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STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions
Maite Murphy, Circuit Court Judge

Appellate Case No. 2015-000433

THE STATE,

Respondent,

v.

RODRIQUEZ J. WOLFE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion for directed verdict and his motion for a new trial because the State presented sufficient evidence of constructive possession where he was the driver and sole occupant of a car containing crack cocaine.

STATEMENT OF THE CASE

An Orangeburg County Grand Jury indicted Appellant for failure to stop for a blue light and possession with intent to distribute (PWID) crack cocaine. (R.132–35.) On January 26–28, 2015, Appellant proceeded to a jury trial before the Honorable Maite Murphy. Joshua Koger, Esquire, represented Appellant, and Assistant Solicitor Josh Edwards represented the State. The jury found Appellant guilty of failure to stop for a blue light and not guilty of PWID crack cocaine. The jury instead found him guilty of the lesser-included offense of simple possession of crack cocaine. Judge Murphy sentenced him to three years' imprisonment for failure to stop for a blue light and to ten years' imprisonment for possession, to be served concurrently. (R. 128–29, 131).

Appellant filed a timely notice of intent to appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Trooper Willie McCauley testified that on April 29, 2014, around 2:00 a.m., he and Trooper Stephen Williams were performing a license checkpoint in Orangeburg County. (R.p. 7, 9). He testified that officers typically stand in the road with signs at the checkpoint and place signs 100 yards before the checkpoint to warn drivers. (R.p. 9). Trooper McCauley saw headlights approaching the license checkpoint when suddenly the vehicle stopped in the road and began to back up. (R.p. 12). He jumped in his patrol car, activated his lights, and approached the vehicle. (R.p. 12). Appellant reacted with a "bootleg" or "fishtail," a way of turning the vehicle around quickly. (R.p. 12). Trooper McCauley advised the trial court he knew from experience that drivers who turn around at checkpoints are usually running from them and turn around for "a certain reason." (R.p. 13).

Trooper McCauley began chasing Appellant once Appellant turned the vehicle around. (R.p. 13). Appellant refused to stop the vehicle even though Trooper McCauley's lights and siren were activated. (R.p. 14). Trooper McCauley testified that Appellant dangerously sped at about seventy-five miles per hour through curvy, local roads. (R.p. 14). For his own safety, Trooper McCauley remained forty feet behind the vehicle as Appellant drove up the center, on and off the road, and even into the opposite lane of travel at times during the chase. (R.p. 13–15). Appellant sped around a sharp curve, over-corrected the vehicle, and wrecked. (R.p. 15). The vehicle turned over onto its roof. (R.p. 15).

Trooper McCauley testified he immediately approached the vehicle with his gun drawn for safety, as Appellant crawled out the driver's side window. (R.p. 15). Trooper McCauley ordered Appellant to show his hands, handcuffed him, and then checked for other passengers. (R.p. 15). Trooper McCauley was 100% sure Appellant was the only person in the car. (R.p.

16). He placed Appellant under arrest and read him his *Miranda* rights. (R.p. 16). Additionally, he conducted a field sobriety test and determined Appellant was not intoxicated. (R.p. 18).

Soon after, Trooper Williams and Corporal Burris arrived on the scene to assist. (R.p. 18–19). Because Appellant was the sole occupant of the vehicle, the vehicle was towed. (R.p. 20). However, before towing the officers conducted an inventory of the vehicle, which involved documenting all personal items in the vehicle. (R.p. 20). While conducting the inventory, officers discovered what appeared to be a small bag of crack cocaine inside the car on the overturned roof on the driver's side of the vehicle. (R.p. 20–21). The substance was in plain view in a single clear plastic bag. (R.p. 23). Officers also found a small sum of cash. (R.p. 21). Trooper McCauley testified he secured the substance in a SLED evidence "BEST kit" once he returned to the patrol office. (R.p. 22). Trooper McCauley testified he did not submit a request to have the plastic bag containing the substance dusted for prints. (R.p. 41).

