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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRYAN REARICK,

APPELLANT

APPELLATE CASE NO. 2014-001692

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by ordering a mistrial over appellant's objection since the state's inability to marshal its evidence and its disorganization did not constitute the "manifest necessity" necessary for the court to *sua sponte* grant a mistrial?

2.

Whether a ruling that the granting of a mistrial for the state over appellant's objection does not constitute double jeopardy in violation of the Fifth and Fourteenth Amendments is appealable since appellant should not have to endure the prejudice of pending criminal charges remaining against him and a second trial because the state was unable to marshal its evidence when it called the case to trial, and the United States Supreme Court case of Abney controlling any contrary state precedent under the Supremacy Clause of the United States Constitution, and the Double Jeopardy Clause of the Fifth Amendment applying to the states pursuant to the Fourteenth Amendment?

STATEMENT OF THE CASE

Appellant Bryan Rearick was indicted for felony driving under the influence, resulting in death, by the Beaufort County grand jury. R. 238. Both the State and Appellant agreed to waive a jury trial, and to have a bench trial before the Honorable Carmen T. Mullen. This bench trial commenced on January 30, 2014. R. 1. Lauren Calloway represented appellant. Adam Russo and Lynorr Musser were the assistant solicitors. R. 2.

The defense moved to suppress the blood sample ordered taken from appellant by Highway Patrolman Summers pursuant to Missouri v. McNeely since it was obtained without a warrant, and without any exigency. R. 51, l. 7 – 57, l. 6; 120, l. 19 – 127, l. 20. The defense also argued that the chain of custody of appellant's blood was fatally defective because the nurse who allegedly drew the blood at the hospital was not being produced as a necessary witness by the state. The defense argued, inter alia, that this denied appellant his right to confrontation. R. 126, l. 25 – 128, l. 17.

Throughout the bench trial, the judge referenced the serious problems with the state's apparent failure to provide discovery and potentially exculpatory information to the defense. At the conclusion of court on January 30, 2014, the judge recessed court to allow the state additional time to review the documents in its possession pertaining to the fatal May 30, 2010 auto accident. (3 ½ years later). R. 173, l. 3 – 182. l. 8.

Court convened again on February 3, 2014. R. 184. At the beginning of the recommencement of the bench trial the judge and attorneys again discussed documents that had not been turned over to the defense, or which now appeared inconsistent with prior testimony. For example, the judge noted documents that now revealed that when

police arrived on the scene: "Two people on the ground, possible entrapment." The evidence from the arresting officer was that appellant and the decedent were both in respective EMS ambulances at the time he arrived so obviously other law enforcement who arrived earlier possibly had more critical information about the accident. R. 186, l. 1 – 5, l. 10. Defense counsel moved for a dismissal arguing that her client's due process rights were being violated by the state's "huge" failure to provide evidence that may well be exculpatory to appellant. R. 188, l. 11 – 197, l. 5.

The solicitor argued that "a continuance would be the appropriate remedy." The solicitor argued that critical witness, Ashe, who "did the MAIT report was in California and unavailable at that time." R. 197, l. 7 – 198, l. 6. The judge stated that given the passage of time she disagreed with the state, and she did not think the continuance the state desired was a proper or useful remedy. However, the judge ruled she was going to declare a mistrial over the defense objection because: "We all know a trial is the search for the truth. Doesn't matter where the source is, it is a search for the truth. That is the only way the system works. Certainly that is my ultimate goal and certainly the oath that I took. I am concerned in this case that later discovered evidence, potential evidence and again this may not turn out to be anything that we don't have everything that is necessary to be able to reach that conclusion, and appropriate one so, to that extent, again, I am declaring a mistrial." R. 206, ll. 1-10.

On February 13, 2014 the defense filed a motion to bar subsequent prosecution citing appellant's rights under the Double Jeopardy Clause. R. 208. The motion noted that the defense opposed a continuance or a mistrial, and that the judge granted a mistrial over the objection of the defense. R. 209.

