ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ORLANDO BROWN,

APPELLANT

APPELLATE CASE NO. 2014-001715

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 9, 2014, Appellant Michael Orlando Brown was indicted by the Richland County grand jury for the offense of attempted armed robbery. R. * (Indictment).

On August 4-5, 2014, Brown proceeded to trial before the Honorable James R. Barber and a jury. Brown was represented by Anastasia Walker and Alicia Dyar Goode. The State was represented by Luck Campbell, Meghan Walker, and Sandra Moser. Tr. 1.

The jury found Brown guilty as charged. Tr. 395, ll. 9-19. He was sentenced to the mandatory sentence of life in prison without the possibility of parole based on his prior convictions. Tr. 403, ll. 12-16.

This appeal follows.

STATEMENT OF FACTS

Background

The allegation against Brown is that he attempted to rob a Chuck E. Cheese restaurant in Columbia on January 3, 2013. R. * (Indictment). Surveillance footage shows an African-American enter the establishment at 9:38:29 p.m. and exit at 9:38:56 p.m. The individual was wearing a wig, a red bandana around their neck, dark clothes, and white tennis shoes. While not clearly visible, the individual appears to be wearing glasses and a ring on their left ring finger. State's Ex. 9 (DVD of Surveillance Video).[1] There were no patrons in the restaurant at the time of the offense, but there were four employees inside – Kadeshia Green, Kyrie Green, Ronnie Kennedy-Martin, and a kitchen worker named Anna.[2] Tr. 186, ll. 11-12. A police dog allegedly tracked a scent from the Chuck E. Cheese entrance to an area behind the nearby El Toro restaurant, where a wig and bandana were located. Tr. 156, l. 6 – 159, l. 16. The wig and bandana were both tested for DNA. Though no DNA was found on the wig, Brown's DNA was allegedly found as the major contributor on the bandana. Tr. 300, l. 18 -301, l. 12; Tr. 305, l. 17 – 306, l. 18.

Despite the presence of two other individuals' DNA on the bandana, Brown was arrested on March 14, 2013. Tr. 304, l. 13 – 305, l. 7; Tr. 260, ll. 22-23. Brown executed an Advice of Rights form and was questioned by Investigator Robert Martin. State's Ex. 1 (Written Waiver of Rights Form). Pre-trial, Brown moved to suppress a portion of the statement allegedly made by him to Investigator Martin. Specifically, Brown sought to

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[1] This Exhibit is on file with the Court.

[2] Kadeshia Green and Kyrie Green are not related. Tr. 186, ll. 15-18. For ease of reference, they are referred to by their first names in Appellant's brief.

exclude his alleged statements offering to plead guilty and his alleged statement "DNA will convict me." Tr. 70, l. 23 – 76, l. 23; Tr. 78, l. 7 – 79, l. 16; Tr. 93, l. 17 – 100, l. 11.

Suppression Hearing and Trial Court's Rulings

Investigator Martin was the investigator assigned to the Chuck E. Cheese incident. Tr. 56, ll. 12-22. As part of his investigation he interviewed Brown after his arrest. Tr. 56, l. 23 – 57, l. 4. Martin said that he went over written Miranda[3] warnings with Brown and then began to ask him questions about the incident. Tr. 57, ll. 4-24. After asking Brown some "background" questions regarding his education and physical condition, Martin read each Miranda right to Brown and Brown signed an acknowledgment of rights. Tr. 58, l. 3 – 60, l. 18. Martin then read the waiver of rights, which Brown signed. Tr. 60, ll. 19 – 61, l. 24. Notably, despite there being two lines for witnesses to execute, only Martin witnessed the advisement and waiver. See State's Ex. 1 (Written Waiver of Rights Form).

On direct examination, Martin testified that he discussed with Brown "what he was charged with and how he came to that charge, because his DNA was left behind at the scene." Tr. 62, ll. 11-15. When asked if he had ever been to the Chuck E. Cheese, Brown said he attended a party there in 2011 or 2012 for a relative of his girlfriend, Judy Castro, and that he had not been in that area since then. Tr. 62, ll. 16-20; Tr. 63, ll. 1-5. He denied having ever worn a wig and told Martin that he could not explain why his DNA would have been found at the scene.[4] Tr. 62, ll. 21-25. Martin said that Brown refused to provide a DNA sample and said "it [DNA] would convict [me]." Tr. 63, ll. 6-14. According to

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[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

[4] Significantly, Brown's DNA was not found at the scene. Rather, it was found on a portable object – a red bandana – that was allegedly used in the attempted robbery.

Martin, Brown "didn't really deny the evidence." Tr. 63, ll. 19. Rather, Brown allegedly said that he would not challenge the DNA and that "he knew DNA would be enough to convict him." Tr. 63, ll. 19-22. Martin also alleged that Brown asked if he could be charged with a less serious charge because he "knew that this carried the possibility of life."[5] Tr. 63, l. 23 – 64, l. 1. Martin testified that Brown eventually indicated that he did not want to talk about his case anymore. He was then allowed to use Martin's office phone to call Castro. Tr. 64, l. 18 – 65, l. 1.

The only recordation of the interview was in the form of Martin's sparse interview notes. Tr. 65, l. 22 – 67, l. 8. He was not sure how long the interview with Brown lasted. Tr. 65, ll. 13-21; Tr. 67, l. 20. He was also unable to recall when in the interview that he made the request for a DNA sample, but said it was "either during or at the end." Tr. 66, ll. 10-15. When asked about it again, he repeated that he "[did not] remember if it was during or at the end or before he made the phone call." Tr. 69, l. 25 – 70, l. 4.

Martin testified that in conjunction with his request to be charged with something less serious, Brown "said he wanted a plea in this case." Tr. 69, ll. 3-5. That was the only reference that Martin made discussion of a "plea" during his testimony at the suppression hearing. He admitted that his notes indicate that when he asked Brown for a DNA sample, "he declined until he had spoken to an attorney." Tr. 66, ll. 16-22. He further admitted that

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[5] Brown was indicted for attempted armed robbery, which carries a potential penalty of zero to twenty years rather than the ten to thirty years carried for robbery. R. * (Indictment); S.C. Code Ann. § 16-11-330. However, both offenses qualify as "most serious offenses" for the purposes of the sentencing enhancement statute. S.C. Code Ann. § 17-25-45. It is that discretionary provision, combined with Appellant's prior convictions that made him *eligible* for life without the possibility of parole. The written notice of intention to seek a life sentence under the enhancement statute was filed in Appellant's case on or about June 25, 2014.

his notes do not mention Brown's alleged statement that he would not give his DNA because it would convict him. Tr. 66, ll. 23-25. The telephone call to Castro was made "on a recorded line," but Martin did not know whether it was "actually captured or recorded." Tr. 67, ll. 11-15. However, he was sitting with Brown when the call was made, so he heard his side of the conversation, where he told Castro that he did not commit the crime and was being framed. Tr. 67, ll. 16-17; Tr. 69, ll. 6-21. Afterward, he "attempted to explore that avenue" by asking Brown who would frame him, but Brown did not give him any information. Tr. 69, ll. 13-19.

Trial counsel argued that Martin was unable to confirm how long the interview was or when in the interview Brown declined to give his DNA. This was important because the refusal to give DNA was coupled with a statement that he wanted to speak with an attorney first. Thus, any further questioning of Brown was in violation of his right to counsel. Tr. 70, l. 23 – 71, l. 17. The solicitor argued that investigator Martin testified that he stopped the interrogation once Brown stated that he was not going to give DNA until he talked to an attorney. Tr. 71, l. 18-24.

The trial judge found that there is no question that Brown made a statement. The disagreement is over the content of the statement. Tr. 71, l, 25 – 72, l. 5. He found that the statement was made voluntarily after Brown was advised of his rights and made a knowing waiver of those rights. Tr. 72, ll. 6-16. However, the trial judge said that he had some concerns. Tr. 72, l. 17. He noted that Martin testified that Brown made a statement "I'm not going to give a DNA sample, because it would convict me." He found that Martin further testified that when the defendant chose to exercise his right to remain silent, the interview stopped. The trial judge said that he would take that to mean that Brown first

made the statement that he was not going to give DNA because it would convict him and then at some point later said I need to talk to an attorney, which is when the questioning stopped. The judge asked the solicitor if they State was intending to elicit testimony that Brown was facing life in prison, which was connected to some of the reasons for the alleged statements. They responded that they were not, and the judge responded that he was "not having any of that," i.e. that the jury could not be made aware of the potential life sentence that Brown faced if convicted. Tr. 72, l. 17 – Tr. 73, l. 10. Additionally, the trial judge ruled that the State was not allowed to reference Brown's refusal to provide a DNA sample. Tr. 73, l. 10 – 74, l. 19. However, he was "sort of inclined to maybe" admit the portion of Brown's alleged statement where he said that DNA would convict him, even though it was said in combination with his refusal to provide a DNA sample. Tr. 74, l. 22 – 76, l. 23.

