ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY M. PORTERFIELD

APPELLANT

APPELLATE CASE NO. 2015-000631

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in permitting the solicitor to question witnesses regarding Appellant not calling an alibi witness during his case-in-chief and to argue during closing about the alibi witness's absence where the solicitor failed to show the witness was available or under Appellant's control, which unconstitutionally shifted the burden to Appellant in violation of the state and federal constitutions?

STATEMENT OF THE CASE

In October of 2012, a Richland County grand jury indicted Appellant for two counts of kidnapping (2012-GS-40-5294; - 5297), burglary in the first degree (2012-GS-40-5295), and armed robbery (2012-GS-40-5296). R. 1069 – 1070; R. 1072 – 1073; R. 1075 – 1076; R. 1078 - 1079. The state, represented by K. Luck Campbell and Meghan L. Walker, called the case for trial before the Honorable R. Knox McMahon and a jury on February 23, 2015. R. 1. Anastasia L. Walker, Robert L. Bank, Jr., and John W. Tate, represented Appellant. R. 1. On February 27, 2015, the jury found Appellant guilty as charged. R. 1010, line 21 – R. 1011, line 16. On March 6, 2015, Judge McMahon sentenced Appellant to thirty years' imprisonment for each offense and ordered the sentences to be served concurrently. R. 1066, line 16 – R. 1067, line 5; R. 1071; R. 1074; R. 1077; R. 1080.

Appellant filed a motion for new trial. R. 1024 - 1025. Judge McMahon heard the motion on March 6, 2015. R. 1026. Campbell and M. Walker represented the state, and A. Walker, Bank, and Tate represented Appellant. R. 1026. Judge McMahon denied the motion on the record. R. 1031, line 16 – R. 1035, line 9.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in permitting the solicitor to question witnesses regarding Appellant not calling an alibi witness during his case-in-chief and argue during closing argument about the alibi witness's absence where the solicitor failed to show the witness was available or under Appellant's control, which unconstitutionally shifted the burden to Appellant in violation of the state and federal constitutions.

Relevant facts

Gulzar Nathani was in the business of repairing, buying, and selling electronics and operated his business from his home and at the flea market. R. 188, line 20 – R. 189, line 7; R. 206, lines 3-15; R. 257, lines 2-4. Appellant met Nathani at a local flea market because Appellant had a computer that required repair. R. 257, lines 13-18; R. 701, lines 5-21. Over the course of several months, Appellant and Nathani continued their business relationship. R. 258, lines 5-19; R. 701, line 22 – R. 702, line 14; R. 703, lines 21-25.

On June 27, 2012, Rabia and Sobia, the daughters of Gulzar, were at home alone while Gulzar, his wife, and his son were at the flea market. R. 190, line 15 – R. 191, line 15; R. 226, lines 15-25; R. 260, lines 17-21. Rabia told the jury that she was familiar with some of her father's business associates, including Appellant. R. 189, lines 16-25. Rabia knew Appellant by his nickname, "Amp." R. 190, lines 1-4; R. 207, lines 6-13. During the afternoon of June 27, Rabia and Sobia went to Chick-fil-A to get some food. R. 191, lines 16-20; R. 227, lines 6-10. When they returned, they noticed a gold or champagne colored sedan parked in their driveway, and two black men were in the car. R. 191, lines 21-24; R. 198, line 22 – R. 199, line 2; R. 207, lines 21-23; R. 228, lines 9-20; R. 229, lines 9-19. Rabia and Sobia claimed the two men in the car entered their

home and robbed them at gunpoint. R. 195, line 22 – R. 198, line 21; R. 199, lines 10-15; R. 202, lines 20-24; R. 235, line 22; R. 236, line 1 – R. 237, line 19; R. 242, lines 13-15. Further, the two claimed one of the men was Appellant. R. 194, line 19 – R. 195, line 1; R. 232, line 5-12; R. 235, lines 10-18.