Larry Zivkovich was a forensic scientist with SLED at the time of trial and testified as an expert witness. (R.p. 60). Zivkovich informed the trial court that his testing determined the substance the officers discovered in the vehicle was indeed cocaine based. (R.p. 67). The crack cocaine had a net weight of 3.53 grams. (R.p. 69).

Trooper McCauley testified Appellant first claimed his aunt was the owner of the vehicle and he was permitted to drive it. (R.p. 28). On cross-examination, Trooper McCauley admitted he did not mention Appellant's claim that the vehicle belonged to his aunt in his report. (R.p. 33). However, the fact that the car was registered to Brenda Anderson was indicated on the report, just not the fact that Anderson is Appellant's aunt. (R.p. 33). Trooper McCauley also admitted he did not have knowledge of where the crack cocaine was located in the vehicle before

it flipped on its roof. (Rp. 38). During Trooper McCauley's testimony, the State played a DVD of the traffic stop and Appellant's arrest, stopping the video before the portion only showing Appellant's transport to the jail. (R.p. 29, line 3–R. 30, line 12). In the video, Trooper McCauley is heard saying he can smell marijuana on Appellant. (State's Exhibit 2, DVD, at approximately 5:30). He then asks Appellant where the marijuana is, again saying he can smell it on him. (State's Exhibit 2, DVD, at approximately 6:10). When the trooper asks who the owner of the car is, Appellant can be heard possibly saying something about a girlfriend and someone named Brenda. (State's Exhibit 2, DVD, at approximately 25:00).

Trooper Williams testified that he saw Appellant back up once he noticed the license checkpoint. (R.p. 51). He arrived on the scene shortly after Trooper McCauley because he was initially occupied with another driver. (R.p. 50–51). Appellant was already handcuffed when Trooper Williams arrived. (R.p. 52). Trooper Williams confirmed that Trooper McCauley was the one who discovered the crack cocaine. (R.p. 55).

Lieutenant Marty Journey, who worked with the Orangeburg County Sheriff's Office narcotics division, testified as an expert witness in illegal narcotics transactions. (R.p. 72, 78). Lieutenant Journey informed the trial court that if he were to find three and a half grams of crack cocaine on someone—the amount discovered in the vehicle Appellant was driving—he would charge possession with intent to distribute. (R.p. 79). Additionally, he testified the amount of crack cocaine discovered was worth approximately $350. (R.p. 77).

After the State rested, Appellant moved for a directed verdict. (R.p. 84). The trial judge denied the motion, finding the State presented enough direct and circumstantial evidence for the jury to weigh the evidence and resolve the case. The trial judge granted Appellant's request to charge the lesser-included offense of simple possession of crack cocaine.

(R.p. 87). The jury found Appellant guilty of failure to stop for a blue light and possession of crack cocaine, and the trial judge sentenced him to three and ten years' imprisonment to be served concurrently. (R.p. 128, p. 131). Appellant was found not guilty of PWID crack cocaine. (R.p. 128).

ARGUMENT

The trial court properly denied Appellant's motion for directed verdict and his motion for a new trial because the State presented sufficient evidence of constructive possession where he was the driver and sole occupant of a car containing crack cocaine.

Appellant argues the trial court erred by failing to direct a verdict for PWID crack cocaine and later erred in denying his motion for a new trial after the jury found him guilty of the lesser-included offense of simple possession of crack cocaine. Specifically, he argues that although he was the driver of a vehicle that contained crack cocaine, the State failed to present sufficient evidence that he had actual or constructive possession of the drugs. This argument fails precisely because Appellant was the driver and sole occupant of the car that held the crack cocaine. *State v. Lane*, 271 S.C. 68, 245 S.E.2d 114 (1978) ("Constructive possession, or control, occurs when the accused has 'dominion and control over either the drugs or the premises upon which the drugs were found.'"). Whether he had constructive possession of the crack cocaine was a question for the jury, and the trial judge properly denied his directed verdict motion and submitted the case to the jury to resolve. Furthermore, because he did not specifically argue the State had not proved constructive possession of the crack cocaine, it is questionable whether this issue is even preserved for review by this Court. In his directed verdict motion, Appellant simply argued "[t]he State has not submitted enough evidence at this point to warrant jury consideration on the failure to stop for blue light and possession with intent to distribute crack cocaine." (R. 84, lines 20–25). *See State v. Kennerly,* 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd on other grounds,* 337 S.C. 617, 524 S.E.2d 837 (1999) ("[I]ssues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review."). This Court should affirm.