Defense counsel also argued for exclusion of Brown's alleged offer to plead guilty. The judge initially instructed the State that it was not allowed to elicit the fact that Brown offered to plead guilty. Tr. 78, ll. 7-14. The solicitor responded that the statement was not a part of any formal plea negotiation between his attorney and the solicitor's office or in response to any prompting by the investigator. Tr. 78, l. 15 – 79, l. 1. After the judge indicated that he would "think about it," defense counsel responded that in addition to inadmissibility as a part of plea negotiations, the statement was more prejudicial than probative and did not amount to a confession. Tr. 79, ll. 2-16.

After discussing some other matters, the trial judge took a brief recess to allow both attorneys to conduct further research in support of their positions. Tr. 93, l. 17 – 94, l. 25. After the break, the solicitor referred the trial judge to Rule 410(4), SCRE, which prohibits the use of a statement made to a prosecuting attorney during plea negotiations. Tr. 95, l. 17

– 97, l. 12. When asked what "exactly" Brown allegedly said, the solicitor said that she understood his statement to be "Can you help me with a plea, I want to plead guilty." Tr. 97, ll. 15-19. She said that "gist" of the conversation was "I don't want to plead guilty to this charge because this charge carries life but if there is something else that doesn't carry life, I can plead guilty." Tr. 97, l. 20 – 98, l. 7. The judge noted that if that were case, then the defendant would be pleading now.[6] Tr. 98, ll. 8-9. Defense counsel clarified that Martin's notes actually indicate: "Brown said he was not going to fight the DNA. Brown wanted to know if he could be charged with something less serious. He said he planned on trying to plead to this charge." Tr. 98, l. 24 – 99, l. 4. The notes do not contain a direct quotation from the Brown, but rather Martin's interpretation of what was said. Defense counsel argued that even if Brown was mistaken in speaking about a plea with law enforcement rather than the solicitor, the alleged statement should still be excluded. Tr. 99, ll. 5-9. The trial judge ruled that defendant's statement that he planned to plead guilty to the charge was admissible. Tr. 99, ll. 10-14. He also ruled that the statement "DNA will convict me" was admissible, but could not be related to the fact that Brown refused to submit himself for a DNA test. Tr. 100, ll. 5-11.

Testimony at Trial

Attempted Robbery and Initial Officer Response

At trial, the Chuck E. Cheese employees testified consistently that while Kadeshia and Kyrie were cleaning the salad bar, a man entered the Chuck E. Cheese. Tr. 171, l. 1-18; Tr. 186, ll. 7-23; Tr. 188, ll. 10-20; Tr. 276, ll. 13-25; Tr. 278, ll. 12-17. As shown on the

[6] The trial judge was alluding to the State's plea offer of a recommended fifteen year sentence in this case, conditioned on Brown's entry of a guilty plea to a case in Lexington, with a recommendation of fifteen to thirty years there. See Tr. 6, l. 3 – 9, l. 15.

surveillance video, the suspect was an African-American man wearing dark clothing including a hoodie, white shoes, a red bandana, a dark wig, black glasses, and a mustache. Tr. 172, l. 16 – 173, l. 4; Tr. 187, l. 1 – 188, l. 9.; Tr. 277, ll. 1-23; Tr. 278, ll. 1-2; Tr. 280, ll. 22-25. Kyrie testified that the man told him to "come here" and then to turn around. Tr. 190, l. 9 – 191, l. 1. He complied and put his hands up, after which he could feel the gun directly in the center of his back. Tr. 191, ll. 2-13. The suspect told him to walk to the back, but when they entered the kitchen and saw the manager, the suspect pushed Kyrie into the wall and ran out the front door. Tr. 192, l. 20 – 193, l. 17; Tr. 194, ll. 11-13.

Toward the end of his direct examination, when asked if the suspect said anything, Kyrie testified that he said "take me to the money." Tr. 197, ll. 14-18. However, he later admitted that he did not mention that in his written statement. Tr. 203, ll. 7-10. He also admitted that his written statement indicated that the bandana was tied around the suspect's neck. Tr. 202, ll. 14-15. Kadeshia did not hear the suspect say anything, but did see him place a gun against Kyrie's back before she ran into the kitchen and alerted the manager, Kennedy-Martin, of the intruder. Tr. 171, ll. 16-18; Tr. 172, ll. 9-10; Tr. 173, l. 21 – 174, l. 24; Tr. 175, ll. 20-21.

Kennedy-Martin testified that though Investigator Martin contacted Kennedy-Martin regarding obtaining surveillance videos a few days after the incident, he did not ask Kennedy-Martin any questions about the incident itself. Tr. 286, l. 19 – 288, l. 13. Kennedy-Martin also said that "enough" of the suspect's face was showing, but he was unable to identify Brown in a photographic lineup a few months after the incident. Tr. 280, 9-17; Tr. 288, l. 14 – 289, l. 5. Kadeshia testified that she did not "get a good look" at the suspect, while Kyrie had the most interaction with the suspect and saw him face-to-face. Tr.

178, ll. 10-11; Tr. 191, l. 18-19; Tr. 197, l. 24 – 198, l. 6. Neither of them was shown any line-up and neither identified Brown through an in-court identification.

Deputy John Sullivan was the first officer to arrive on the scene. He testified that after meeting with Kennedy-Martin, Kyrie and Kadeshia, he was shown surveillance footage from an external camera at the establishment showing the suspect run from the front door of the establishment toward the El Toro club.[7] Tr. 123, l. 10 – 124, l. 9; Tr. 125, ll. 16-25; Tr. 147, ll. 10-20. He could see on the video that the suspect was wearing a brown female wig, possibly a fake mustache, a red bandana around the neck, eyeglasses, white shoes, dark jeans with a hole, a dark-colored jacket, and a dark sweater underneath. Tr. 140, l. 10 – 141, l. 12. Sullivan requested assistance of a K-9 officer, who responded to the scene and located a wig and red bandana on the side of the El Toro club.[8] Tr. 126, l. 15 – 127, l. 3; Tr. 155, l. 21 – 156, l. 7; Tr. 158, l. 1 – 159, l. 12. Though the K-9 unit continued to the follow the scent, it was eventually lost in a parking area. Tr. 159, l. 13 – 160, l. 7.

A suspect was temporarily detained by officers on the night of the incident near the adjacent gas station. He was wearing dark clothing and waving down a passerby. Tr. 132, ll. 3-7. Sullivan testified that that the manager, Kennedy-Martin, initially said that he "might be the guy." Tr. 132, ll. 8-9; Tr. 137, l. 3-12. Kennedy-Martin said that it was Kyrie who "pointed out" the man at the gas station as a possible suspect, not him. However,

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[7] There are 32 different camera angles, including interior and exterior cameras. Tr. 165, l. 25 – 166, l. 4; Tr. 168, ll. 3-13. However, the footage from the external camera was not available for later retrieval by law enforcement. Tr. 166, ll. 5-18.

[8] Sullivan responded to the area where the items were located and took photographs of the area and the items. Tr. 127, l. 4 – 128, l. 20; State's Ex. 3-5 (Photographs). He also collected and packaged the items for future testing. Tr. 129, l. 20 – 131, l. 5; Tr. 145, l. 22 – 146, l. 19.

Kennedy-Martin implied that he also thought "that guy did look" like the suspect. Tr. 286, ll. 1-14. According to Sullivan, Kyrie viewed the detainee also and said "that is the guy" but later recanted the identification. Tr. 137, ll. 13-16; Tr. 138, l. 5. Kyrie testified that he did not affirmatively say that he was "the guy." Rather, he said that the glasses that the man was wearing were the same type worn by the suspect. Tr. 200, ll. 9-18. Sullivan confirmed the detainee's alibi and let him go that night. Tr. 132, ll. 9-24; Tr. 137, ll. 20-25.

