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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of General Sessions

OCT 01 2015

Stephen H. John, Circuit Court Judge

SC Court of Appeals

Case No.: 2012-GS26-02679
Appellate Case No.: 2014-

The State,

Respondent,

vs.

Vivian Schrader-Falls,

Appellant.

FINAL BRIEF OF APPELLANT

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ISSUE ON APPEAL

- I. Did the circuit court err in requiring the Defendant to testify before calling her expert witness?

STATEMENT OF THE CASE

On July 26, 2012, Vivian Schrader-Falls (“Schrader-Falls” or the “Defendant”) was indicted for the murder of Tony Hughes. [R. p. 615]. A jury trial was held before the circuit court in Horry County from May 5 through May 8, 2014. [R. p. 4]. At trial, Schrader-Falls presented a defense based upon the theory that she suffered from battered spouse syndrome and shot Hughes in an act of self-defense. Before beginning Schrader-Falls’ case-in-chief, counsel for Schrader-Falls made a formal request¹ to the circuit court to allow the defense’s expert witness to testify regarding battered spouse syndrome before calling the Defendant to testify. [R. pp. 285-287]. The circuit court denied this request and ruled instead that Schrader-Falls was required to testify before her expert could be called. [R. pp. 287-288].

Accordingly, counsel for the Defendant rearranged the order in which he called his witnesses and Schrader-Falls testified before the defense’s expert. [R. pp. 298, 407]. During her testimony, Schrader-Falls admitted to shooting Hughes, but argued that her actions were in self-defense as a response to an act of aggression from Hughes. [R. p. 378]. Immediately following Schrader-Falls’ testimony, the defense called Mary Victoria Bourus, who served as an expert for the defense on domestic violence and battered spouse syndrome. [R. pp. 408-427].

Following the close of Schrader-Falls’ case-in-chief, post-trial motions were heard, closing arguments were made, the jury was instructed, and the case was submitted to the jury. [R. pp. 450-535]. The jury returned a guilty verdict. [R. pp. 537-539]. The circuit court then sentenced Schrader-Falls to imprisonment for a term of thirty years’. [R. p. 561]. Further, the

¹ It appears from the record that the circuit court and counsel had previously discussed the order of witnesses during a conversation held in chambers, thus defense counsel made this formal request to preserve the issue on the record. [R. p. 284].

circuit court held that Schrader-Falls failed to establish that she was eligible for early parole under section 16-25-90 of the South Carolina Code of Laws.² [R. pp. 561-562.]

Following trial, Schrader-Falls filed a motion to reconsider, asking the circuit court to reconsider its decision to deny Schrader-Falls the opportunity for early parole pursuant to section 16-25-90. [R. p. 617.] On May 22, 2014, the circuit court held a hearing to address this motion. [R. pp. 564-566]. At this hearing, Schrader-Falls' counsel presented two additional witnesses, Ann Rich and Raphael Falls, who provided first-hand testimony of Hughes' physical abuse of Schrader-Falls. [R. pp. 588-601]. Neither of these witnesses testified at her trial.³ The circuit court declined to make a ruling at the hearing. [R. pp. 611-612]. However, on July 14, 2014, the circuit court issued an order granting Schrader-Falls' motion to reconsider and ruled that pursuant to section 16-25-90 of the South Carolina Code, Schrader-Falls was eligible for early parole after serving one-quarter of her sentence. [R. p. 1].

² S.C. Code Ann. §16-25-90, which is entitled "Parole eligibility as affected by evidence of domestic violence suffered at hands of household member," states:

[A]n inmate who was convicted of . . . an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate . . . presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member.

³ It is unclear from the record why these two witnesses, who, based upon their testimony at the May 22nd hearing, clearly had first-hand knowledge of Hughes' physical abusive of Schrader-Falls and thus would have further bolstered Schrader-Falls' version of the facts, were not called during Schrader-Falls' trial.

STATEMENT OF THE FACTS

On March 31, 2012, Vivian Schrader-Falls shot and killed her then boyfriend, Tony Hughes, outside the home of another woman in Horry County, South Carolina. While there were several witnesses nearby, there were no eye-witnesses who saw the shooting take place. At trial, Schrader-Falls presented uncontroverted testimony that she and Hughes were engaged in a heated argument at the time of the shooting, during which Hughes advanced towards her in a threatening manner. Based upon her long, horrific history of abuse and the fact she suffered from battered woman's syndrome, Schrader-Falls reacted to Hughes' act of aggression by drawing a pistol she was carrying and shooting Hughes three times in the chest.