The defense further argued in the motion that a mistrial could only be declared when dictated by "manifest necessity" or "the ends of public justice." The defense argued there was no reason that the court, as the trier fact in this case, could not have reached a verdict. The defense argued: "There was no reason the court could not have reached a verdict. The court simply renounced its responsibility and duty to return a just verdict." R. 209-212.

The state filed a return to this motion noting the judge determined that a continuance would only prejudice the defendant, and that dismissal was not warranted. The State argued the lack of other viable options, by itself, constitutes "manifest necessity." R. 218.

A hearing on the motion to bar further prosecution based on double jeopardy was held on April 8, 2014. Lauren Caraway again represented appellant. Lynorr Musser represented the State. R. 220-221.

The defense argued that double jeopardy had attached because the court declared a mistrial over the defense objection, and where the state never requested a mistrial. The defense noted there was no "manifest necessity for the mistrial, and because of that, the controlling case law indicates double jeopardy has attached. And what I am relying on in this case, Your Honor, is State v. Prince.[1]" Defense counsel argued there was not anything which barred or prohibited the judge for making applicable rulings and reaching a verdict in this bench trial. R. 223, l. 3 – 224, l.6.

The solicitor argued there was the "manifest necessity" necessary for the judge to grant a mistrial on her own motion. The assistant solicitor maintained that certain

[1] 279 S.C. 30, 301 S.E.2d 471 (1983).

information or evidence had been lost and the judge was only left with two choices: "either dismiss the case or to declare the mistrial." R. 224, l. 12 – 226, l. 10. The solicitor argued that Prince was distinguishable because the judge in that case had viable options other than to declare a mistrial in that case. R. 226, ll. 5-10.

Defense counsel noted the "huge discovery problems" in this case because of the state's disorganization. For example, there was evidence Beaufort County sheriff's deputies may have been on the accident scene that could have been interviewed for exculpatory evidence, there was the remaining question whether a videotape existed of the accident scene, and whether that videotape had been destroyed. In addition, at least fifty pages were missing from the MAIT report turned over to the defense discussing the reconstruction of the accident scene.

The defense noted that the judge had watched on the computer in the courtroom the display of the proof that there were more the fifty pages missing from the MAIT report because the apparent disorganization or bad faith of the prosecution. R. 227, l. 3 – 229, l. 18. The judge took the matter under advisement and said that she would issue an order. R. 229, ll. 19-21.

On June 24, 2014 the judge issued an order denying appellant's motion to bar prosecution under the double jeopardy clause. The order noted the problems with the state's evidence, and whether certain exculpatory evidence had been turned over to the defense. The court wrote that it had three options which were continuing the case, dismissing the case, or declaring a mistrial. The judge noted that she granted a mistrial over appellant's objection. R. 233-235.

The judge observed that: "[D]iscovery issues became clear throughout the proceedings and continued on the day that the bench trial was set to resume. Five different assistant solicitors had handled the file over a three and a half year period between indictment and trial." *citing* State v. Prince 279 SC 30, 33, 301 S.E.2d 471, 473 (1983). R. 234. The court ruled that the granting of the mistrial over objection in this case was based on "manifest necessity," and she denied appellant's motion to bar further prosecution as violating double jeopardy. R. 234-235.

Appellant filed a notice of intent to appeal, and he filed his initial brief and designation of matter with the Court of Appeals on May 29, 2015. The state filed a motion to dismiss appellant's appeal, and a motion to certify this case to the Supreme Court on June 2, 2015. Appellant filed a return dated June 15, 2015 opposing the motion to dismiss, but agreeing that this case should be certified to this Court.

This Court issued an order dated October 8, 2015 denying the motion to dismiss. This Court ordered appellant to file an amended initial brief with this Court addressing the issue included in the first initial brief, "along with the issue of appealability." R. 236.

ARGUMENT

1.

The court erred by ordering a mistrial over appellant's objection since the state's inability to marshal its evidence and its disorganization did not constitute the "manifest necessity" necessary for the court to *sua sponte* grant a mistrial.