DNA Evidence

The bandana and wig were both sent for DNA testing, along with buccal swabs of Michael Roscoe[9] and Appellant Brown. Tr. 299, ll. 9-16. The State's DNA expert, John Barron, testified that he found no human DNA on the wig. Tr. 300, l. 18 – 301, l. 1. On the bandana, however, he found one major contributor, one minor contributor, and one place with 5 alleles indicating a third contributor. Tr. 301, l. 2 -305, l. 16. He testified that only the major contributor was enough to be compared to the database. Tr. 305, l. 17 – 306, l. 4. A DNA match came back to Brown, which he also confirmed with the buccal swab obtained from Brown. Tr. 306, ll. 5-18. He also tested Michael Roscoe's buccal swab and excluded him as a match to both the major and minor contributor DNA collected from the bandana. Tr. 311, ll. 17-23. On cross-examination, Barron conceded that his analysis does not tell you when the DNA was left on the article of evidence and admitted that different individuals "slough off" skin cells at different rates. Tr. 317, ll. 23-25; Tr. 319, ll. 4-19.

[9] It is not clear from the testimony at the trial whether Michael Roscoe was the same man detained at the nearby gas station on the night of the incident or an entirely different suspect.

Martin's Initial Investigation and Review of Surveillance Footage

At trial, Martin testified that upon being assigned to investigate the incident at Chuck E. Cheese, he reviewed the notes of the responding officers and witness statements, attempted to retrieve video from the store surveillance cameras, reviewed the evidence collected, and submitted evidence for DNA testing. Tr. 207, ll. 3-20.

When asked about what witnesses Martin interviewed as a part of his investigation, he indicated that he spoke with Kennedy-Martin, who "didn't have anything else to add" and who was unable to identify Brown in a photo line-up. Tr. 250, ll. 9-18; Tr. 255, ll. 10-19. Martin admitted that he did not meet with Kadeshia or Kyrie himself. Regarding Kadeshia, he claimed that she was difficult to get in touch with since she quit her job at Chuck E. Cheese and they did not have a good phone number for her. Martin acknowledged that "if [he] had dedicated more time in this case [he] would have" spoken to them, but he was "just moving on to the next [case]." Tr. 250, l. 19 – 251, l. 3; Tr. 254, l. 23 – 255, l. 6. Instead, he relied on the written reports that the witnesses prepared for their employer, even though he would not "usually" do that, since the police questioning would "probably" be more in depth. Tr. 251, ll. 4-23.

Martin finally obtained the surveillance footage from one of the Chuck E. Cheese cameras on January 22, 2013, and reviewed it, looking for anything distinctive about the individual. Tr. 208, l. 19 – 209, l. 6; Tr. 242, l. 23 – 245, l. 9. He said that you could see the suspect reaching for and pulling out his gun and a large, bulky band on his ring finger. Tr. 209, ll. 9-13. The surveillance video was played for the jury while Martin pointed out the suspect's white flat shoes, a reflective area on the ring finger indicative of a bulky piece of jewelry, "trendy" plastic 1950s era glasses, a mustache, a red bandana around the neck,

and a bulky jacket. He noted that the images were "a little bit blurry" on the display used the courtroom, but alleged that the images were clearer and sharper on a computer screen. Tr. 209, l. 14 – 211, l. 20; State's Ex. 9 (DVD of Surveillance Video).

Martin later testified that the white shoes, "clunky" ring, black eye glasses, and hoodie worn by Brown upon his arrest were like those shown in the surveillance video. He further testified that Brown had "a little bit of a mustache" and that the "size of his hands" struck him "as being consistent with what was depicted on the video." Tr. 220, l. 13 – Tr. 222, l. 4; State's Ex. 6-8 (Photographs). However, the surveillance footage is far too blurry to say that the ring, glasses, or hoodie worn by Brown on the date of the interview are even similar. Compare State's Ex. 6-8 (Photographs) with State's Ex. 9 (DVD of Surveillance Video). Additionally, the photo of Brown's ring shows that it is not a bulky ring at all, but rather a classic band worn by many men. Tr. 262, ll. 13-20; State's Ex. 6 (Photograph of Brown's left hand). Further, on cross-examination, Martin admitted that Brown was not wearing white shoes on the day of his arrest, but rather red shoes. Tr. 261, l. 20 – 262, l. 12.

Martin testified that the DNA testing came back with a "match" to Brown, though he later admitted Brown was only a contributor to the DNA mixture on the bandana and that no DNA was found on the wig. Tr. 207, ll. 21-25; Tr. 256, l. 15 – 257, l. 9; Tr. 260, ll. 15-19. Nonetheless, after reviewing the video and the DNA report, they arrested Brown and brought him to Martin's office. Tr. 201, l. 23 – 212, l. 2.

Martin's Interrogation of Brown

Martin met with Brown in his cubicle and advised him of his Miranda rights and testified that he did not use any threats, pressure, or promises to induce the waiver of rights.

Tr. 212, l. 6 – 217, l. 11. He stated that Brown signed the wavier of rights and they began to talk. Tr. 217, ll. 12-17.

Martin originally testified that when his interview of Brown began, Brown wanted to know more about the facts of the case and the DNA evidence. He said that the questions that Brown was asking seemed to stem from someone having read him the warrant. Tr. 217, l. 15– 218, l. 7. Martin said that "he was pretty much trying to interview me at that point," so he had to "shut that down." Tr. 218, ll. 6-10. He described this as "common tactic" from suspects who want to know "how bad" they are caught and what the police "have one [them]," so that they can develop an alibi or determine how to "spin" the evidence. Tr. 218, ll. 11-16. That is why Martin "just told him it was his DNA" without further detail and told Brown that he knew he was one who committed the attempted robbery. Tr. 217, ll. 17-20; Tr. 218, ll. 17-22.

However, later in Martin's testimony he said that the interview began with Martin asking Brown when he was last at the Chuck E. Cheese or that area, to which Brown responded that he was last there for a birthday party in 2011 or 2012. Tr. 222, ll. 9-22. Martin also asked him if he had ever worn a wig or owned a handgun, both of which Brown denied. Tr. 222, l. 23 – 223, l. 1. Martin alleged that Brown subsequently said:

> That he wasn't going to challenge the DNA. He was looking to – he wanted to be charged with something lesser if he could. He knew that DNA would convict him. He knew that – he stated that he knew that – he wanted a less severe charge, and he wanted to discuss a plea.

Tr. 218, l. 25 – 219, l. Martin responded by telling him that any offer would be between his attorney and the solicitor. Tr. 219, ll. 6-9. He said that Brown did not deny involvement,[10]

[10] Brown told Martin that he had not been to the Chuck E. Cheese or that area since 2011 or 2012. Tr. 222, ll. 9-22.

and repeated that Brown was instead interested in whether he could be charged with something less severe than armed robbery,[11] would not challenge the DNA, and knew DNA would convict him. Tr. 219, l. 19 – 220, l. 5. Martin testified that "at some point the interview was terminated and he wanted to make a phone call to his girlfriend." Tr. 220, ll. 6-8. While on the phone with Castro, Martin overheard Brown tell her "they found DNA on something" and that someone was trying to frame him by planting his DNA. Tr. 223, l. 10 – 224, l. 9. Martin testified that Brown did not make any such averment about being framed to him. Tr. 224, ll. 4-9.

Despite the interview having been terminated prior to the phone call, Martin asked Brown about who would be trying to frame him but Brown allegedly "didn't have any answers for [him] at that point." Tr. 224, ll. 10-19. However, after looking at his notes, Martin said that when asked who would frame him, Brown responded that he did not want to tell "because the people were significant." He then alleged that Brown again wanted to talk about plea negotiations, and the interview ended when Martin explained that he would not help him with a plea. Tr. 226, l. 23 – 227, l. 17.

On cross-examination, Martin testified that his interview began by telling Brown that his DNA was located at the crime scene. Tr. 264, ll. 11-14. Brown asked him "what type of DNA was recovered at the crime scene," to which Martin responded that it was Brown's DNA. Tr. 264, ll. 15-24. He never informed Brown that the DNA was a mixture. Tr. 266, ll. 1-5. Martin then asked Brown when he was last at the Chuck E. Cheese. Brown said 2010 or 2011. Martin testified that though it was not written in his notes, Brown said that his last visit was for a birthday party for a relative of his girlfriend, Castro, and that he

[11] As discussed supra in footnote 7, Brown was indicted for attempted armed robbery.

had not been to the St. Andrews area since then. Tr. 264, l. 25 – 265, l. 12. He then asked Brown if he had ever worn a wig, which he denied. Tr. 265, l. 13-15. Martin confirmed that his notes next indicate that "Investigating Officer told Brown there was no doubt it was he who was wearing the wig in committing the robbery." Tr. 265, ll. 16-20. Defense counsel asked Martin if he told Brown that there was no doubt that he was the one in the video, to which Martin responded "[t]here is no doubt." Tr. 265, ll. 21-23. Martin's notes next indicate that Brown told him "I'm not going to fight the DNA" and wanted to know if he could be charged with something "not as serious." Martin alleged that Brown knew that robbery carried a severe penalty, though that was not contained in his notes. Tr. 266, ll. 6-21.

