

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Lexington County

Honorable Thomas A. Russo, Circuit Court Judge  
\_\_\_\_\_

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FEB 01 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRIAN JACOB TERRELL,

APPELLANT

APPELLATE CASE NO 2015-001020  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

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**STATEMENT OF ISSUE ON APPEAL**

Whether the judge erred by revoking appellant's probation in full without a finding that the monetary violation was willful since defense counsel told the judge appellant's inability to pay was caused by circumstances beyond his control?

## STATEMENT OF THE CASE

Appellant had been incarcerated for forty-two months, and he had been released from prison when he was indicted at the March 2015 term of the Lexington County Grand Jury for the offense of indecent exposure. R. 31-32. He appeared on April 15, 2015 before the Honorable Thomas A. Russo. Tommy Shealy represented appellant and Suzanne Mayes was the assistant solicitor. Tr. 1. Appellant pled guilty to the indecent exposure indictment, and he simultaneously had a probation revocation hearing. Tr. 4, l. 1 – 17, l. 23.

Judge Russo revoked appellant's probation in full, and imposed the maximum three year prison sentence on the indecent exposure charge,, consecutive to the probation revocation. Tr. 29, ll. 2-10.

This appeal follows.

## ARGUMENT

The judge erred by revoking appellant's probation in full without a finding that the monetary violation was willful since defense counsel told the judge appellant's inability to pay was caused by circumstances beyond his control.

### **Relevant Facts**

Defense counsel Shealy told the judge that appellant's inability to pay monetary portions of his probation were "not willful." Tr. 20, ll. 4-6. Counsel explained that appellant had two other children, and that he got behind on child support. Appellant's paychecks were being garnished. He simply did not have the financial ability to pay the monetary portions of his probation. Defense counsel said since the monetary violations were not willful, and appellant should not be violated on this basis. Tr. 20, ll. 4- 14.

However, the judge revoked appellant in full with no consideration, even a mention, of the fact that the monetary obligations of probation could not be fulfilled because of circumstances beyond appellant's control. Tr. 29, ll. 2-10.

### **Discussion**


In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (2007), our Supreme Court held the state presented insufficient evidence that the defendant's failure to pay his restitution was willful. Consequently, the Court found his probation was revoked erroneously, and it vacated the order that revoked his probation.

The Court reiterated that probation could not be revoked solely for the failure to make payments unless the circuit court judge first found that the probationer was not making a *bona fide* effort to pay. Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986). Bearden v. Georgia, 461 U.S. 660 (1983).

A willful failure to pay means a voluntary, conscious and intentional failure to pay. State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006). Since the judge did not find that appellant's failure to pay the monetary portions of his probation was a voluntary, conscious and intentional failure to pay, the revocation of his probation should be vacated since it was caused by circumstances beyond appellant's control.

**CONCLUSION**

By reason of the foregoing argument, the revocation of appellant's probation should be vacated.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2017.

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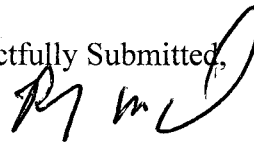
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brian Jacob Terrell states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of probation revocation hearing before Judge Thomas A. Russo, which was held on April 15, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, He asks the Court to relieve him as counsel for Brian Jacob Terrell.

Respectfully Submitted,



Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR APPELLANT

This 1st day of February, 2017.

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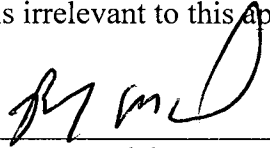
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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

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

- (1) True-billed indictment:
- (2) Probation revocation hearing.

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

February 1, 2017

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

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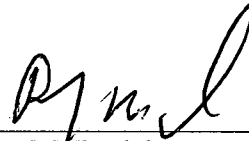
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**SC Court of Appeals**

**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."

February 1, 2017.



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Chief Appellate Defender

South Carolina Commission on Indigent  
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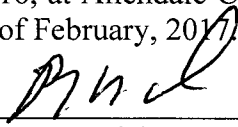
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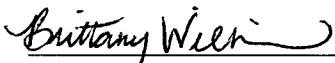
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Brian Jacob Terrell, #326516, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 1st day of February, 2017.

  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 1st day of February, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: November 3, 2026.