Relevant facts

The auto accident giving rise to this case occurred on May 30, 2010 on Highway 278 going toward Bluffton, South Carolina. The decedent's car apparently pulled on to the highway out of the parking lot of the Crazy Crab. It was a head on collision. The facts of exactly what happened were disputed. R. 12, l. 13 – 14, l. 7. The defense noted that at one point in a report from Mr. Ashe, the MAIT report, he stated the decedent "was traveling at such a high rate of speed that there was no way he could have stopped at the stop sign." R. 14, l. 18 – 15, l. 6. The solicitor disputed this fact and argued the evidence would show appellant was "driving slightly faster." R. 15, ll. 7-20.

The state's first witness during the bench trial, and the motion to suppress the blood alcohol evidence was Trooper Thomas Summers, III. R. 21, l. 5 – 22, l. 10. Summers testified that when he arrived at the scene of the accident at about 1 a.m. on May 30-31, 2010 that appellant "was in the back of the ambulance." R. 22, ll. 2-16. Summers said he was called on the telephone by one of the Beaufort County Sheriffs deputies reporting the automobile accident. Summers said that his video camera would have been running as soon as he turned on his blue light. R. 23, l. 5 – 25, l. 19; 37, ll. 3-24. Summers was very vague about how many police officers were on the scene when he arrived "it might have been one." R. 26, ll. 14-20.

On cross-examination, Summers agreed that the best evidence of what happened would be in the report contemporaneously made. R. 29, ll. 14-20. Summers said that the fire department and EMS were already on the scene and at some point Sergeant Gregory arrived. Summers believed he talked to a fireman first and the he "stuck his head" in the ambulance and identified himself to appellant at the accident scene. R. 30, l. 16 – 32, l. 2. His usual practice was that he would ask for a driver's license and registration at the accident scene. The judge asked Summers if he had a chance to review his report and hand written notes. Summers responded that he had not reviewed these documents. The judge then stated they would take a ten minute break to allow Summers to prepare. R. 31, l. 24 – 33, l. 16. The judge told Summers he could not talk to the solicitor since he was under oath but he could review the "wreck report" and the DVD and interview with Public Safety, which defense counsel agreed that Summers could review. R. 33, l. 11 – 35, l. 11.

After about a forty-five minute break court reconvened and Summers testified there "were some deputies there" at the accident scene. He said there was more than one deputy there. Summers estimated he spent 30-45 minutes at the accident scene and that his videotape was running at the time from his squad car. "I don't know how long [the videotape was running] - it activated when I cut the blue light on." R. 36, l. 6 – 37, l. 6.

Defense counsel noted she was concerned about the evidence not having been turned over to the defense under Brady[2], and Rule 5 of the Criminal Rules. She argued that appellant's demeanor, his conversations, and indications that he was not intoxicated were critical in this case and that the state's disorganization was very troubling. R. 39, l.

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[2] Brady v. Maryland, 373 U.S. 83 (1963).

6 – 41, l. 24. Counsel argued perhaps most bothersome was that there were other Beaufort County deputies on the scene of the accident and that at this late point the state was unable to accurately say who was at the scene of the accident. R. 41, l. 25 – 47, l. 14.

As stated, defense counsel had moved to suppress the blood sample taken from appellant at the scene of the accident under Missouri v. McNeely.[3] She argued there was no exigency that prohibited the state from getting a search warrant and that Summers ordering the blood drawn simply because he opined this may have been a felony DUI resulted in an unconstitutional violation of appellant's Fourth Amendment rights. R. 51, l. 13 – 58, l. 5. The judge ruled that she would take the matter under advisement. R. 58, ll. 6-11. The state's first witness during the bench trial, when jeopardy attached, was Trooper Shadrach Summers, III. R. 74, l. 9 – 77, l. 7. See, Serfass v. United States, 420 U.S. 377, 388 (1975).

When court reconvened on February 3, 2014, the judge asked if documents referenced in an affidavit of Captain Mike Maddox had been turned over to the defense. The solicitor said that they were not turned over to the defense. However, he maintained of the three and a half year investigation: " I only found them the other day." R. 186, l. 4-8. The judge observed that this report referenced "two people on the ground, possible entrapment." This seemed inconsistent with prior testimony as stated above. R. 186, l. 9 – 187, l. 5.