Brown then made a phone call to his girlfriend, Castro, and said "that it wasn't him, that he was being framed, someone was setting him up." Tr. 267, ll. 4-15. After the call ended, Martin gave Brown an "opportunity" to tell him who would frame him. Brown was allegedly unable to "find any details" to substantiate that claim. Tr. 267, ll. 16-21. On re-direct, Martin alleged that after the telephone conversation, Brown "again" told him that he wanted to plead guilty. Tr. 270, ll. 17-22.

When asked where the alleged statement by Brown that "DNA will convict me" is listed in his report, Martin said "That is not in my report. It is part of my testimony." Tr. 267, l. 22 – 268, l. 4. Martin continually downplayed the importance of taking complete and accurate notes, saying that "you leave what you feel [is] important" and that it is not an exact science. Tr. 232, l. 20 – 234, l. 7.

Motion for Directed Verdict and Trial Court's Ruling

At the close of the State's case, defense counsel made a motion for directed verdict. Tr. 327, ll. 23-24. Defense counsel argued that the circumstantial evidence against Brown was not substantial such that the case should not be given to the jury. Tr. 327, l. 24 – 330, l. 20. Counsel cited to a recent directed verdict case, State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014), *cert. granted* (Mar. 4, 2015). She noted that the Pearson opinion cites to several other cases where the circumstantial evidence was insufficient for the case to go to the jury and briefly discussed its facts. Tr. 329, ll. 4-6; Tr. 329, l. 20 – 330, l. 3.

She argued that in the present case no one was able to identify Brown as the perpetrator and there was no physical evidence that places Brown directly at the crime scene. The DNA on the bandana, that was found two buildings away, shows only that Brown possessed it at some point in his life, not at any time to close to the incident. The State's own expert agreed that his analysis cannot determine *when* DNA was placed on an item. Further, the bandana had DNA of *at least* three people. Thus, she argued that the evidence raised only a mere suspicion of guilt and did not constitute circumstantial evidence substantial enough to submit the case to the jury. Tr. 329, ll. 11-19; Tr. 330, ll. 7-20.

The solicitor responded that taking the evidence in the light most favorable to the State, there was both direct and substantial circumstantial evidence in this case. Tr. 330, ll. 21-24. She argued that the State presented evidence of a suspect entering a business in Richland County with a gun and demanding money, who was identified "directly" by three witnesses as wearing a bandana, a wig, distinctive eyewear, clothing, a dark hoodie,

white shoes, and a ring. Tr. 330, l. 25 – 331, l. 6. The bandana was found "just feet"[12] from the incident location, having been tracked from the incident location by the K-9 officer's dog. This was the same bandana identified by several witnesses and there was a "[DNA] match to the Defendant." Tr. 331, ll. 6-12. The State also pointed out Brown's alleged attempt "to work out a deal." Tr. 331, ll. 14-18. The State opined that Brown's statements and the "clear substantial circumstantial evidence" were sufficient for the case to go to the jury. Tr. 331, ll. 12-13 and 19-21.

Defense counsel responded that the solicitor misstated the evidence and reminded the court that none of the witnesses identified Brown as the suspect. Tr. 331, l. 25 – 332, l. 10. Before defense counsel could finish her response, Judge Barber issued his ruling. He began by stating that the standard for a directed verdict motion is whether there is a scintilla of direct evidence or there is substantial circumstantial evidence. Tr. 332, ll. 11-15. Explaining his reasoning for denial of the motion for directed verdict, the judge said:

> The evidence in this case is somebody went into Chuck E. Cheese with a bandana, a wig, glasses, dark clothing, and attempted to rob the place but was unsuccessful. They ran out the front door. They ran out the building and went around to the back of the building. At some point in time a dog picked up the scent from the location and followed it exactly to where the bandana and the wig was found.
>
> When the wig and bandana were found, they ultimately were analyzed, and DNA appeared on the bandana belonging to your Defendant. Nothing appeared on the wig. Your client was ultimately – which is all circumstantial, but to me that is substantial circumstantial evidence to identify one, the individual that committed the robbery. The scent was picked up and went to the location of where this was found.
>
> In addition, there is direct evidence when your client was arrested he made a statement which indicated that he did not believe that he could contest

[12] This is a clear mischaracterization of the evidence, as the back of the El Toro is well beyond "just feet" from the Chuck E. Cheese.

> the DNA, that he wanted to go ahead and enter a plea to something, as to some charge. I'm a little confused as to whether he wanted to enter a plea to the attempted armed robbery or something else, but he indicated, according to the officer's testimony, that he wanted to enter a plea to some – which would be direct evidence, in my opinion, a scintilla of direct evidence at least, that he is admitting that he committed this offense in the course of his confession.

Tr. 332, l. 16 – 333, l. 21. He said that whether that evidence is actually sufficient to convict Brown will depend on how the jury determines the facts, and denied the directed verdict motion. Tr. 333, l. 22 – 334, l. 1. The defense did not present any evidence. Tr. 340, ll. 18-20.

In her closing statement, the solicitor repeatedly referenced Brown's alleged statement "I want to plead guilty" and argued that it was direct evidence of Brown's guilt. Tr. 350, ll. 3-5; see also Tr. 351, ll. 6-8; Tr. 358, ll. 9-10; Tr. 360, ll. 12-13; Tr. 361, l. 6. She further argued that his statement reflected that "[a]t that point in time he wanted to take responsibility for his actions" and that an innocent man would not make such a statement. Tr. 358, ll. 16-25. The solicitor also argued that Brown's alleged statement that "the DNA alone is enough to convict me" was direct evidence of his guilt. Tr. 351, ll. 6-8.

After the jury verdict, defense counsel renewed "all objections and motions previously overruled... or denied." Tr. 400, ll. 12-22. The court denied the motion for new trial and did not indicate any change to his prior rulings. Tr. 400, l. 23 – 401, l. 8.

ARGUMENT

I. The trial court erred in admitting Appellant's alleged offer to plead guilty where the probative value of the statement was outweighed by the undue prejudicial effect under Rule 403, SCRE.

Plea negotiations occur in almost every criminal case. They benefit both the defendant and the State. However, as occurred in Brown's case, there are occasions where a defendant chooses to invoke his constitutional right to a jury trial and require the State to prove its case against him. Generally, those prior plea negotiations are not admissible at the defendant's trial pursuant to Rule 410(4), SCRE, which prohibits the admission against an accused of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." However, even informal plea discussions that do not fall under the purview of Rule 410, SCRE, may still be excluded as unduly prejudicial pursuant to Rule 403, SCRE. In the present case, Detective Martin testified at the suppression hearing that Brown wanted to know if he could be charged with something less serious and wanted to enter a guilty plea. Tr. 63, l. 23 – 64, l. 1; Tr. 69, ll. 3-5. Defense counsel argued that the statements regarding a plea were more prejudicial than probative and that it does not amount to confession. Tr. 79, ll. 14-16. She also noted that the alleged "offers" to plead guilty were made in response to Martin's mischaracterizations of the evidence against Brown. Tr. 79, ll. 2-13. Nonetheless, the trial judge ruled that the statements were admissible. Tr. 99, ll. 13-14.

At trial, the State introduced testimony from Martin that Brown said "he wanted to discuss a plea," Tr. 219, ll. 3-5, Tr. 224, l. 24 – 225, l. 1; "he wanted to plead guilty," Tr. 219, ll. 10-12, Tr. 228, 19-21; "wanted to see if he could negotiate some kind of plea or get a

plea negotiated on his behalf" Tr. 219, l. 25 – 220, l. 2; and "went back into trying to negotiate a plea and if I could offer him a plea or help him with a plea." Tr. 227, ll. 10-12. Their admission punishes Brown for even mentioning a plea offer when facing interrogation by officers who are mischaracterizing the weight of the evidence against them and emphasizing the long potential sentence ahead. A policy of allowing such indefinite statements or inquiries to be used against a defendant offends the presumption of innocence and requirement that the State bear the burden of proving its case beyond a reasonable doubt.

Brown's alleged offer to plead guilty did not amount to a confession. There are many strategic reasons that a defendant considers in determining whether to enter a plea or go to trial. "The defendant who opts to go to trial rather than negotiating a plea runs the risk of a harsher sentence than he would have received by pleading guilty." State v. Brouwer, 346 S.C. 375, 391, 550 S.E.2d 915, 924 (Ct. App. 2001) (quoting United States v. Quejada–Zurique, 708 F.2d 857 (1st Cir.1983)).