It is axiomatic that in ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.* "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." *Id.* at 292–93, 625 S.E.2d at 648. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *See State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 807 (2016).

As explained in *Pearson*, the United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Pearson, 415 S.C. at 471 n.2, 783 S.E.2d at 806 n.2 (quoting *Jackson*, 443 U.S. at 319); *see also State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

Our Supreme Court articulated the following concerning the standard of review in a directed verdict case:

> The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (quoting *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)). This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in Jackson*, 443 U.S. at 317 n.9.

Constructive possession is proven by showing that the accused has dominion and control, **or the right to exercise dominion and control**, over the contraband. *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981). Constructive possession may be established by

circumstantial as well as direct evidence and possession may be shared. *Id.* at 775. Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband. *State v. Mollison*, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995).

In *Hudson*, the Supreme Court held that where the contraband is found on premises under the control of the accused, that fact alone gave rise to an inference of knowledge and possession sufficient to take the case to the jury. *Hudson*, 277 S.C. at 202, 284 S.E.2d at 774–75. In *Hudson*, the appellant and his wife were both convicted of possession of heroin that was found in their home. At the time law enforcement executed a search, Hudson's wife was home but he was away from the house. Before entering, law enforcement heard individuals scurrying around inside the house. The officer found Hudson's wife standing by the bathroom door and found three bags of white powder inside the toilet. His wife was arrested. Meanwhile, Hudson's daughter, who was also in the house, called Hudson's phone in his van to tell him what happened. Hudson did not go home or to the police station to see his wife. He was arrested three hours later on the interstate near the exit to the airport. When stopped by police, he told them he was "just driving around." *Hudson*, 277 S.C. at 202, 284 S.E.2d at 774.

The Supreme Court affirmed the denial of directed verdict, explaining, "where appellants shared control of the premises, we hold there was sufficient evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt appellant Robert Hudson constructively possessed heroin with intent to distribute." *Id.* at 203, 284 S.E.2d at 775.

In *State v. Williams*, 346 S.C. 424, 552 S.E.2d 54 (Ct. App. 2001), relying on *Hudson*, this Court found that constructive possession was a jury question when evidence showed that marijuana was found in Williams' locker, where he was an inmate at Ridgeland Correctional

Institution. The evidence in *Williams* was further supported by suspicious behavior: Williams ran to the bathroom and spit something in the sink before he could be searched. *Id.* at 430–31, 552 S.E.2d at 57–58.

In *Mollison*, evidence was found to support constructive possession for both defendants where contraband was found in a hotel room. Mollison and co-defendant Smith had stayed in the same room on prior occasions, the hotel room was under Smith's name, they arrived in the same car; they gave false addresses to the police; $360 in cash was found in the room; and a pistol was found in Smith's car. *Mollison*, 319 S.C. at 46, 459 S.E.2d at 91–92.

In the instant case, the mere fact that Appellant was the driver and sole occupant of the car is dispositive, as he controlled the car that can be fairly termed "the premises." *Hudson, supra*; *Williams*, *supra*; *Lane*, *supra*. However, this fact is augmented by other evidence implicating Appellant's involvement. Appellant turned his car around at the checkpoint and drove off at a high rate of speed when officers attempted to stop him. This implicates Appellant's knowledge that he had a reason for turning around and evading police—namely the crack cocaine. The evidence establishes constructive possession of the crack cocaine. Accordingly, the trial court did not err in denying the motion for directed verdict.

> Conviction of possession of [illegal drugs] requires proof of possession-either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.

Hudson, 277 S.C. at 202, 284 S.E.2d at 774–75.