Defense counsel referenced documents that were missing, and she noted the passage of time between the accident and trial. Counsel argued that a dismissal of the case was the only proper remedy. "I believe this case has been pending for three and a

[3] 133 S.Ct. 1552 (2013).

half years. The essence of due process has been violated in every way during this case. I do believe that dismissal is the appropriate remedy. Not only do we have these new documents but we have the issue of this video, and with all due respect to Trooper Summers it's not up to him what is good evidence and what is not." R. 188, l. 1 – 197, l. 5.

The judge further noted that Investigator Ashe, who authored the MAIT report, was now in California, and was not available to testify. R. 197, l. 7 – 198, l. 6. Defense counsel also reminded the judge that the Beaufort County Sheriff deputies, who could not be named today, who were on the scene of the accident on May 30, 2010. Those deputies "might not have any recollection today, [but] that's my point exactly, this is the same as evidence that has been lost or destroyed. Their memories have been - its 4 years old, your Honor. But if I had known about them in 2010 they would have been able to provide lots of useful information..." R. 198, l. 9 – 199, l. 1.

The judge opined that she did not think there was any prosecutorial misconduct involved in this case. "I think that Mr. Russo got a very stale file." The judge said that Russo was the fifth solicitor on the case, and that she agreed a continuance would not solve any of multiple problems that existed in this case. However, the judge ruled that she was not going to dismiss the case, and that a mistrial on her own motion was the proper remedy since "a trial is a search for the truth." The judge apparently reasoned that the state had not been able to present a coherent case, and therefore she could not reach a verdict. R. 204, l. 13 – 206, l. 15.

Discussion

The judge's ruling that a mistrial was necessary because the trial was "a search for the truth" was an admission that the state was so disorganized, and its lack of preparation showed it could not prove appellant's guilt beyond a reasonable doubt. This Court in State v Needs, 333 SC 134, 508 S.E.2d 857 (1998), took the opportunity to strongly urge trial courts to avoid using "seek the truth language" when instructing jurors on the definition of a reasonable doubt.

Yet, the trial judge in this case, as the trier of fact, clearly determined that her duty was to find the truth, and she mistakenly confused her real function which was to determine whether the state had proved appellant's guilt beyond a reasonable doubt.

The defense correctly argued that once the trial began, and jeopardy had attached, that the judge could not validly use the state's ineptitude and its lack of preparation to fail to reach a verdict. R. 223. The judge, respectfully, failed to fulfill her duty as the trial judge, and the trier of fact, when she granted a mistrial out of convenience, and to allow the state a second attempt to save its case at a later date to appellant's considerable detriment. The Double Jeopardy Clause does not allow Mulligans where the state – which gets to time the call of the case – is unprepared.

In State v. Prince, 279 SC 30, 301 S.E.2d 471 (1983), the Court held that once the trial has begun there must be a "manifest necessity" for the discharge of the jury. If such manifest necessity exists, a plea of former jeopardy will not prevail. However, where a mistrial is not dictated by manifest necessity or the ends of public justice a plea of double jeopardy will prevail. See Illinois v. Somerville, 410 U.S. 458 (1973).

In Prince, as in this case, a mistrial was granted by the court, respectfully, for the convenience of the court. As in Prince, this record fails to reveal facts which justify declaring a mistrial over the objection of appellant, and by doing so subjecting him to a new trial before the same or different judge or jury at a future time.

The double jeopardy clauses of the United States and South Carolina Constitutions prevent all citizens from being placed twice in jeopardy of life or liberty. See Fifth Amendment to the United States Constitution, and South Carolina Constitution, Article 1 §12.

Pursuant to the double jeopardy clause, a defendant is protected against not only prosecution for the same offense after acquittal, and prosecution for the same offense after conviction, but against multiple prosecutions for the same offense after an improvidently granted mistrial. See State v. Baum, 355 S.C. 209, 213, 584 S.E.2d 419, 421-422 (Ct. App. 2003) *citing* State v. Kirby 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977).