In Brady v. United States, the United States Supreme Court stated:

> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. ***For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious-his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.*** For the State there are also advantages-the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage which perhaps

> explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.
>
> ***Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas nor the system which produces them.*** But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

397 U.S. 742, 751-52, 90 S.Ct. 1463, 1471 (1970) (emphasis added). The Brady court recognized that a contrary holding would forbid guilty pleas, require no discretion in sentencing, or require sentencing proceedings occur before a separate authority with no knowledge of the manner in which the conviction in each case was obtained. Id.

In United States v. Robertson, 582 F.2d 1356, 1365 (5th Cir. 1978) (en banc), the Fifth Circuit Court of Appeals noted that "not every discussion between an accused and agents for the government is a plea negotiation." However, the purpose of Fed. R. Evid. 410, after which the South Carolina rule is modeled, is "to serve both as an incentive and as a prophylactic; the rule both encourages and protects a free plea dialogue between the accused and the government." Id. at 1366. The Robertson court held that in determining admissibility of statements purportedly made during plea negotiations, a court must determine "first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." Id. (citations omitted).

Providing guidance as to how to employ this two-tiered inquiry, the Robertson court wrote:

> The initial inquiry into the accused's subjective state of mind must be made with care to distinguish between those discussions in which the accused was merely making an admission and those discussions in which the accused was seeking to negotiate a plea agreement. The trial court must appreciate the tenor of the conversation. ***In those situations in which the accused's subjective intent is clear and the objective circumstances show that a plea bargain expectation was reasonable, the inquiry may end. For example, if the accused unilaterally offers to "plead guilty," or to "take the blame," in exchange for a government concession, then the policy underlying Fed.R.Crim.P. 11(e)(6) and Fed.R.Evid. 410 is served only if the discussions are held inadmissible.*** That is not to say that we require a preamble explicitly demarcating the beginning of plea discussions. Yet, when such a preamble is delivered, it cannot be ignored. Indeed, even when such nascent overtures are completely ignored by the government, such express unilateral offers ought to be held inadmissible, if the context is consistent.

Id. at 1367 (internal citations and quotations omitted) (emphasis added).[13]

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[13] At the time of the Robertson decision, Fed. R. Evid. 410 provided, in relevant part:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

582 F.2d 1356, 1364 n. 18. The Rule was subsequently amended in 1980 to read as it does today. Courts are divided on the threshold issue of what standard should be applied to determine whether a statement has been made "in the course of plea discussions," with some continuing to apply to the two-tiered Robertson test, and others applying a "totality of the circumstances" test, having found the Robertson was superseded by the 1980 amendments to the rules. United States v. Stein, No. CR. 04-269-9, 2005 WL 1377851 *8 (E.D. Pa. 2005) (citing United States v. Leon Guerrero, 847 F.2d 1363, 1367-68 (9th Cir. 1988) (adopting Robertson test); United States v. O'Brien, 618 F.2d 1234, 1240-41 (7th Cir. 1980) (same); United States v. Fronk, 173 F.R.D. 59, 67 (W.D.N.Y. 1997) (same); United States v. Penta, 898 F.2d 815, 818 (1st Cir. 1990) (holding the amended rule "embraces neither Robertson's two-tiered test" nor a multi-factored approach, and instead the "plain language" of the rule should be applied); United States v. Lloyd, 43 F.3d 1183, 1186 (8th Cir. 1994) (applying a totality of the circumstances test)).

Distinguishing between a defendant's offer of cooperation and an offer to plead guilty, the Second Circuit Court of Appeals wrote in United States v. Levy, 578 F.2d 896, 901 (2nd Cir. 1978), that "an offer by the defendant must, in some way, express the hope that a concession to reduce the punishment will come to pass. A silent hope, if uncommunicated, gives the officer or prosecutor no chance to reject a confession he did not seek." However, that must be balanced against the purpose of the inadmissibility of plea negotiations, which is "to encourage plea bargaining, a system thought by many, though others disagree, to be desirable." Id. Thus, the Levy court held that an "accused is required, at least, to make manifest his intention to seek a plea bargain before he takes the route of self-incrimination."

Notably, the statements admitted here were not incriminating statements made in a vain effort to obtain a favorable plea agreement. Because the interview with Brown was not recorded by audio or visual equipment, the content of Brown's alleged statements was evidenced from Martin's scant notes and his varying recollection. In essence, Martin testified that Brown made the statements "I want to discuss a plea" and "I want to plead guilty" and asked the questions "can I negotiate a plea" or "can someone negotiate a plea on behalf." Tr. 219, l. 3 – 220, l. 2; Tr. 224, l. 24 – 225, l. 1; Tr. 227, ll. 10-12; Tr. 228, 19-21. Rule 403, SCRE, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by `the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Further, in the present case, the policy considerations in favor of plea agreements and common sense weigh in favor of exclusion under Rule 403, SCRE.

One of the few respects in which Martin's testimony was consistent, was that Brown's statements regarding pleading guilty were coupled with his request to plead to something less serious because he understood that he faced a potential life sentence. Thus, Brown made clear that it was his desire to enter into plea negotiations. Martin testified that he then informed Brown that he could not help him with any kind of plea and that would instead be between Brown's attorney and the solicitor. The idea that any statement regarding interest in a plea offer can be used against a defendant, even where no plea offer results and no accompanying incriminating information is provided, is absurd and contrary to the policy in favor of plea negotiations.

Here, Brown made no admission that he had been anywhere near the Chuck E. Cheese since attending a birthday party there in 2011 or 2012. Tr. 62, ll. 16-20; Tr. 63, ll. 1-5. He did not admit to having ever worn a wig either. Tr. 62, ll. 21-25. Though Brown inquired about what type of DNA evidence Martin was referring to, Martin never told him that was from skin cells on a red bandana found behind another establishment or that there were other DNA contributors on the bandana. Tr. 217, ll. 17-20; Tr. 218, ll. 17-22. Based on the information that he was given – that there was definitive DNA evidence against him and that he was facing life imprisonment without parole – it is not difficult to understand why Brown would have inquired about the possibility of a plea or stated that he intended to plead guilty at the time of his interrogation despite being innocent of the attempted robbery. This cannot amount to a confession, as it is not evidence of a consciousness of guilt.

As is evident from the record, Brown did not ultimately accept a plea offer in this case and instead invoked his right to trial. Nonetheless, the State wanted to use Brown's

inquiry regarding a plea offer and statement that he planned or wanted to plead guilty against him at the trial where he pled not guilty. Unquestionably, had the prosecutor been present during the interview or formal negotiations occurred between defense counsel and the solicitor, any discussion of a plea would have been inadmissible pursuant to Rule 410(4), SCRE. However, even if Brown's statements are not inadmissible under the express provisions of Rule 410, the Court must still engage in a Rule 403 analysis. Tr. 79, ll. 14-16.

Instructive in the analysis of probative value versus undue prejudicial is the purpose behind the provisions to Rule 410. In State v. Mathis, 287 S.C. 589, 592-93, 340 S.E.2d 538, 540-41 (1986), our Supreme Court held that **"the highly prejudicial potential of" of a withdrawn guilty plea "mandates its exclusion for all purposes."** See Rule 410(1), SCRE; see also Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582 (1927); United States v. Mitchell, 633 F.3d 997, 1003 (10th Cir. 2011). The Mathis court noted the reasons for exclusion of withdrawn guilty pleas articulated in other jurisdictions, which included:

> (1) It is unfair to use the plea against the accused after he has been allowed to retract it. (2) Evidentiary use of a withdrawn plea denies the defendant the benefit of the presumption of innocence. (3) The public interest of encouraging settlement of criminal cases without necessity of trial favors permitting an accused to plead guilty to the offense charged without prejudicing his position if it is later withdrawn. (4) The privilege of withdrawal is illusory if evidence of the plea is allowed. (5) The highly prejudicial nature of a prior guilty plea may induce the jury to become reckless in its consideration of the other evidence, regardless of cautionary instructions.