"Possession requires more than mere presence." *State v. Stanley*, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005). "In drug cases, the element of knowledge is seldom

established through direct evidence, but may be proven circumstantially." *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." *Id.* In South Carolina, flight from prosecution constitutes evidence of guilt. *State v. Crawford*, 362 S.C. 627, 635–36, 608 S.E.2d 886, 890–91 (Ct. App. 2005).

Appellant seeks to rely heavily on *State v. Heath*, 370 S.C. 326, 635 S.E.2d 18 (2006), but fails to notice how *Heath* and the instant case are distinguishable. In *Heath*, officers obtained a search warrant for the residence where Heath lived with his mother and a young child. When the officers arrived to execute the search warrant, Heath and his brother were outside the front of the home washing a vehicle. Immediately after noticing the officers, Heath's brother ran inside the residence and locked himself in the bathroom. Heath remained outside beside the vehicle. During the search, officers discovered crack cocaine, $2,500 in cash, and various forms of drug paraphernalia. Heath was convicted of trafficking cocaine and sentenced to twenty-five years' imprisonment. He appealed his conviction, arguing the judge should have granted a directed verdict because of the State's failure to prove he was knowingly in constructive possession of the crack cocaine.

The Supreme Court agreed with the appellant and reversed the ruling. On appeal, the Court found no direct or circumstantial evidence linked the appellant to the crack cocaine found. *Id.* at 330, 635 S.E.2d at 19. In order for the State to prove constructive possession, it needed to have shown that the appellant exercised dominion or control or the right to exercise dominion or control over the crack cocaine; the State failed to do so. The Court specifically stated,

> We hold that the State failed to present evidence that Appellant could exercise dominion and control over the area where the crack

> was found. Appellant lived in the home where the crack was found. However, the home is owned by Appellant's mother. As a result, it is arguable that Appellant merely had a right to access the area where the crack was found, not actual dominion and control of the property.

Id.

Heath is distinguishable from the instant case for several reasons. First, Heath was present with his brother when the officers arrived while here, Appellant was the only individual present when officers discovered the crack cocaine. Next, in *Heath*, he did not raise the officers' suspicions by running from them or trying to escape. Here, Appellant was located where the crack cocaine was located while Heath was not in the place searched when officers arrived. Additionally, Appellant avoided a license checkpoint by reversing in the road and then recklessly speeding through the roads of Orangeburg County in an attempt to evade officers.

Another case warranting the grant of a directed verdict is *State v. Jackson*, 395 S.C. 250, 717 S.E.2d 609 (Ct. App. 2011). In *Jackson*, the defendant was a passenger in a car with an associate he had only met on one prior occasion. While in the vehicle, they were stopped by an officer for impeding the flow of traffic. The officer testified that once he approached the vehicle he smelled marijuana. Subsequently, the officer searched the vehicle and his K-9 discovered clear plastic bags of marijuana under the center console. The defendant was charged with possession with intent to distribute marijuana. At trial, the defendant moved for a directed verdict, arguing the State failed to meet its burden in proving he had constructive possession of the marijuana. The motion was denied. The defendant appealed and the Court of Appeals reversed.

In its analysis, this Court stated that the marijuana was not under the dominion or control of the appellant because he did not own the car, did not rent the car, and was not driving the car when the marijuana was discovered; instead the car was provided and driven by appellant's

associate. *Jackson*, 395 S.C. at 258, 717 S.E.2d at 613. This Court noted that the appellant also only met the associate he was riding with once. Furthermore, this Court stated its decision to reverse was influenced by the fact that the marijuana was out of sight and the appellant did not make any nervous or suspicious movements when the two were pulled over by the officer. *Id.* This Court ruled the trial court erred in denying his motion for directed verdict.