Rabia did not identify Appellant as one of the robbers when she called 911. R. 200, lines 10-11. However, days later, Rabia and Sobia identified Appellant's photograph from a line-up conducted by the police. R. 200, line 20 – R. 202, line 11; R. 240, line 9 – R. 241, line 25; R. 457, line 17 – R. 466, line 14. Additionally, both identified Appellant during the course of the trial. R. 203, line 17 – R. 204, line 4; R. 243, line 4 – R. 244, line 2.

According to the evidence presented by the state, the robbery occurred at approximately 2 p.m. R. 70, lines 1-2; R. 272, lines 2-11.

Appellant presented an alibi defense. On June 27, 2012, Appellant went to work at 8 a.m. R. 690, lines 6-14. Appellant's roommate, TK, was moving out and had requested access to the apartment on that day to retrieve some furniture. Appellant wanted to be present while TK gathered his belongings, and asked his boss for permission to go home during the work day. R. 690, line 21 – R. 691, line 21. Appellant remembered TK picking him up from work shortly before 12:00 p.m. for the two to go to the apartment together. R. 692, lines 3-27. While at the apartment, the two moved some of TK's belongings. R. 696, lines 12-25.

During this time, Appellant contacted Nazirah Gale to pick him up from the apartment and take him to work. R. 697, lines 1-25. Gale did as Appellant asked. R. 698, lines 5-13. Appellant estimated he returned to work around 12:45. R. 699, lines 3-

5. Although Appellant used the company's old machine for clocking in and out that day, he gave his time card to his boss when he returned from meeting with TK because he was a few minutes late. R. 694, lines 5-23; R. 699, lines 6-13.

Nazirah "NaNa" Gale told the jury that she picked Appellant up from work on June 27, 2012, between 12:00 and 12:20. R. 580, lines 7-19; R. 582, lines 6-9; R. 583, lines 21-24. She took Appellant to his apartment. R. 581, lines 15-16. After dropping off Appellant, she went to a gas station to "grab something to drink and something to snack on." R. 581, lines 18-20. When she returned, Appellant's friend and roommate, TK, was there. R. 581, line 21. TK "was packing his stuff up" and putting it in his mother's car. R. 581, lines 23-25. Appellant got into the car with Gale and the two returned to Appellant's worksite between 1:00 and 1:30 p.m. R. 581, line 25 – R. 582, line 5; R. 583, lines 6-15. She estimated the two were gone for approximately thirty to forty-five minutes. R. 593, lines 22-23; R. 595, lines 15-16; R. 597, lines 4-6.

Appellant's co-worker, Adrian Deberry, recalled Appellant leaving work around lunchtime to deal with TK moving out of the house. R. 650, lines 18-22; R. 651, lines 12-14; R. 653, lines 1-3; R. 655, lines 4-14. According to Deberry, a young woman called "Little Mama" picked Appellant up from work during lunch. R. 668, lines 13-19. He was unaware of her real name. R. 668, lines 20-24. During cross-examination of Deberry, the solicitor asked if TK were present in the courtroom, and Deberry noted he was not there. R. 662, line 24 – R. 663, line 1.

After Deberry testified, defense counsel noted that the solicitor had asked about TK's presence in the courtroom during the cross-examination of two witnesses.[1] R. 676, lines 14-17. Defense counsel objected to this questioning as "burden shifting." R. 676, lines 19-20. Further, defense counsel moved to bar the state from arguing this point to the jury during closing. As explained by defense counsel, the state was asking the jury to draw an adverse inference from the defense's failure to call TK as a witness. R. 676, line 20 – R. 677, line 4. The solicitor responded "there is case law on point," which she stated she would retrieve later. R. 677, lines 6-7. She argued that once the defendant put up a case, she could "question it the same way - - anything." R. 677, lines 8-10. According to her, she could comment in closing "if the witness is available." R. 677, lines 12-14. The judge agreed the burden could not be shifted, but he thought the solicitor could "ask that question as far as TK [being] present." R. 677, lines 15-21. Thereafter, defense counsel referred the judge to a recent decision of the Supreme Court concerning the issue in a sexually violent predator trial. R. 677, lines 22-25.