287 S.C. at 591-92, 340 S.E.2d at 540 (internal citations omitted).

Similar reasoning counsels in favor of exclusion of the highly prejudicial statements inquiring about a plea offer or mentioning an intention to work out a guilty

plea during an interrogation. A defendant has a constitutional right to trial by an impartial jury and is entitled to the presumption of innocence. U.S. Const. 6th Amdt; S.C. Const. Art. I, sect. 14; Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394 (1895). In adopting the rule of exclusion of withdrawn guilty pleas, the Louisiana Supreme Court stated in State v. Joyner, 84 So.2d 462, 463 (La. 1955):

> We think the majority view is sound and more consonant with our concept of the constitutional rights of an accused. Where the plea of guilty is withdrawn, the defendant stands for trial upon a plea of not guilty, and is entitled to all the safeguards and presumptions of innocence which the humanity of the law extends to an individual whose life or liberty is at stake. One such right is that he is presumed to be innocent until proved guilty beyond a reasonable doubt, and the state has the burden of proving that guilt.

Allowing statements that Brown allegedly intended to plead guilty or inquired about plea negotiations during his interrogation risks the same recklessness by the jury in its consideration of the other evidence. To the extent that such statements are less prejudicial than the actual entry of a guilty plea, the distinction is marginal. The solicitor certainly emphasized the alleged statements in her closing argument to the jury. Additionally, the public interest in encouraging settlement of criminal cases without necessity of trial similarly favors permitting an accused to discuss the possibility of pleading guilty to the offense charged without prejudicing his position if he instead chooses to go to trial.

Therefore, the trial court erred in admitting Brown's alleged statements and inquiries regarding a plea offer because they were unduly prejudicial and admission of such statements is contrary to the overwhelming policy considerations that favor confidentiality of plea negotiations. Accordingly, Brown's conviction should be vacated and his case remanded for a new trial.

II. The trial court erred in admitting Appellant's alleged statement that "DNA will convict me" and alleged offer to plead guilty where such statements were made after Appellant had invoked his Fifth Amendment right against self-incrimination and right to counsel.

Brown was advised of his Miranda rights at the outset of the interview and signed a written waiver of rights. Tr. 57, ll. 4-7; R. * (State's Ex. 1, Advice and Waiver of Rights Form). However, at some point during the interview, he declined to give a DNA sample until he spoke with an attorney and said that he no longer wished to talk about his case. These assertions of Brown's Fifth Amendment right against self-incrimination and right to counsel necessitated the immediate stop of his interrogation. Any statements made after that were inadmissible. Because Investigator Martin was unable to provide a precise timeline of the interview, and in fact, testified to questioning he engaged in after the interview had unquestionably been terminated by Brown, the trial court erred in admitting Brown's alleged statement that "DNA will convict me." The testimony did not support the trial judge's finding that Brown said "I'm not going to give DNA because it will convict me" prior to the assertion of his constitutional rights. Tr. 72, l. 22 – 73, l. 2.

Additionally, Martin testified that Brown made statements and/or inquiries regarding a plea offer at two different times during the interview. His notes reflected that: "Brown said he was not going to fight the DNA. Brown wanted to know if he could be charged with something less serious. He said he planned on trying to plead to this charge." Tr. 98, l. 24 – 99, l. 4. Martin later testified, referring to his notes, that after hearing Brown on the telephone with Ms. Castro, he asked him who would want to frame him. He said that Brown told him that the people were significant and "then went back into trying to negotiate a plea and if I could offer him a plea or help him with a plea." He said that he explained

again that he could not negotiate a plea and that would occur down the road. The interview was then terminated. Tr. 227, ll. 1-17.

Both Brown's alleged statement that "DNA will convict me" and his offers to plead guilty were ruled admissible by the trial judge. Tr. 99, ll. 10-14; Tr. 100, ll. 5-11. The record indicates that these rulings were intended to be final, especially when viewed in light of the tentativeness of the court's initial inclinations in ruling and his recessing for the attorneys to conduct additional research before reaching his final decisions. Tr. 74, l. 22 – 75, l. 8; Tr. 79, ll. 2; Tr. 93, l. 17 – 94, l. 25. Though Investigator Martin was not the first witness called by the State after the pre-trial motions hearing, none of the intervening witnesses or evidence presented was relevant to the suppression of the statements. As such, there was no new basis for suppression elicited and no basis for the trial judge to change his ruling. Thus, no further objection by defense counsel was necessary and would have been futile. See State v. Kromah, 401 S.C. 340, 353, 737 S.E.2d 490, 496-97 (2013) ("Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced. There is an exception to this general rule when a ruling on the motion *in limine* is made immediately prior to the introduction of the evidence in question. This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection." (internal citations and quotations omitted)); see also State v. Wiles, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009) (finding that despite the fact that the evidence was not immediately introduced after the motion *in limine*, the trial judge indicated, by his actions, that his ruling was a final, rather than preliminary); State v. Mueller, 319 S.C. 266, 268–69, 460 S.E.2d 409, 410–11 (Ct. App. 1995) (noting where there is no

evidence between the motion and the testimony, there is no basis for the trial court to change its ruling, so the decision is a final one).

"A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda . . . ." State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000). In Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966), the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney.

The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. CONST. AMEND. V; Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981). If a suspect invokes his right to counsel, police interrogation ***must*** cease unless the suspect himself initiates further communication with police. Id. Similarly, though not a permanent bar to police reinitiating contact with the suspect, when a suspect invokes his right to remain silent, law enforcement officers ***must*** scrupulously honor it. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321 (1975). While not an exclusive list, Courts interpreting Mosley have set forth five factors to analyze to ascertain whether the defendant's right to cut off questioning was "scrupulously honored": (1) whether the suspect was given Miranda warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of Miranda warnings before the second interrogation; and (5) whether the second

interrogation was restricted to a crime that had not been a subject of the earlier interrogation. State v. Benjamin, 345 S.C. 470, 476-77, 549 S.E.2d 258, 261 (2001).

Though the solicitor argued that investigator Martin testified that he stopped the interrogation once Brown stated that he was not going to give DNA until he talked to an attorney, as discussed supra, the testimony was not so precise. Tr. 71, l. 18-24. Brown's interview with Investigator Martin was not recorded by audio or video equipment. Tr. 264, ll. 3-6. Rather, Martin took notes regarding what he felt was "important" in the interview. Tr. 232, l. 20 – 233, l. 18; Tr. 264, ll. 7-10. Martin admitted that his notes do not mention Brown's alleged statement that he would not give his DNA because it would convict him. Tr. 66, ll. 23-25. He was also unable to recall when during the interview the alleged incriminating statement was made. He said that it was "either during or at the end" and later that he "[did not] remember if it was during or at the end or before he made the phone call." Tr. 66, ll. 10-15; Tr. 69, l. 25 – 70, l. 4.

Martin admitted that his notes indicate that when he asked Brown for a DNA sample, "he declined until he had spoken to an attorney." Tr. 66, ll. 16-22. However, he testified that he stopped the interview when Brown indicated "he didn't want to talk about his case anymore." Brown was then allowed to use Martin's office phone to call his girlfriend, Castro. Tr. 64, l. 18 – 65, l. 1. He was sitting with Brown during the call and overheard him tell her that he did not commit the crime and was being framed. Tr. 67, ll. 16-17; Tr. 69, ll. 6-21. Despite Brown's prior indication that he did not wish to discuss his case further, Martin asked Brown follow up questions regarding who would want to frame him. Tr. 69, ll. 13-19. It was after that line of questioning that Brown allegedly made a

second inquiry regarding a plea offer and the interview was then actually terminated. Tr. 227, ll. 1-17.

In making his initial ruling on the admissibility of the "DNA will convict me" statement, the trial judge said:

> He [Martin] testified that the Defendant made a statement, I'm not going to give a DNA sample because it would convict me. And then he further testified that when the Defendant exercised his rights, he stopped.
>
> So that I take means that the Defendant made: I'm not going to give DNA because it will convict me. And then at some point in time – the inference is that at some point in time he further went on and said, I need to talk to an attorney. And that is when they stopped.

Tr. 72, l. 17 – 73, l. 2. He gave the attorneys additional time to research the issue, but said that he was inclined to allow the statement "DNA will convict me" but not the fact that, contemporaneously therewith, he was asked to provide a DNA sample and refused. Tr. 74, l. 22 – 75, l. 8. After hearing further argument for counsel, the trial judge ruled that the statement "DNA will convict me" was admissible, but could not be related to the fact that Brown refused to submit himself for a DNA test. Tr. 100, ll. 5-11. The trial judge also allowed testimony regarding Brown's alleged statements related to a potential guilty plea. Tr. 99, ll. 13-14.

The trial court's finding and ruling are not supported by the evidence. During Brown's interrogation he invoked both his Fifth Amendment right to counsel and his Fifth Amendment right to remain silent. He invoked his right to counsel when he asked to speak to an attorney after being asked to submit a DNA sample. Tr. 66, ll. 16-22. At that point, the interview should have stopped completely. Brown also invoked his Fifth Amendment right against self-incrimination when he sought to end the interview. Tr. 64, ll. 18-24. At that point Brown's right to remain silent should have been "scrupulously honored."

