face, the victim told Lieutenant Wilkie that the man she saw was Dwayne Starks, the man who robbed her. (R. p. 67-70; see also p. 89-90; p. 219-21). At trial, the victim testified that

she was "positive" that the man she saw in the backseat of the patrol car was Dwayne Starks, the man who robbed her. (R. p. 132, line 15 – p. 133, line 2). Sergeant McAllister testified that as soon as Corporal Thomason turned on the interior light in the police car, the victim stated that the man in the back was the person who robbed her and she was "extremely" confident in her identification. (R. p. 187, line 15 – p. 188, line 13). Finally, the amount of time between the crime and the pre-trial confrontation was very brief, less than an hour and a half. (See R. p. 68-69; p. 84, lines 17-18; p. 88-89). See Moore at 289, 540 S.E.2d at 449 (finding that a time of between one and a half and two hours from the time of the crime to the time of the confrontation would establish reliability if other reliability factors were present); see also State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (Ct. App. 1996) (describing a lineup that occurred approximately two days after the crime as occurring within a "short period of time"); State v. Patterson, 337 S.C. 215, 230-31, 522 S.E.2d 845, 853 (Ct. App. 1999) (noting that the identification took place "only two weeks" after the crime).

Again, significantly, the victim identified Petitioner based upon her regular and continuous observations and interactions with him in the two years prior to the robbery. (See R. p. 84-95; p. 120-40). See State v. Frazier, 394 S.C. 213, 222, 715 S.E.2d 650, 654 (Ct. App. 2011) (upholding an identification as reliable under the totality of the circumstances, "[p]lacing particular weight on [the witness's] acquaintance with [the defendant]); State v. Roach, 364 S.C. 422, 429-30, 613 S.E.2d 791, 794-95 (Ct. App. 2005) (upholding an identification as reliable where the witness had many previous encounters with the defendant and was familiar with him), *vacated in part on other grounds by* State v. Roach, 377 S.C. 2, 659 S.E.2d 107 (2008); cf. Moore at 289, 540

S.E.2d at 449 (identification was not reliable where the witness, who was not a victim but instead a mere passerby, failed to recognize the defendant as a man she knew from the community at the time of the crime but later claimed to recognize the defendant at a show-up occurring at the police station). Indeed, the victim's memory of Petitioner's voice, build, and mannerisms was especially fresh considering that he had visited the store as a customer the same evening prior to the robbery. (See R. p. 138, lines 16-24). The victim's identification of Petitioner by name, even before the show-up took place, was clearly based upon her previous familiarity with Petitioner, and the identification following the show-up was not tainted by any suggestibility present in the show-up procedure. Since the victim had an independent basis for identifying Petitioner, her identification was clearly reliable. The trial judge did not err in finding the identification reliable under the totality of the circumstances.[5]

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[5] Petitioner complains that the trial judge failed to expressly rule on each of the five reliability factors. (Petition for Writ of Certiorari, p. 15-16). This issue is not preserved for review where Petitioner did not raise this issue below but instead raised it for the first time on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."); see also State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal.") (citations omitted); cf. State v. Portillo, 408 S.C. 66, 70, 757 S.E.2d 721, 724 n2 (Ct. App. 2014) (defendant's argument that the trial court erred in failing to specifically make each finding required by Rule 702, SCRE, was not preserved for appellate review where the defendant raised this issue for the first time on appeal). Furthermore, even if the issue had been preserved, and even if the trial judge was required to conduct an explicit on-the-record analysis regarding the second prong of Biggers despite the fact that the show-up procedure was merely confirmatory and not unduly suggestive, the record reflects that the trial judge was aware of all the relevant factors and the evidence supported his ultimate finding that the identification was reliable. (See R. p. 62-71; p. 83-101). Cf. State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) (even though an on-the-record Rule 403 analysis was required, there was no reversible error because the trial judge's comments concerning the matter indicated he was cognizant of the evidentiary rule when making his findings). Therefore, any error with respect to the trial judge's alleged failure to make explicit findings regarding each of the five factors was entirely harmless.

Harmless Error

Even assuming the trial judge committed error with respect to the admission of the victim's identification, any error was harmless beyond a reasonable doubt. First, even if the challenged identification had been excluded, the jury would have still been privy to the testimony indicating that the victim was familiar with Petitioner and that she identified Petitioner by name as the robber at the time the crime occurred. (See R. p. 120-30). The jury would have also heard the victim provide Petitioner's name as the perpetrator to the 911 dispatcher. (See State's Exhibit # 24). Consequently, evidence regarding the show-up identification was insignificant in the context of the entire case, and the real issue for the jury to decide was whether the victim's ***pre***-show-up identification was credible and reliable.

Second, there was absolutely overwhelming evidence of Petitioner's guilt. Again, the victim identified Petitioner as the perpetrator by name to the 911 dispatcher. Petitioner was then located in close proximity to the scene of the crime mere minutes later, and cash matching the cash stolen from the gas station was found in his pocket and clothing matching the clothing worn during the robbery was scattered around Petitioner and contained his DNA. (See R. p. 120-30; p. 156-67; p. 275-84). Any error with respect to the pre-trial identification issue in this case was harmless beyond a reasonable doubt. See, e.g., State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the outcome of the trial); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the

result."); see also State v. Singleton, 395 S.C. 6, 14-15, 716 S.E.2d 332, 336 (Ct. App. 2011) (any error in allowing the victim's identification testimony was harmless in light of the overwhelming evidence of defendant's guilt).

Furthermore, notwithstanding the overwhelming nature of the evidence presented during trial, other procedural safeguards protected Petitioner from suffering any undue prejudice from the admission of the pre-trial identification evidence. Specifically, the trial judge thoroughly instructed the jury regarding the State's burden of proof, the defendant's presumed innocence, the necessity that the State prove the defendant's identity as the perpetrator beyond a reasonable doubt, and the factors to be considered in evaluating identification evidence. (R. p. 318-30; p. 325-36). See Perry v. New Hampshire, 132 S. Ct. at 728-729 ("We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on the eyewitnesses testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. Another is the defendant's right to effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts haves adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence." (citations and footnote omitted)). Beyond the trial judge's instructions, defense counsel was able to expose alleged deficiencies in the victims' identifications of Petitioner through cross-examination of the

witnesses and was able to call into question the reliability of the identification in closing argument. (See R. p. 133-40; p. 171-75; p. 189-90; p. 225-35; p. 286-88; p. 308-18). Cf. Liverman, 398 S.C. at 143-144, 727 S.E.2d at 428-429 (finding any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments). In light of the procedural safeguards at work in this case, and considering the insignificance of the pre-trial identification testimony and the overwhelming evidence of guilt as discussed above, any error with respect to the identification issue was harmless. Accordingly, the trial judge did not commit reversible error by admitting the victim's identification, and Petitioner's convictions should be affirmed.

CONCLUSION

For the reasons discussed above, Petitioner's convictions must be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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PETITIONER.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the State's **Return to Petition for Writ of Certiorari** in the above-referenced matter has been served upon **John Edward Robinson**, McDowell Law Offices, 36 Broad Street, Charleston, SC, 29401, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **23rd** day of **February, 2015.**

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