Another of Appellant's co-workers, Hakeem Coffeil, recalled Appellant asking for a longer lunch break toward the end of June 2012. R. 793, lines 19-22; R. 794, lines 17-20; R. 795, lines 13-16. He remembered Appellant made the request to deal with his roommate, TK, moving out. R. 795, line 19 – R. 796, line 6. He remembered Appellant returning to work between 1 and 1:30. R. 798, lines 17-25. According to Coffeil, a female picked Appellant up from work. R. 802, lines 5-17.

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[1] The solicitor also asked Appellant's fiancée, Diana Addison, if Appellant were present in court that day. R. 646, lines 11-14.

Finally, Appellant's boss, Aaron Griffin, also recalled Appellant taking an extended lunch on June 27, 2012, to handle his roommate moving out. R. 817, lines 19-20; R. 818, lines 11-16; R. 819, lines 12-14; R. 822, lines 17-18; R. 825, lines 23-24; R. 826, lines 5-14. He remembered Appellant left around 11:30 a.m. and was gone for approximately thirty-five or forty-five minutes. R. 826, lines 7-21; R. 834, lines 19-24. According to Griffin, a female picked Appellant up from work. R. 837, lines 13-21. Griffin also presented Appellant's time card showing the hours he worked that day. R. 827, line 18 – R. 828, line 22; R. 1021. The time card showed three entries on Wednesday: 8:07, 11:12, and 4:32. R. 1021. Griffin explained this often happened when someone forgot to clock in or out for lunch. R. 830, lines 4-10. He would indicate the number of hours worked in handwritten form and sign the time card. R. 830, lines 10-14.

After both sides had rested, the solicitor told the court she had "look[ed] at the case that we referred to the other day about the missing witness rule." R. 912, lines 22-24. She claimed "it was a 2014 case that refer[ed] to State v. Charping." R. 912, lines 24-25. The solicitor told the judge the case held "that with fact witnesses that still can be appropriate." R. 912, line 25 – R. 913, line 2. However, the solicitor told the judge "that out of an abundance of caution," the state would "not be mentioning anything in closing about that." R. 913, lines 2-4. She did "think [the case] did support the questions that were asked during cross-examination," however. R. 913, lines 4-6. Despite the solicitor's assurance that nothing would be mentioned in closing about TK's absence, the solicitor wasted little time in pointing out the defense's failure to present TK as a witness to the jury.

During her closing argument, the solicitor told the jury Appellant had presented "the spaghetti defense, where you throw everything against the wall and see what sticks." R. 956, lines 23-25. The solicitor then commented on Appellant's alibi defense characterizing it as "multiple alibi witnesses who say multiple things." R. 957, line 24 – R. 958, line 1. She further juxtaposed the defense against what she termed "relevant, credible evidence in the case." R. 957, line 24 – R. 958, line 2. The solicitor described the trial as getting "really interesting" when the defense presented "alibi witnesses." R. 966, lines 16-18. Further disparaging the defense, the solicitor told the jury she was using the term alibi "very loosely" "[b]ecause the alibi witnesses are supposed to say where you were when the crime happened. And it would be helpful if the alibi witnesses all said that you were with the same person at the same time." R. 966, lines 18-23.

The solicitor falsely claimed there were "at least two different alibis." R. 966, lines 24-25. Thereafter, the solicitor commented on the absence of TK from the trial. Specifically, the solicitor said, "He was either with TK - - who still hasn't made it - - or he was with NaNa Gale." R. 966, line 24 – R. 967, line 1. Thereafter, the solicitor argued Appellant contradicted his own alibi witnesses because Appellant told the jurors that TK picked him up from work whereas other witnesses said Gale picked Appellant up from work. R. 967, lines 2-7; R. 970, lines 5-6. Thereafter, the solicitor claimed that Appellant testified he was "back to work no later than 1:00 o'clock," but Appellant "also said that while he was still at home with TK, that is when he called NaNa and told her to come get him." R. 970, lines 6-10. However, according to the solicitor, "[t]hat call didn't happen until 1:38." R. 970, lines 10-11. Therefore, the solicitor characterized Appellant's defense as inconsistent. R. 970, line 11.