In Baum, the Court noted that the prohibition against double jeopardy was intended to condemn the practice of a mistrial being granted for the purpose of prosecution being allowed to buttress weaknesses in its evidence. In Baum, the discovery of the body of the victim during a murder trial was critical evidence because it had the tendency to exonerate or inculpate the accused so it was not an abuse of discretion because a manifest necessity for granting a mistrial existed.

In Taylor v. Florida, 811 So.2d 803 (Ct. App. 1st Dist. 2002), the court held that the trial court granting of a mistrial was not based on manifest necessity. In Taylor, the assistant manager of the store that had been robbed testified at trial he knew the names of

certain customers who were in the store during the robbery. This information had not been previously disclosed to the defense so counsel for the co-defendant moved for discovery sanctions and a mistrial. After a hearing, the court concluded that the assistant manager had given this information to the investigating officers, but it had not been recorded in any police report nor shared with the prosecuting attorneys. The trial court determined that a mistrial was the proper remedy. Taylor's attorney objected to the granting of a mistrial, and moved to dismiss a double jeopardy grounds when that mistrial motion was granted over his objection.

The Court in Taylor found the case was materially indistinguishable from the United States v. Chica, 14 F.3d 1527 (11th Cir. 1994) in which four co-defendants were jointly tried on drug-related offenses. When a witness gave unexpected testimony, a mistrial was granted to all four defendants. The Court agreed with Chica that the prosecution had failed in its "heavy burden" to show a mistrial was the result of manifest necessity. The court found that the state had failed to show manifest necessity to grant a mistrial in Taylor's case, and that Taylor was entitled to dismissal of his charges on the grounds of double jeopardy.

The double jeopardy clause prohibits that a defendant, such as appellant, be subject to trial twice for the same offense. See, Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Benton v. Maryland, 395 U.S. 784 (1969).

In this case it is apparent that the state's inability to marshal its evidence to prove appellant's guilt beyond a reasonable doubt was due to its own ineptitude, and the judge mistakenly thought her duty as a trier of fact was to "search for the truth." This was the wrongful basis for the granting of the mistrial on the court's own motion.

Moreover, the unavailability of critical evidence for the prosecution to prove its case must be subject to the strictest scrutiny when it becomes the basis for a mistrial. See Arizona v. Washington 434 U.S, 497, 508 (1978). An overbroad definition of "manifest necessity," as used by the trial judge in this case, invites the discretion of "an unlimited, uncertain, and arbitrary judicial discretion." Downum v. United States, 372 U.S.734, 738 (1963).

The state's failure to marshal its evidence, and its failure to turnover and retain potentially strong exculpatory evidence did not constitute a "manifest necessity" for a mistrial. Further, it is apparent that the state was very unlikely to secure a conviction in this case because the blood alcohol evidence was not going to be admissible under Missouri v. McNeely where Trooper Summers admitted he ordered the blood taken because he suspected this was a felony DUI case. The record showed there was no exigency involved particularly since the Trooper had a cell phone, and the Trooper admitted he did not even think of securing a search warrant, even where Magistrates are obviously readily available to consider application for such warrants.

Further, the state would not have been able to establish a chain of custody because the nurse who allegedly drew appellant's blood upon the order of the Trooper was not called by the state to testify at trial. The fact that the nurse had moved to another state did not render her unavailable, or make it impractical for the state to produce her for trial. The state simply could not prove the chain of custody as far as practicable in this case given the absence of the nurse. See State v. Joseph, 328 S.C. 352, 364-365, 491 S.E.2d 275, 281-282 (Ct. App. 1997).

The defense objected to the chain of custody, and further noted that the hospital records themselves stated that the chain of custody could not be established for "legal or employment purposes" from the hospital records. R. 57.

The trial court erroneously ruled that there was "manifest necessity" necessary for the granting of a mistrial over appellant's objection.

2.