Schrader-Falls is a fifty-two-year-old mother of three. [R. pp. 298, 314]. In addition to her three biological children, Schrader-Falls also helped raise two stepchildren and two adopted children. [R. p. 314]. She was born in Charlotte, North Carolina. [R. p. 301]. From a very early age, she has suffered as the victim of physical and sexual abuse. [R. pp. 301-305]. Schrader-Falls described her father as a strict disciplinarian. [R. p. 301]. Growing up, Schrader-Falls' father would routinely "slap" and "whip" her hard enough to leave marks. [R. pp. 301, 304-305]. In addition to the physical abuse from her father, Schrader-Falls was sexually molested by her older brother, Buddy, beginning around the age of five. [R. pp. 303-304]. This molestation continued until Schrader-Falls was twelve years old. [R. p. 304]. Schrader-Falls left her father's home when she was fourteen years old to live with her mother. [R. p. 306].

Shortly after moving in with her mother and still at the age of fourteen, she married her first husband, Jimmy Deering. [R. p. 307]. At the time they married, Deering was twenty-one years old and in the Army. [R. pp. 306-307]. Schrader-Falls and Deering were married for a little over eight years. [R. p. 309]. Schrader-Falls described Deering as a "very mean, very

violent” man who limited Schrader-Falls’ contact with her family. [R. p. 309]. Deering would frequently abuse Schrader-Falls, including hitting, kicking, pulling her hair, and even cutting her with a knife. [R. p. 309]. This abuse continued until Schrader-Falls, with the help of a relative, was able to get out of the house and seek a divorce. [R. p. 310].

Several years later, Schrader-Falls married her second husband, John “Booster” Jones. [R. p. 311]. Jones and Schrader-Falls were married for approximately ten years. [R. p. 311]. This relationship was much like her prior marriage with Deering. [R. p. 311]. Jones would regularly drink and use drugs and become very abusive with Schrader-Falls. [R. pp. 311-312]. Several of Schrader-Falls’ children described this relationship as “terrible” and “abusive.” [R. pp. 258, 272]. Jones would regularly beat on Schrader-Falls, often punching her in the head and face. [R. p. 312]. Schrader-Falls testified that she still has jaw problems as a result of Jones’ abuse. [R. p. 312]. Schrader-Falls was eventually forced to seek a restraining order against Jones, before ultimately filing for and obtaining her second divorce. [R. pp. 312-313].

Schrader-Falls then married her third and final husband, Daryl Falls. [R. p. 313]. Unlike her prior two husbands, Falls was not abusive and, instead, was very supportive of both Schrader-Falls and her children. [R. pp. 313-314]. In 2009, Falls died of a massive, unexpected stroke. [R. p. 313]. As a result of this abusive past, Schrader-Falls suffered from a host of mental health issues, including anxiety, bi-polar disorder, and post-traumatic stress disorder. [R. p. 319].

Shortly after Falls death, Schrader-Falls, along with her two sons that were still living with her, moved to the Myrtle Beach area. [R. p. 314]. In Myrtle Beach, Schrader-Falls met Tony Hughes through an online dating website known as PlentyOfFish or POF.com. [R. p. 315].

Hughes owned a home in Gresham, South Carolina. [R. p. 321]. Hughes worked for a waste management company in Florence, South Carolina. [R. p. 325].

Hughes and Schrader-Falls spoke infrequently until May of 2011, when Hughes ended a relationship with his then fiancé. [R. p. 317-318]. Following the break up with Hughes' fiancé, Hughes reached out to Schrader-Falls via social media and they began to have daily conversations over the phone. [R. p. 317-318]. Approximately one week later, they decided to meet in person. [R. p. 320]. After their first meeting, Schrader-Falls testified that she and Hughes began seeing each other daily. [R. p. 320]. Within weeks of first meeting, Hughes moved into Schrader-Falls' house. [R. pp. 324-325].

Ultimately, Schrader-Falls testified that Hughes informed her that they were "married in the eyes of God." [R. p. 331]. Though they never had a formal ceremony or obtained a marriage certificate, Schrader-Falls and Hughes had a ceremony on the beach in which they exchanged rings. [R. pp. 331-332]. Several of Schrader-Falls' children testified to noticing these wedding bands and characterized Hughes and Schrader-Falls' relationship as being "like husband and wife." [R. pp. 269, 277].