Discussion

It is elementary that the state must prove each element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970); see also Sandstrom v. Montana, 442 U.S. 510, 522 (1979); Estelle v. McGuire, 502 U.S. 62, 72 (1991). However, by permitting the solicitor to question the witnesses regarding the absence of an alibi witness from the trial and to argue to the jury concerning the witness's absence where the solicitor failed to show the witness was available or under Appellant's control, the trial judge diluted the state's burden of proof and impermissibly shifted the burden of proof to Appellant in violation of Appellant's right to due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

Missing Person Rule

Recently, the South Carolina Supreme Court provided a historical overview of the "missing witness rule." In re Gonzalez, 409 S.C. 621, 629, 763 S.E.2d 210, 214 (2014). According to the Supreme Court,

> [I]t has long been the general rule in South Carolina that if a party fails, without satisfactory explanation, to produce the testimony of an available witness on a material issue in the case and the evidence is within his knowledge, is within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness.

Id.; see also State v. Bamberg, 270 S.C. 77, 81, 240 S.E.2d 639, 640 (1977)(finding no error in the trial judge's decision to permit the solicitor to comment in argument on the fact the defendants did not present "many" witnesses to support their alibi); State v. Shackelford, 228 S.C. 9, 11, 88 S.E.2d 778, 779(1955)(finding prosecutor's closing argument

commenting on the defendant's failure to call an alibi witness was not improper because the evidence indicated the witness was "seemingly accessible to the accused, or under his control, who are or should be cognizant of material and relevant facts and competent to testify thereto, and whose testimony would presumably aid him or substantiate his story if it were true"); contra State v. Posey, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1977)(holding the rule which permits an adverse inference comment upon the failure of a party to produce a witness exclusively in his control does not apply to a criminal defendant who introduces no evidence at all). The "missing person rule" is based upon the idea "that a party's failure to rebut evidence that the party naturally would be able to refute, through testimony or physical evidence, may warrant an inference that such evidence either does not exist or would be unfavorable." Gonzalez, 409 S.C. at 630, 763 S.E.2d at 214 (internal citation omitted).

Foundational Requirements

Despite what appears to be a fairly straightforward rule, over the ensuing years, the Court has emphasized the necessary foundational requirements to be met in order for a party to invoke the "missing witness rule" and several exceptions to the application of the rule. In State v. Charping, 333 S.C. 124, 128, 508 S.E.2d 851, 853 (1998), the South Carolina Supreme Court reiterated the long-standing rule that "it is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness." (internal citation omitted). However, the Court explained Charping's counsel was not permitted to argue this point to the jury in closing regarding the state's failure to call Charping's alleged co-conspirator because "a party is not to be prejudiced by his failure to call a witness who is equally available to the other party" and the witness was "clearly accessible to both the state

and the defense." Id. at 128, 508 S.E.2d at 853-854 (internal citation omitted). Additionally, the Court explained "an adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses" and two other witnesses had testified to the material facts in Charping's trial. Id. at 129, 508 S.E.2d at 854.

Proof of the availability of the "missing" witness is of utmost importance. In State v. Simmons, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976), the Court held the trial judge erred in permitting an adverse inference comment during closing where the prosecutor failed to demonstrate the so-called missing witness was "available" or "accessible for compulsory service of process." According to the record, the witness was not present at the trial and it appeared the witness was out of state, and therefore, not subject to a subpoena. Id. In reversing the case, the Court instructed trial courts to exercise "[e]ven greater caution" "in permitting an adverse inference comment in criminal proceedings than in civil proceedings." Id.

Additionally, the Court has explained "a necessary predicate to allowing an adverse inference argument" is evidence the party tried to suppress or conceal the testimony of the witness. Gonzalez, 409 S.C. at 633, 763 S.E.2d at 216. Further, the Court stated the simple "failure to call a witness does not justify an arbitrary presumption of suppression of evidence." Id. at 634, 763 S.E.2d at 216 (internal citation omitted).

