

STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

MAR 10 2015

APPEAL FROM BEAUFORT COUNTY  
Brooks P. Goldsmith, Circuit Court Judge

**SC Court of Appeals**

Appellate Case No. 2013-002537

THE STATE, .....RESPONDENT

v.

MARION BENJAMIN POWELL, .....APPELLANT.

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**RESPONDENT’S MOTION TO STRIKE  
AND REQUIRE FILING OF  
AMENDED INITIAL BRIEF OF APPELLANT**

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Respondent (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

Appellant was indicted by the Beaufort County Grand Jury for numerous charges, including kidnapping, first-degree burglary, armed robbery, and possession of a firearm during the commission of a violent crime. On November 18, 2013, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable Brooks P. Goldsmith, circuit court judge, presiding. At the conclusion of trial, Appellant was convicted of five counts of kidnapping, one count of first-degree burglary, one count of armed robbery, and one count of possession of a firearm during the commission of a

violent crime and was sentenced to an aggregate twenty-seven year term of imprisonment. Appellant then timely filed an appeal.

## II.

Appellant filed an Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal. The issue raised on appeal is whether the photo array was unduly suggestive and created a substantial likelihood of irreparable misidentification in violation of Appellant's right to due process. In his initial brief, Appellant inserted a copy of the photo array into the body of the argument section. He did not designate it in his Designation of Matter to be Included in the Record on Appeal.

## III.

Rule 208(b)(1)(D), SCACR, provides:

Argument. The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority. A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions.

Rule 208(b)(4), SCACR, states that “[t]he brief shall contain **references to** the transcript, pleadings, orders, **exhibits**, or other materials which may be properly included in the Record on Appeal . . . .” (emphasis added). According to Rule 209, SCACR, an appellant “shall serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal which shall set forth with specificity those parts of the transcript, pleadings, orders, **exhibits**, or other materials which he proposes to include in the record on appeal.” (emphasis added). Notably, nothing within these rules allows for an exhibit to be reduced and inserted directly into the body of the brief. Rule 267(c), SCACR,

states: “With the exception of exhibits as provided in Rule 210(f), no photographic reduction of the Record on Appeal, brief or other paper is acceptable which reduces the size of the alphabet below that of pica type.” Rule 210(f), SCACR, specifies that “paper exhibits shall be inserted in the Record on Appeal where they can be reduced” or “[w]here they are larger, or do not reasonably lend themselves to accurate reproduction, they need not be included in the Record on Appeal, but shall be filed separately.”

#### IV.

Here, not only did Appellant reduce and insert an exhibit directly into the body of the brief, he did not designate it to be included in the Record on Appeal. The exhibit appears to have been reduced and a portion of the original exhibit in the upper right corner is cut off. Additionally, the color and clarity of the copy seem inadequate for this Court to make any determination regarding the photo array, especially in light of the fact that Appellant did not designate the actual exhibit in his Designation of Matter to be Included in the Record on Appeal. Therefore, the State submits this Court will be unable to evaluate the trial court’s ruling based on an inaccurate copy of the exhibit the trial court was able to view. Appellant should have designated the actual exhibit to be included in the Record on Appeal, as required by Rule 209, SCACR.

#### V.

Because Appellant failed to comply with the South Carolina Appellate Court Rules in his Initial Brief of Appellant, this Court should strike the exhibit that is included in Appellant’s brief and order Appellant to file an amended brief that complies with the Rules. See Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties

and [the appellate court] with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.”).

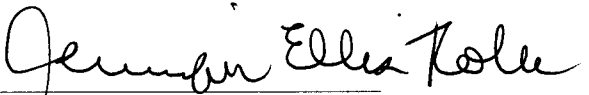
WHEREFORE Respondent, the State of South Carolina, respectfully requests that this Court strike the exhibit included within the body of the Initial Brief of Appellant and require Appellant to file an amended initial brief that complies with the South Carolina Appellate Court Rules. Respondent also respectfully asks this Court to hold its deadline for filing and serving the initial brief of respondent in abeyance pending a ruling on this motion, and to allow twenty (20) days from its decision on the present motion to strike for the State to submit a proper responsive brief if required.

Respectfully submitted,

ALAN WILSON  
Attorney General

JENNIFER ELLIS ROBERTS  
Assistant Attorney General

ISAAC MCDUFFIE STONE, III  
Solicitor, Fourteenth Judicial Circuit

BY: 

Jennifer Ellis Roberts  
S.C. Bar No. 79818

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina  
March 10, 2015

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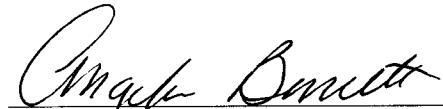
**PROOF OF SERVICE**

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I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Motion to Strike and Require Filing of Amended Initial Brief of Appellant* on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Chris Moore, Esquire  
Richardson, Patrick, Westbrook & Brickman, LLC  
1730 Jackson Street  
Barnwell, SC 29812

I further certify that all parties required by Rule to be served have been served.  
This 10<sup>th</sup> day of March, 2015.



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Angela Bennett  
Legal Assistant

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Columbia, SC 29211-1549  
(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

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**SC Court of Appeals**

March 10, 2015

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, S.C. 29211

RE: State v. Marion Benjamin Powell  
Appellate Case No. 2013-002537

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Strike and Require Filing of Amended Initial Brief of Appellant, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Jennifer Ellis Roberts  
Assistant Attorney General  
Bar No. 79818

JER/ab  
Enclosures

cc: Chris Moore, Esquire  
Robert M. Dudek, Esquire  
Victim Services