Like many of the men in Schrader-Falls' life, Hughes proved himself to be a very abusive. During their relationship, Hughes physically, emotionally, and sexually abused Schrader-Falls. Hughes was a large man, standing six feet, three inches tall and weighing over two hundred pounds. [R. p. 381]. Hughes would easily anger with Schrader-Falls and become physically violent towards her. [R. pp. 335-336]. Hughes would grab Schrader-Falls by the shoulders and arms and violently shake her. [R. pp. 340-342]. He also choked Schrader-Falls. [R. p. 338]. Hughes was extremely jealous in nature and questioned Schrader-Falls regarding her plans when leaving the house. [R. pp. 328-330]. Hughes tried to control Schrader-Falls in

many ways, telling Schrader-Falls that she could not leave the house and could only be with him. **[R. pp. 328-329]**. Finally, Hughes forced Schrader-Falls to participate in sexual acts that she was uncomfortable with, including anal sex. **[R. pp. 333-334]**.

At some point during their relationship, Schrader-Falls discovered that Hughes was chatting with other women online. **[R. p. 346]**. Ultimately, in an attempt to make Hughes happier, Schrader-Falls actually assisted Hughes in setting up a profile on the online dating website PlentyOfFish so that Hughes could flirt with other women online. **[R. p. 349]**. It was through this website that Hughes met Diane Movsky. **[R. pp. 54, 71]**.

On March 30, 2012, Tony Hughes went on a date with Movsky. **[R. p. 57]**. Hughes and Movsky ended up cancelling their plans to go out and, instead, spent the evening at Movsky's home. **[R. p. 57]**. Ultimately, Hughes ended up spending the night at Movsky's home. **[R. p. 59]**.

The following morning, on March 31, 2012, Schrader-Falls returned from a last-minute trip to visit her sick son in a hospital in North Carolina. **[R. p. 358]**. She had driven through the night to return home and had very little sleep the previous evening. **[R. p. 358]**. Upon arriving back in Myrtle Beach, Schrader-Falls dropped her two sons at her house and proceeded to run some errands. **[R. p. 361]**. While out, Schrader-Falls turned down the road where she knew Movsky lived to see if Hughes' car was at Movsky's home. **[R. pp. 362-363]**. Upon discovering Hughes' car parked out front, Schrader-Falls got out and took pictures of Hughes' vehicle. **[R. pp. 363-364]**. Schrader-Falls tried to call Hughes to confront him on the phone, but he did not answer. **[R. p. 364]**. Schrader-Falls then retrieved the pistol she carried in her car with the intention of shooting the tire on Hughes' car, which was new to Hughes. **[R. p. 371]**. However, upon approaching the vehicle, Schrader-Falls became afraid of Hughes' reaction and

decided not to shoot his vehicle. [R. p. 371]. Instead, she tucked the pistol into the waistband of her pants. [R. p. 372].

Schrader-Falls then approached Movsky's house and knocked on the front door. [R. p. 372]. Movsky answered and explained that Hughes was not there. [R. pp. 62-63]. Shortly thereafter, as Schrader-Falls was walking to her car to leave, Hughes came out of the side door of Movsky's home. [R. p. 374]. Schrader-Falls and Hughes then engaged in a heated argument. [R. pp. 376-378]. Hughes became upset and approached Schrader-Falls in an aggressive manner. [R. p. 378]. As a response to this physical gesture, Schrader-Falls pulled her pistol and shot Hughes three times. [R. p. 378]. At trial, when describing the shooting, Schrader-Falls specifically testified:

I needed to go to the car, but I heard him say something, and he had raised his voice, and he said who the F do you think you are and told me what I could do, and I looked back and he looked at me, and he has a look, a certain look, where he is going to come at you, and he threw the cigarette down and come at me, when he did, I just closed my eyes and all I remember was the gun firing.

[R. p. 378]. Immediately following the shooting, Schrader-Falls held Hughes and yelled to a nearby neighbor to call an ambulance. [R. p. 294]. Schrader-Falls stayed on the scene until police arrived. [R. p. 380].

After Schrader-Falls' testimony, Schrader-Falls' counsel presented expert testimony regarding the battered woman's syndrome from Mary Victoria Bourus. [R. p. 408]. Bourus is the co-executive director of the Family Justice Center in Georgetown, South Carolina. [R. p. 408]. At the time of her testimony, Bourus had over twenty-seven years of experience with battered women. [R. p. 409]. Bourus has a Master's degree in social work and holds a LISW license to practice social work in South Carolina, which is the highest level of licensure awarded

in our state. [R. pp. 409-410]. At trial, the circuit court qualified Bourus as an expert in the field of domestic violence and battered women's syndrome. [R. p. 413].

Before testifying, Bourus spent seven hours interviewing Schrader-Falls about her history. [R. p. 415]. She also reviewed the entire record of Schrader-Falls' medical and law enforcement records. [R. p. 415]. Finally, Bourus took seven additional interviews of individuals associated with Schrader-Falls for corroborating evidence of abuse in both her former relationship and her relationship with Hughes. [R. p. 416]. From this investigation, Bourus developed her professional opinion that Schrader-Falls suffered from battered women's syndrome, which is actually a sub-set of post-traumatic stress disorder. [R. p. 416].