However, there is no indication that interrogation immediately ceased when Brown was questioned further after his phone call to Castro and allegedly made a second inquiry regarding plea negotiations. No significant period of time passed, no second set of Miranda warnings was given, and the continued questioning had to do with the same alleged crime.

Martin's testimony regarding when Brown's statements were made was speculative, as he repeatedly stated that he did not remember and it could have been during the interview, at the end of the interview, or before he made the phone call. Tr. 66, ll. 10-15; Tr. 69, l. 25 – 70, l. 4. Thus, the trial judge's "inference" of the order in which the statements and invocation occurred is unfounded where the testimony was that Martin could not recall whether the request for DNA and alleged statement "DNA will convict me" were made during or at the end of the interview. If they were made at the end of the interview, then they consequently would have been made after Brown indicated that he no longer wished to continue discussing the case and requested an attorney. Further, Martin was clear that the second offer to plead guilty occurred just prior to the actual termination of the interview, after the phone call to Castro, at which point Brown had unquestionably invoked his right against self-incrimination by stating that he no longer wished to discuss the case. Tr. 64, l. 18 – 65, l. 1; Tr. 226, l. 23 - 227, l. 17. This undeniable violation lends even more suspicion to the order of the statements and invocation of rights.

Because the testimony of the officer was not clear that the incriminating statement "DNA will convict me" was made prior to Brown's assertion of his right to counsel and right against self-incrimination, the trial court erred in allowing admission of the statement at trial. Furthermore, at a minimum, Brown's second inquiry regarding a plea offer was unquestionably made after he asserted his right to end the interview and Martin failed to

scrupulously honor that request. Therefore, the trial judge erred in admitting Brown's alleged incriminating statements. Accordingly, Brown's conviction should be reversed and his case remanded for a new trial.

III. The trial court erred in denying Appellant's motion for directed verdict where there was no direct evidence of his guilt and the circumstantial evidence against him was not substantial.

The only physical evidence potentially linking Brown to the crime was his DNA found on a red bandanna, which was tracked by a K-9 unit from the door of Chuck E. Cheese to the back of El Toro restaurant, located across the parking lot. The DNA of at least two other unknown persons was also found on the bandana. Despite this, the trial judge denied the motion for directed verdict, finding that the circumstantial evidence was substantial, stating:

> [S]omebody went into Chuck E. Cheese with a bandana, a wig, glasses, dark clothing, and attempted to rob the place but was unsuccessful. They ran out the front door. They ran out the building and went around to the back of the building. At some point in time a dog picked up the scent from the location and followed it exactly to where the bandana and the wig was found.
>
> When the wig and bandana were found, they ultimately were analyzed, and DNA appeared on the bandana belonging to your Defendant. Nothing appeared on the wig . . . . The scent was picked up and went to the location of where this was found.

Tr. 332, l. 16 – 333, l. 8. The trial judge further pointed to statements Brown allegedly made "that he did not believe that he could contest the DNA, that he wanted to go ahead and enter a plea to something, as to some charge" which he characterized as "direct evidence" that Brown was "admitting that he committed this offense in the course of his confession." Tr. 333, ll. 9-21. As discussed supra in Parts I and II of this brief, the alleged incriminating statements made by Brown were admitted in error. Even so, the statements do not constitute direct evidence or substantial circumstantial evidence. Therefore, the trial court erred in its denial of Brown's motion for directed verdict.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct.App. 2013) (quoting State v. Brannon, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010)). "The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." Id.; see also State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (noting the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act"). If there is substantial circumstantial evidence reasonably tending to prove the defendant's guilt, an appellate court must find the trial court properly submitted the case to the jury. Lane, 406 S.C. at 121, 749 S.E.2d at 167 (citing Odems, 395 S.C. at 586, 720 S.E.2d at 50). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). "The lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances [that] do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402,404–05 (2001).

In State v. Bostick, 392 S.C. 134, 139-41, 708 S.E.2d 774, 777-78 (2011), our Supreme Court began its analysis with a review of "three seminal cases from our jurisprudence analyzing the proof necessary in cases with circumstantial evidence," which included State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984),State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), and State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Each of those cases resulted in reversal and remand for entry of judgment of

acquittal because the State failed to produce substantial evidence to overcome the motion for directed verdict. 392 S.C. at 139-41, 708 S.E.2d at 777-78. The court likewise determined that the evidence presented in Bostick "raised only a suspicion of guilt." Id. at 141, 708 S.E.2d at 778. Bostick was convicted of the murder of his neighbor, Polite, who died from carbon monoxide resulting from the arson of her home after she evidently suffered blunt force trauma to her head. Id. at 136-37, 708 S.E.2d at 775. The court found that there was no direct evidence against Bostick and the circumstantial evidence consisted of "(1) Polite's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; (2) the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire; and (4) while the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to Polite's DNA." Id. at 141-42, 708 S.E.2d at 778. The court noted that the State did not introduce the weapon used to beat Polite in the head or any evidence concerning Bostick's knowledge that Polite may have had money in the briefcase. Id. at 142, 708 S.E.2d at 778. The court found that, at most, this evidence raised only mere suspicion that Bostick committed the murder. Id. It accordingly found that the trial court erred in failing to direct a verdict in Bostick's favor. Id.

Shortly after Bostick, the Supreme Court noted in State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), that it has "repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." The court held that the

circumstantial evidence presented in Odems' case did not reasonably tend to prove his guilt, and thus failed the "***well-settled directive*** that circumstantial evidence that is not substantial is insufficient to go to a jury." 395 S.C. at 592, 720 S.E.2d at 53 (emphasis added). The primary pieces of circumstantial evidence against Odems were: "(1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." Id. at 588, 720 S.E.2d at 51. The court found that even though Odems' overall actions may have appeared suspicious, mere suspicion is insufficient to support a guilty verdict. Id. at 590, 720 S.E.2d at 52. The evidence in Bostick and Odems was certainly yielded a greater suspicion of guilt than the marginal evidence presented in Brown's case.

"Touch" DNA is similar in characteristic to fingerprints, which our Supreme Court has found, even combined with other suspicious factors, insufficient for submission to the jury when the State fails to place the defendant at the scene of the crime, State v. Arnold, 361 S.C. 386, 389, 605 S.E.2d 529, 530-31 (2004), or fails to connect the placement of the fingerprint to the time the crime was committed, State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000); see also State v. Gilliam, 245 S.C. 311, 140 S.E.2d 480 (1965); State v. Bennett, 408 S.C. 302, 758 S.E.2d 743 (Ct. App. 2014), *cert. granted* (Nov. 19, 2014); State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (2014), *cert. granted* (Mar. 4, 2015). Courts in other jurisdictions have held that fingerprints found on movable items or items open to the public are insufficient to sustain the conviction without evidence that the fingerprints were placed at the time of the crime. See C.E. v. State, 665 So.2d 1097, 1098 (Fla. Dist. Ct. App. 1996) ("Where fingerprint evidence found on the shattered glass of a

vehicle is relied upon to establish identity, the evidence must be such that the print could have been made only when the crime was committed."); Lee v. State, 640 So.2d 126, 127 (Fla. Dist. Ct. App. 1994) (holding fingerprints on broken window pane at burglarized church were insufficient to sustain a conviction); State v. Bass, 278 S.E.2d 209, 212 (N.C. 1981) ("[W]hen the State relies on fingerprints found at the scene of the crime, in order to withstand motion for nonsuit, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed.").

In United States v. Strayhorn, 743 F.3d 917, 923 (4th Cir. 2014), *cert. denied*, 134 S.Ct. 2689 (2014), the Fourth Circuit Court of Appeals held that evidence of a fingerprint on a movable object, in the absence of evidence regarding when the fingerprints were made, is insufficient to support a conviction unless the government produces sufficient additional incriminating evidence so as to allow a rational juror to find guilt beyond a reasonable doubt. In fashioning that framework for analysis, the court reviewed its prior decisions involving the sufficiency of fingerprint evidence. 743 F.3d at 922-23.

The Strayhorn court first recalled its statement in United States v. Corso, 439 F.2d 956 (4th Cir. 1971) (per curiam), that "the probative value of an accused's fingerprints upon a readily movable object is highly questionable, unless it can be shown that such prints could have been impressed *only* during the commission of the crime." Id. at 922 (citing Corso, 439 F.2d at 957) (emphasis in original). In Corso, the Fourth Circuit found that defendant's fingerprint on a matchbook cover used to keep a door from locking was insufficient to support a burglary conviction. Id. The Strayhorn court noted that the remainder of the government's evidence in Corso was either "without probative value" or

"constituted an accumulation of purely circumstantial evidence that was insufficient to permit the jury to find the defendant guilty beyond a reasonable doubt." Id.