Exceptions

Recognizing the "risk of unfairness" that an adverse inference could impose based on a litigant not calling an expert witness, the Supreme Court held "a party's invocation of

the missing witness rule should be limited to *fact* witnesses, and it should not be applied to *opinion* witnesses, particularly psychiatric experts." Gonzalez, 409 S.C. at 635, 763 S.E.2d at 217 (emphasis in original); see also Way v. State, 410 S.C. 377, 383-384, 764 S.E.2d 701, 705 (2014). In the trial pursuant to the Sexually Violent Predator Act, the defendant had retained an independent expert, but had not called the expert to testify. Gonzalez, 409 S.C. at 627, 763 S.E.2d at 213. In closing argument, the state argued the jury could infer the absence of the expert indicated the expert's testimony would have been unfavorable to Gonzalez. Id.

Noting the complexities of a psychiatric evaluation, the Court held it was not proper to assume the doctor's diagnosis would have been one of two results. Id. The Court held it was "inherently difficult to assume that [an expert]'s opinion must have been one of only two options." Id. at 635, 763 S.E.2d at 217. Additionally, Gonzalez "had no obligation to produce medical evidence at trial, and the fact that he exercised his right to obtain an independent examination should not confer such an obligation upon him at trial." Id. at 634, 763 S.E.2d at 217. Applying the adverse inference to "these types of experts allows a jury to simply *speculate* as to what the expert might have said." Id. at 635, 763 S.E.2d at 217 (emphasis in original). In explaining that the missing witness rule was limited to *fact* witnesses, the Court reiterated that "the fact witness must be under the control of the party failing to call him" and "expressly defined" control to mean "the uncalled witness is an agent, employee, relation, or associate of the party failing to call him." Id.; see also, Davis v. Sparks, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959)(holding the drawing of an adverse inference for failure to call a witness over which the party lacks control is improper).

The Court explained the ability of the prosecutor to argue an adverse inference based upon a missing witness was not permissible in a case involving a criminal defendant who introduced no evidence at all. Posey, 269 S.C. at 503, 238 S.E.2d at 177. According to the Court, the "sound basis" for such a rule was that "an accused is presumed innocent until proven guilty and that the burden is upon the state to prove that the accused committed the crime charged." Id. Thus, "[a]n accused has the right to rely entirely upon this presumption of innocence and the weakness in the state's case against him." Id. If the solicitor could argue the adverse inference, and the jury could so infer, then the defendant "would clearly be deprived" of his right to the presumption of innocence. Id.

Jury Instruction

In State v. Hammond, 270 S.C. 347, 357, 242 S.E.2d 411, 416 (1978), the Supreme Court recognized charging the jury on an adverse presumption would "bring[] about more problems than solutions." Citing State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973), the Court renewed its "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness." Hammond, 270 S.C. at 356, 242 S.E.2d 415. A charge on this proposition to the jury was unwarranted "except under most unusual circumstances." Id. More recently, the Court held that "because a jury instruction carries with it the imprimatur of a judge learned in the law, and therefore, usually has more impact on a jury than the arguments of counsel," "the better practice is that use of the missing witness rule should be limited to counsel's argument, and the jury instruction on the matter should not be given." Gonzalez, 409 S.C. at 635, 763 S.E.2d at 217 (internal citation omitted).

Thus, the missing witness rule is *inapplicable* where (1) the witness was equally available to both parties, Charping, supra; (2) other witnesses have testified to the material facts to which the absent witness would have testified, Charping, supra; (3) the witness is an opinion witness, Gonzalez, supra; (4) the witness is not under the control of the party failing to call him, Gonzalez, supra; (5) the evidence does not indicate the witness was not called in an effort to suppress or conceal the testimony of the witness, Gonzalez, supra; and (6) the defendant in a criminal case presents no evidence, Posey, supra. Further, it is clear that South Carolina no longer permits a charge to the jury that adverse inference may be drawn from the failure of a party to call a witness. Gonzalez, supra.

Applying the rule, including its foundational requirements, to the instant matter reveals the trial judge's error. The record is clear the missing witness – TK – was not present in the courtroom during the trial. Thus, it appears the witness was unavailable to Appellant. In any event, the prosecutor did not show – and probably could not show – the witness was available to Appellant, and only to Appellant.