STANDARD OF REVIEW

Generally speaking, the circuit court has the power to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence" Rule 611, SCRE. Accordingly, "the order of proof must be left to the sound discretion of the [circuit court], and . . . will not be reversed unless it clearly appears that the [circuit c]ourt has abused its discretion." *State v. Van Williams*, 212 S.C. 110, 113, 46 S.E.2d 665, 667 (1948).

ARGUMENT

- I. The circuit court's arbitrary decision to require the Defendant to testify prior to calling her expert witness constitutes an abuse of the circuit court's discretion and ultimately violated the Defendant's due process rights as espoused by the United States Supreme Court in *Brooks v. Tennessee*, 406 U.S. 605 (1972).**

The circuit court erred in requiring the Defendant to testify before her expert witness could be called at trial. In making this ruling, the circuit court failed to provide a valid reason for forcing defense counsel to change the order in which its witnesses would be called. This arbitrary decision amounted to an abuse of the circuit court's discretion. Moreover, this error

infringed on the Defendant's right to due process as defined by the United States Supreme Court in *Brooks v. Tennessee*, 406 U.S. 605 (1972).

During the presentation of the Defendant's case-in-chief, counsel for Schrader-Falls requested that the circuit court allow the defense's expert, Victoria Bourus, to testify before placing the Defendant on the stand. [R. pp. 285-286]. Specifically, counsel for the Defendant stated that Bourus would testify as to her investigation of the Defendant's relationship history, including her relationship with Hughes, as well as her findings resulting from that investigation. [R. p. 286]. Defense counsel stated that Bourus' testimony was relevant under proper South Carolina case law and was properly founded upon information collected during her investigation, as permitted by Rule 703 of the South Carolina Rules of Evidence. [R. p. 286]. In denying this request, the circuit court stated that the expert testimony "had a proper place in . . . the facts of this particular case." [R. p. 287]. The circuit court noted that the facts could "only be established through the testimony of the Defendant." [R. p. 287]. The circuit court concluded that if Bourus was allowed to testify prior to Shrader-Falls, there was a serious potential for a mistrial if the Defendant's testimony "fail[ed] in any way." [R. p. 288].

Generally speaking, each party to a case has the right to control the presentation of its case. *See Day v. Kilgore*, 311 S.C. 73, 77, 427 S.E.2d 683, 685 (Ct. App. 1992), *aff'd*, 314 S.C. 365, 444 S.E.2d 515 (1994) ("This Court observes that the control of a party's presentation of evidence while presenting his case in chief should be reserved to that party."). However, this right to control the presentation of the case is subject to the circuit court's discretion to control the admission and presentation of evidence under the South Carolina Rules of Evidence. *See* Rule 611, SCRE (noting the court shall exercise reasonable control over the order of witnesses and evidence presented in a case); *State v. Sullivan*, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981)

(noting the “order of proof during a trial rests in the discretion of the trial judge”). Specifically, Rule 611 provides:

Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Rule 611(a), SCRE. Accordingly, Rule 611 recognizes a number of reasons for which the circuit court can exercise control over the order in which evidence is presented at trial. *Id.*

Because “the order of proof must be left to the sound discretion of the [circuit court],” it “will not be reversed unless it clearly appears that the [circuit c]ourt has abused its discretion.” *Van Williams*, 212 S.C. at 113, 46 S.E.2d at 667. “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” *State v. Douglas*, 367 S.C. 498, 507, 626 S.E.2d 59, 64 (Ct. App. 2006) *aff'd in part, rev'd in part*, 380 S.C. 499, 671 S.E.2d 606 (2009). “The term ‘abuse of discretion’ has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support.” *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000). As our supreme court stated,

Overly simplified, abuse of discretion involves the extent of disagreement. When an appellate court is in agreement with a discretionary ruling or is only mildly in disagreement, it says that the trial judge did not abuse his discretion. On the other hand, when the appellate court is in substantial or violent disagreement, it says that there has been an abuse of discretion.

Id. (quoting *Rish v. Rish*, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App. 1988)).

Accordingly, where the circuit court ruling is arbitrary or unreasonable, an abuse of discretion has occurred. *See Douglas*, 367 S.C. at 508, 626 S.E.2d at 64 (noting a circuit court’s ruling

“constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair”).

