

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Beaufort County
Carmen Tevis Mullen, Circuit Court Judge

NOV 09 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA,

Respondent,

v.

EARNEST STEWART DAISE,

Appellant

Appellate Case No. 2013-002394

RESPONDENT'S MOTION TO ALLOW FILING ON NOVEMBER 6, 2015 AND
ALLOW FILING AS IS

The Respondent, above-named, hereby make a motion to the allow filing of the Initial Brief of Respondent on November 6, 2015 and to allow filing of the Initial Brief of Respondent As Is of an 88 page merit brief in relaxation of SCACR Rule 208(5). .

The Initial Brief of Respondent was due to be filed on Friday October 30, 2015. While working on the brief, below-signed counsel became aware that there was a missing transcript of a pretrial hearing where at least one of the issues raised in the brief was ruled ipon which was not provided to below signed counsel and there was no record of Appellate Defense having ordered it. Counsel also requested copies of certain named motions in the Appellant's

designation of matter that it was unable to locate either in the Clerk's office or in its own records. The issue concerning the motion designation was resolved with opposing counsel after business hours on Friday October 30, 2015.

The apparent missing hearing transcript was resolved on Tuesday November 3, 2015 when the 14th Circuit Solicitor's Office was able to locate and provide a copy of a September 26, 2013 pretrial motion hearing transcript before Judge Mullen. On information and belief, this transcript was not in the possession of the Office of Appellate Defense. It directly addresses and was held on the issue of admissibility of the statement made by the surviving child to paramedics and includes the trial judge's order admitting the evidence in the motion in limine. This is a necessary part of the record. It was immediately provided to opposing counsel. At that time opposing counsel advised below-signed counsel that there was no objection to allow filing on November 6, 2015 after review of the materials. Respondent requests that this Court grant this part of the motion.

Respondent also requests that the Court grant leave to relax SCACR Rule 208(5) concerning the length of the briefs to allow filing of the 88 page Initial Brief of Respondent. The underlying case was tried as a death penalty case and involves an extensive record. Although the Appellant's brief was 20 pages, Respondent's counsel required 88 pages to address the seven (7) issues included extensive alternative grounds and harmless error analysis. The Table of Contents reveal the breadth of the issues being addressed which in many cases would each stand alone as an issue on appeal:

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I. The trial judge did not abuse her discretion in admitting evidence that the two-year old surviving child’s statement that his name was “Doug” and when asked who hurt him said “Daddy” to the Emergency Medical Technician in the ongoing medical emergency when the questions were to determine his level of consciousness. The evidence was “non-testimonial” and was not a violation of the Confrontation Clause. The primary purpose the questions were asked of the child in a medical emergency situation after he regained consciousness to determine his responsiveness and level of consciousness. When the only issue objected at trial concerned the Confrontation Clause, any issue concerning admissibility under general evidence law was waived. However, the evidence would be admissible as an “excited utterance” and “present sense impression.”.....3

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IV. When there was no motion made by the Appellant pursuant to Batson v. Kentucky, 476 U.S. 79(1986) after jury selection, the issue concerning the quashing of the challenged subpoena is moot and a new trial is not appropriate as a remedy. Further, the trial judge did not err or abuse her discretion in quashing the pretrial subpoenas duces tecum to the Solicitor’s Office and Office of Prosecution Coordination to produce “all documents regarding jury selection, including but not limited to training documents, training agenda, manuals, policy statements or advisements and correspondence with current or former prosecutors and circuit court judges” where the information was not relevant to the guilt or innocence of the Appellant and there was no statute or court rule authorizing such discovery in a criminal case.....52

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VI. The trial court did not abuse its discretion in admitting relevant photographs from the crime scene to depict supportive evidence that there was no force break-in nor an appearance of anything stolen at the crime scene although State Exhibits 5 and 6 revealed unidentified items on a couch which were two boxes identified in camera as containing a birthday cake or cupcakes which would have been related to deceased child victim’s birthday.76

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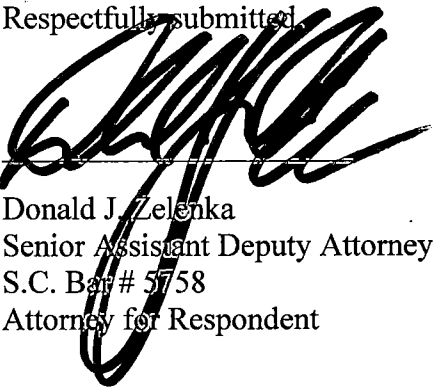
Respondent respectfully request Court grant the Respondent’s motion to relax to allow such filing.

CONCLUSION

Respondent respectfully request the Court grant the Respondent’s motions upon a showing of extraordinary circumstances for the request.

Handwritten initials

Respectfully submitted,



Donald J. Zelenka
 Senior Assistant Deputy Attorney General
 S.C. Bar # 5758
 Attorney for Respondent

November 6, 2015

CERTIFICATE OF SERVICE

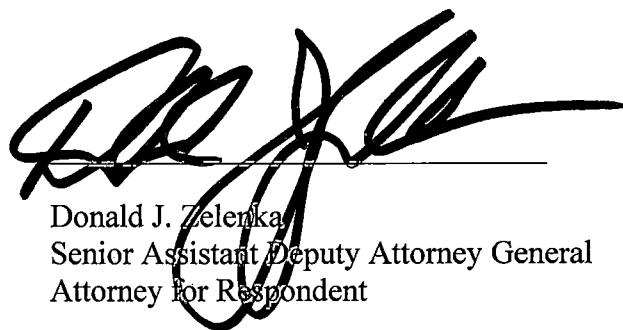
I, **Donald J. Zelenka**, hereby certify that a true copy of the Motion to extend time to file the RESPONDENT'S MOTION TO ALLOW FILING ON NOVEMBER 6, 2015 AND ALLOW FILING AS IS in the above referenced case has been served upon counsel for Appellant by depositing one copy of same in the United States Mail, postage prepaid, to each attorney, addressed as follows:

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This 6th day of November, 2015.



Donald J. Zelenka
Senior Assistant Deputy Attorney General
Attorney for Respondent