The facts of *Jackson* are easily distinguishable from the instant case. In *Jackson*, the appellant was not alone and was riding with an associate who not only rented or owned the car but was also the driver. Here, however, Appellant was the driver with no passengers present. Even though he was not the owner of the vehicle, he admitted he was permitted to use it. As this Court noted in *Jackson*, the fact that he "did not own or rent the car" worked in Jackson's favor, implying that renting a car would weigh more toward proving constructive possession. However, this case seems to make it clear that one need not be the actual owner of a car in order to have dominion and control, or the right to exercise dominion and control, over the drugs. Additionally, Appellant not only acted suspicious but refused to stop for officers and caused a dangerous chase through Orangeburg County, while the appellant in *Jackson* did not lead officers on a chase. Moreover, this Court acknowledged the marijuana was out of sight when discovered in *Jackson*, while in the instant case the drugs were found in plain view. While there is no way to tell where the drugs were before the vehicle flipped, the fact that drugs were in the car and Appellant was the driver and sole occupant is sufficient to submit the case to the jury. Where the drugs might have been before the car flipped was an interesting argument Appellant had the opportunity to, and did, make to the jury in his closing argument. (R. 94, line 14–R. 95, line 19). However, when looking at the evidence in the light most favorable to the State, as this

Court must, the drugs were found in plain view and nothing indicates they were hidden prior to the crash.

"The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987). "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." *State v. Muhammed*, 338 S.C. 22, 26-27, 524 S.E.2d 637, 639 (Ct. App. 1999) (citing *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775).

Here, the drugs were found in the vehicle Appellant was driving. Moreover, Appellant' s conduct of turning around at the checkpoint and driving away from the officers may be considered by the jury to create an inference that he knew of the existence of the drugs. *See Mollison*, 319 S.C. at 45, 459 S.E.2d at 91. And because an appellate court views the evidence and all reasonable inferences in the light most favorable to the State when reviewing a directed verdict, this evidence was sufficient to submit the case to the jury. *See State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Accordingly, the trial court correctly denied the directed verdict motion.

Additionally, the trial court correctly denied Appellant's motion for a new trial in response to the jury's finding him guilty of the lesser-included offense of simple possession of crack cocaine. Appellant argues that "[i]nstead of focusing critical attention on whether the state had proved Appellant was knowingly in actual or constructive possession of the crack, the jury likely merely compromised and found Appellant guilty of the lesser offense." (App.Br.8). He cites *State v. Blassingame*, 271 S.C. 44, 244 S.E.2d 528 (1978), for this theory. However, that

case is about the trial judge giving an incorrect definition of manslaughter to the jury and has no bearing on this case. Here, the trial court gave an extensive definition of the PWID crack cocaine charge in his jury instructions, which included what the State needed to prove to show possession, consisting of the definitions of actual and constructive possession. (R. 110, lines 4–24). The trial court then explained to the jury, "If you find that the State has failed to prove beyond a reasonable doubt that the Defendant is guilty of possession with intent to distribute crack cocaine, you may consider whether the State has proved beyond a reasonable doubt that the Defendant is guilty of simple possession of crack cocaine. Simple possession does not require an intent to distribute the crack cocaine." (R. 111, line 22–R. 112, line 3). Based on the trial court's instructions to the jury making clear that the only requirement from the definition of PWID that was not necessary for a verdict of simple possession was the intent to distribute element, the jury had to have focused on whether the State proved Appellant was knowingly in actual or constructive possession to have arrived at a guilty verdict for simple possession. The verdict was not a compromise. "[J]urors are presumed to follow the law as instructed to them." *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999); *Foye v. State*, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999).

Instead, ample evidence supports the verdict: (1) Appellant was the sole occupant of the vehicle, (2) he made a risky flight attempt to avoid a checkpoint and no other reasonable explanation for reckless behavior of this extreme proportion exists in the record, and (3) in addition to the crack cocaine, law enforcement found a substantial amount of cash in the vehicle.

Accordingly, the trial court correctly denied both his motion for a directed verdict and his subsequent new trial motion, and this Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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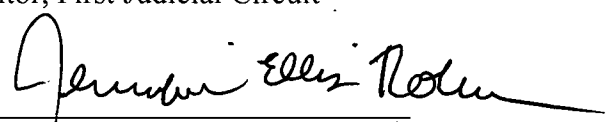
BY: 
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November 7, 2016

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APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions
Maite Murphy, Circuit Court Judge

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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November 7, 2016