In the instant action, the circuit court arbitrarily forced defense counsel to call the Defendant before calling his expert witness. As noted by defense counsel, Rule 703 of the South Carolina Rules of Evidence permits an expert to base his opinion upon facts made known to the expert “at *or before* the hearing.” Rule 703, SCRE (emphasis added). Moreover, the rule further states that the information relied upon need not be admissible in evidence. *Id.* Accordingly, the circuit court’s statement that the facts of this particular case could “only be established through the testimony of the Defendant” had no bearing on Bourus’ ability to testify at trial. In addition, the circuit court’s ruling does not address any of the concerns highlighted in Rule 611. *See* Rule 611(a), SCRE (noting the court’s power to control the presentation of evidence “so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment”). The different order of witnesses did not make the presentation of evidence more effective for the ascertainment of the truth. The change was not made to avoid needless consumption of time. The circuit court was not concerned with protecting witnesses from harassment or undue embarrassment.

Finally, the circuit court’s concern for a mistrial is misplaced. In a worst-case scenario where Schrader-Falls’ testimony completely refuted Bourus’ opinion that she was suffering from battered-spouse syndrome, this contradiction would simply effect the credibility of the defense’s witnesses, not create a potential mistrial. Accordingly, the circuit court has failed to advance any valid reason for requiring the defendant to testify before her expert. This unfounded and arbitrary decision therefore amounts to an abuse of discretion. *See Douglas*, 367 S.C. at 508,

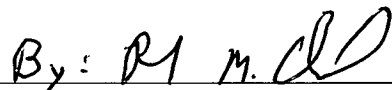
626 S.E.2d at 64 (noting a circuit court's ruling "constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair").

Moreover, the circuit court's abuse of discretion in requiring Schrader-Falls to testify before Bourus directly violated Schrader-Falls' due process rights by depriving Schrader-Falls of "the guiding hand of counsel at every step of the proceedings against [her]." *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). The United States Supreme Court has specifically examined a trial judge's power to control when a Defendant testifies and found that requiring a defendant to testify before calling other witnesses constitutes an impermissible invasion of defense counsel's right to control the presentation of his client's case and thus results in a violation of the defendant's due process rights. *See Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972). In *Brooks*, the Supreme Court examined the constitutionality of a Tennessee statute that compelled criminal defendants to be the first witness for the defense or forego the opportunity to testify all together. *Id.* at 606. The majority opinion found that the statute violated the defendant's constitutional right to remain silent by forcing the defendant to prematurely decide whether or not to testify before the defendant had the opportunity to evaluate the strength of his case without his testimony. *Id.* at 610-611. More importantly, the majority also held that the statute constituted an impermissible invasion of defense counsel's right to control the presentation of his client's case, and an unconstitutional deprivation "of the 'guiding hand of counsel' in the timing of this critical element of his defense." *Id.* at 612-13. In making this ruling, the Court stated, "While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and *when in the course of presenting his defense*, the accused should take the stand." *Id.* at 613 (emphasis added).

Like the statute in *Brooks*, the circuit court's ruling in the instant case improperly removed the decision of when to have Schrader-Falls testify from the hands of her defense counsel. This ruling required Schrader-Falls to testify without first having the opportunity to fully evaluate the strength of her case prior to her testimony. It is possible that after hearing Bourus' testimony, Schrader-Falls or her counsel may not have continued with their plan for Schrader-Falls to testify. More importantly, this ruling also interfered with defense counsel's ability to control the presentation of his client's defense and therefore constituted an unconstitutional deprivation of "the 'guiding hand of counsel' in the timing of this critical element of his defense." *Id.* at 613. As noted by the Supreme Court, "the ordinary power of a trial judge to set the order of proof" cannot interfere with the accused and his counsel's ability to decide "whether, and *when in the course of presenting his defense*, the accused should take the stand." *Id.* (emphasis added). Accordingly, the circuit court's ruling in the instant case constitutes a clear violation of the Defendant's due process rights as explained in *Brooks*.

CONCLUSION

Based on the foregoing, the Defendant's conviction should be reversed and the case remanded for a new trial.

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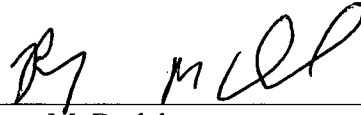
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October 1, 2015

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 1, 2015

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

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OCT 01 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

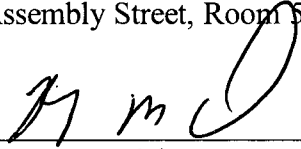
VIVIAN SCHRADER-FALLS,

APPELLANT

APPELLATE CASE NO. 2014-001679


CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of October, 2015.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of October, 2015.


Notary Public for South Carolina

My Commission Expires: July 24, 2022