The court also discussed its decision in United States v. Van Fossen, 460 F.2d 38 (4th Cir. 1972), in which it held that the defendant's fingerprints on two photographic negatives and one engraving plate could not sustain a conviction for counterfeiting because it was not supported by other evidence indicating that the fingerprints were imprinted at the time of a crime. Id. There, the court focused on the fact that "the trier of fact must be able to reasonably infer from the circumstances that the fingerprints were impressed at the time the crime was committed." Id. Because the government failed to show when the defendant's fingerprints were imprinted on moveable objects, "the prosecution rested on conjecture and suspicion and the jury could only have guessed that the imprinting occurred during the commission of the crime." Id. at 922-23.

The Fourth Circuit then distinguished its decisions in United States v. Harris, 530 F.2d 576 (4th Cir. 1976) (per curiam) and United States v. Burgos, 94 F.3d 849 (4th Cir. 1996). 743 F.3d at 923. In Harris, the defendant's fingerprints were on a note that read "this is a holdup" that was handed to a teller during a bank robbery. Id. In upholding the conviction, the court found it significant that the government presented additional incriminating evidence, namely, the defendant's detailed confession, even though the defendant repudiated the confession before the trial. Id.; see also United States v. Anderson, 611 F.2d 504, 508–09 (4th Cir. 1979). In Burgos, the defendant's fingerprints were found on a plastic bag containing cocaine base. 743 F.3d at 923. The Strayhorn court said "[c]rucially, we noted that the fingerprint 'was not the only incriminating evidence establishing Burgos's guilt; rather, there was an abundance of evidence

establishing that Burgos was guilt.'" Id. (quoting Burgos, 94 F.3d at 874–75). That included "conclusive" incriminating testimony that the defendant "knew" that his co-conspirators had crack cocaine on them and that the plan was "to sell the dope" at a North Carolina university. Id. The Strayhorn court then wrote:

> Viewing these cases holistically, they reveal that in challenges to convictions involving fingerprints on movable objects, in the absence of evidence regarding when the fingerprints were made, ***the government must marshal sufficient additional incriminating evidence so as to allow a rational juror to find guilt beyond a reasonable doubt.*** Although the government may meet this burden with circumstantial evidence, that evidence must be sufficiently incriminating to support the conviction.

Id. (emphasis added).

Turning then to the facts of Strayhorn's case, where the fingerprint evidence consisted of one partial print on the duct tape used in the robbery, the court found that "[t]he duct tape is, without question, an easily movable object." Id. The government's expert conceded that he had no way to determine when the fingerprint was imprinted on the tape and that it could have been impressed even a year earlier. Id. It therefore found the probative value of the fingerprint evidence "highly questionable." Id. The most significant additional piece of evidence the government offered was Strayhorn's "possession" of the Colt Peacemaker gun taken during the robbery and found in the Cadillac that he was driving when he was stopped by the police two months later. Id. at 923-24. The court found that the gun was not "recently stolen" so as to permit an inference of theft and that Strayhorn's possession of it was explained. Id. at 924. The court rejected the government's argument that "Strayhorn's conspiring with his brother to commit the second robbery is probative of his guilt on the first robbery," calling it "little more than an impermissible propensity argument." Id. It did not find that any of the

other evidence pointed to by the government was "helpful" in determining Strayhorn's involvement in the robbery either. Id. Thus, the court found that the government failed to adduce "additional incriminating evidence which would allow a rational juror to find guilt beyond a reasonable doubt" and accordingly reversed Strayhorn's convictions for Hobbs Act robbery and brandishing a firearm in relation to that robbery. Id.

In the present case, the video surveillance shows that the suspect who entered the Chuck E. Cheese was wearing a red bandana and wig. State's Ex. 9 (DVD of Surveillance Video). The K-9 team that responded to the scene tracked a scent from the Check E. Cheese to a tree line across the parking lot, along the tree-line, and then along the side and back of the El Toro club. It was behind El Toro that the dog located a wig and bandana. Tr. 158, l. 5 – 159, l. 12. The only contributor identified was Brown. Tr. 306, ll. 5-18. However, this portable object could have been easily accessed by multiple individuals prior to the attempted robbery. In fact, DNA testing revealed that the bandana was handled or worn by at least two unidentified individuals other than Brown. Tr. 300, l. 18 – 305, l. 16. Similar to Strayhorn, the State's own expert admitted that he could not determine when Brown's DNA was actually transferred to the bandanna. Tr. 317, ll. 23-25. He also admitted that he was working with a "minute" amount of DNA and that different individuals "slough off" skin cells at different rates. Tr. 316, ll. 3-13; 319, ll. 4-19. Thus, this evidence only proves that Brown's skin was in contact with the bandana at some point in time, but not that he is the suspect seen wearing the bandana in the surveillance video. Like Van Fossen, the jury could have only guessed that Brown's DNA was actually left on the bandana during the commission of a crime.

With the only evidence against Brown being his DNA on a movable object and no evidence of when that DNA was left on the object, the State was required to "marshal sufficient additional incriminating evidence so as to allow a rational juror to find guilt beyond a reasonable doubt." Strayhorn, 743 F.3d at 923. As discussed more fully supra in Parts I and II, the trial court erred in admitting Brown's alleged statements to Martin that "DNA will convict me" and "I want to plead guilty." However, even assuming *arguendo* that the statements were properly admitted, unlike Harris and Burgos, the remaining evidence of Brown's alleged statements that "DNA will convict me" and "I want to pled guilty" are not "sufficiently incriminating to support the conviction." Notably, contrary to the solicitor's argument and trial court's ruling, Brown's alleged statements were not direct evidence, but rather circumstantial evidence. "Unlike direct evidence, evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded—a process not required when evaluating direct evidence." State v. Logan, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013). "Analysis of circumstantial evidence is plainly a more intellectual process." Id. at 97-98, 747 S.E.2d at 451.

Our Supreme Court has observed that this analysis requires two steps: "After concluding that a particular fact is true, the individual juror is called upon to ask: First, can I infer guilt from that fact? Second, if so, is there any reasonable explanation other than guilt?" Id. (citations omitted). Similarly here, if the jurors believed Martin's testimony regarding Brown's statements, they then had to engage in the two-step analysis of whether they could infer guilt from those statements, and if so, if there was any reasonable explanation other than guilt. See Logan, 405 S.C. at 97-98, 747 S.E.2d at 451.

When considered in context, the statement regarding DNA is not reflective of guilt, but rather the defendant's perception of the weight of the evidence as characterized by the police. Recognition of the potential weight that DNA evidence would have with a jury is common sense, not inculpatory. This is especially true where the officer neglected to tell Brown that the DNA of at least two other individuals was found on the item, which was not actually found at the Chuck E. Cheese. As discussed supra in Part I, the statement "I want to plead guilty" does not amount to a statement of guilt either. There are many reasons a defendant may be interested in pleading guilty despite being innocent of the crime. In this case, those include the evidence against him as "conveniently" portrayed by his interrogator and the harsh potential penalty he was facing. Thus, even Brown's alleged statements were only circumstantial evidence and were not sufficiently incriminating to allow a rational juror to find guilt beyond a reasonable doubt.

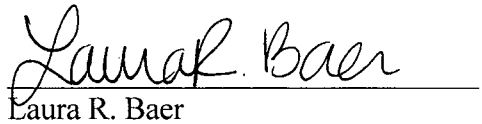
"The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Here, it was the duty of the trial judge to grant the motion for directed verdict because, even viewing the circumstantial evidence in the light most favorable to the State, the evidence presented does not reasonably tend to prove Brown's guilt and fails the South Carolina Supreme Court's well settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury. The State's evidence against Brown was entirely circumstantial – the location of his DNA on a movable object, i.e. the red bandanna, and the alleged incriminating statements he made. At best, this evidence raises

a suspicion of guilt. As discussed above, a mere suspicion is not sufficient evidence for submission to the jury. Accordingly, Brown's conviction should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Michael Orlando Brown respectfully requests that this Court reverse his convictions and grant him a new trial (Issues I or II) or enter a directed verdict of acquittal (Issue III).

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ORLANDO BROWN,

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, and Mr. Michael Orlando Brown, #295408, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of June, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of June, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.