Additionally, other witnesses testified to the material facts to which TK would have testified. Not only did Appellant testify to the circumstances surrounding his encounter with TK on June 27, but Nazirah Gale testified to her observations of the encounter between TK and Appellant on that date. Thus, other witnesses testified to the material facts. On this point, the solicitor misconstrued Appellant's alibi defense. The solicitor claimed Appellant's alibi was that he was either with TK or with Gale at the time of the robbery; however, the record is clear that Appellant was at work at the time of the robbery. The witnesses all testified that Appellant had returned to work prior to 2 p.m. and did not leave work until 4 p.m. The solicitor intentionally misled the jurors to believe that TK was a

necessary alibi witness for Appellant, when TK was simply a witness who would have corroborated Appellant's testimony that prior to 2 p.m., he and Appellant were together at the apartment. If the robbery were to have occurred at 2 p.m. as alleged by the state and the Nathanis, then Appellant's alibi was his presence at work, not in the company of TK.

The prosecutor failed to show – and would have been unable to show – the witness was under the control of Appellant. The evidence in the record showed the two were friends and had been roommates. There was no evidence that TK was Appellant's "agent, employee, relation, or associate." Appellant simply exercised no control over TK. Perhaps most importantly was the lack of evidence that TK's failure to appear was the result of Appellant attempt to suppress or conceal his testimony. In fact, the record contained only evidence to the contrary. Appellant had gone to great lengths in an effort to find TK and subpoena him for trial as evidenced by his testimony, Addison's testimony, and the substance of the telephone conversations between Appellant and TK. Thus, the solicitor failed to satisfy the foundational requirements in order to argue for an adverse inference based on a missing witness.

Although the law is clear that South Carolina does not permit an adverse inference comment when the defendant presents *no* evidence, the law is less clear concerning an absolute bar to such a comment when the defendant presents evidence, particularly, evidence of an alibi. This Court should take this opportunity to clarify for the Bench and Bar that an adverse inference comment is impermissible in all criminal prosecutions. Without doubt, a criminal defendant bears no burden during trial. Further, "[a]n alibi places no burden on a criminal defendant but emphasizes that it is the state's burden to prove the defendant was present and participated in the crime." Roseboro v. State, 317 S.C. 292, 294,

454 S.E.2d 312, 313 (1995). An alibi is "merely a means of disproving the charge – not an affirmative defense, but a negation of the state's case." State v. Bealin, 201 S.C. 490, 507, 23 S.E.2d 746, 754 (1943)(internal citation omitted). The same reasoning for not allowing a jury charge on this issue applies. Charging a jury concerning an adverse inference from a missing witness, even a permissible inference, runs the significant risk of diluting the burden on the state and impermissibly shifting that burden to the defendant. Allowing the solicitor to argue an adverse inference in light of a missing witness poses the same risk. While the solicitor's argument does not carry with it the "imprimatur of a judge learned in the law," the solicitor's words to the jury carry the full force and weight of the sovereign.

By permitting the solicitor to question the witnesses regarding the absence of an alibi witness from the trial and to argue to the jury concerning the witness's absence, the trial judge diluted the state's burden of proof and impermissibly shifted the burden of proof to Appellant in violation of Appellant's right to due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of April, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY PORTERFIELD,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Markale Porterfield states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge R. Knox McMahon, which was held on February 23-27, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Anthony Markale Porterfield.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of April, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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R. Knox McMahon, Circuit Court Judge

THE STATE,

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ANTHONY PORTERFIELD,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire trial transcript dated Feb. 23-27, 2015 pages 1-1019;
(2) State's Exhibit #23 (jail calls);
(3) Defendant's #17 (DNA report);
(4) Defendant's #18 (time card);
(5) Court's #2 (jury note);
(6) Court's #3 (jury note);
(7) Motion for New Trial;
(8) Entire sentencing transcript dated March 6, 2015 pages 1-43;
(9) True–billed indictments (2012-GS-40-5294; -5295; -5296; & -5297);
(10) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

April 13th, 2016

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

April 13, 2016

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Anthony Markale Porterfield, #310529, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of April, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of April, 2016.

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