A ruling that the granting of a mistrial for the state over appellant's objection does not constitute double jeopardy in violation of the Fifth and Fourteenth Amendments is appealable since appellant should not have to endure the prejudice of pending criminal charges remaining against him and a second trial because the state was unable to marshal its evidence when it called the case to trial, and the United States Supreme Court case of *Abney* controlling any contrary state precedent under the Supremacy Clause of the United States Constitution, and the Double Jeopardy Clause of the Fifth Amendment applying to the state's pursuant to the Fourteenth Amendment.

In Abney v. United States, 431 U.S. 651 (1977), the United States Supreme Court held that a pre-trial order denying a defendant's motion to dismiss on double jeopardy grounds was a "final decision," and that it was immediately appealable. The Supreme Court noted, "the rights conferred on a criminal accused by the double jeopardy clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." Abney v. United States, 431 U.S. at. 660.

The Court in Abney also reasoned: "If a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be available before that subsequent exposure occurs...We therefore hold that the trial order rejecting the claim of former jeopardy, such as that presently before us, constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of Section 1291." Abney v. United States, 431 U.S. at. 662.

Thus, any argument put forward by the state that appellant's assertion of double jeopardy here cannot be maintained unless and until he is convicted and sentenced must

give way to the supreme law of the land as explained in Abney v. United States. "Initially, we note that an interlocutory appeal before retrial is proper in this kind of case, for otherwise the defendant could be subjected to the very thing the double jeopardy clauses are designed to guard against, retrial for the same offense. Abney v. United States, 431 U.S. 651, 660-62 (1977). State v. Janvrin, 121 N.H. 370, 430 S.E.2d 152 (1981). A state procedural rule that conflicts with the defendant's constitutional rights, here, his right not to be tried twice for the same crime, cannot prevail. See Chambers v. Mississippi, 410 U.S. 284 (1973).

State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986), the seminal contrary state case, is based on case law that long antedates Federal Double Jeopardy Protection being part of a state defendant's due process rights. Cf. Benton v. Maryland, 395 U.S. 784 (1969).

The "gotcha" nature of Miller saying you have only a statutory right of appeal, resulting in you being denuded of your Federal Double Jeopardy rights, is repellent. The Romans noted, "Ubi Jus, Ibi Remedium," "where there is a right there is a remedy."

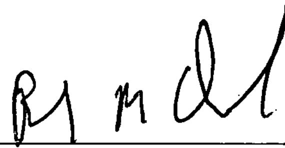
Appellant intends to move to argue against the precedent of Miller before this Court because he strongly maintains it conflicts with applicable United States Supreme Court precedent as enunciated in Abney v. United States, 431 U.S. 651 (1977). Abney contains substantial analysis of the Federal constitutional ban against double jeopardy. Abney demonstrates why an appeal *now* is required. Abney holds that an adverse ruling on a motion to dismiss on Double Jeopardy Grounds is a "final decision," and it is immediately appealable.

Appellant should not unjustifiably continue to have these criminal charges looming over his head where there was no manifest necessity for a mistrial, nor did the ends of public justice demand it, and particularly where it strongly occurred the state would not be able to prove its case beyond a reasonable doubt for the reasons explained above. Moreover, the judge's ruling that she could not adequately "search for the truth" given the state's ineptitude in this case constitutes a manifestly erroneous reason to grant a mistrial. Appellant has the due process right to the present appeal.

CONCLUSION

By reason of the forgoing arguments, the decision of the lower court should be reversed, and an order of dismissal should be issued by this court.

Respectfully submitted,



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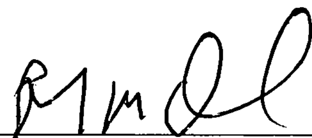
Chief Appellate Defender

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

May 6th, 2016



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THE STATE,

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V.

BRYAN REARICK,

APPELLANT

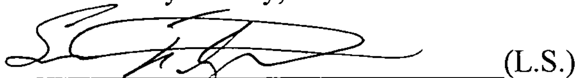
CERTIFICATE OF SERVICE

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 Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of May, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of May, 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.