

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JERMAINE WELLS,

APPELLANT

APPELLATE CASE NO 2016-000950

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding that Appellant's cross examination of an investigator opened the door to allow testimony from the investigator that another jury found a non-testifying codefendant guilty of the murder for which Appellant stood trial?

STATEMENT OF THE CASE

On April 10, 2015, the Laurens County Grand Jury indicted Appellant Wells for armed robbery, criminal conspiracy and possession of a weapon during the commission of a violent crime, indictments #2015-GS-30-503, 504, 505. On July 24, 2015, the Laurens County Grand Jury indicted Appellant for murder, indictment #2015-GS-30-1162. On April 25, 2016, Appellant proceeded to jury trial on all indictments before the Honorable Frank R. Addy, Jr. Rodney Richey represented Appellant at trial. Warren Mowry and Ruston Neely prosecuted the case. The jury found Appellant not guilty of murder but guilty of armed robbery, conspiracy and the weapon charge. Judge Addy sentenced Appellant to life in prison without the possibility of parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was served on May 2, 2016. This appeal follows.

ARGUMENT

The trial judge erred in finding that Appellant's cross examination of an investigator opened the door to allow testimony from the investigator that another jury found a non-testifying codefendant guilty of the murder for which Appellant stood trial.

On October 31, 2013, officers with the Laurens County Sheriff's Department answered a 911 call in reference to shots fired on River Hill Road in Enoree. When the officers arrived at the scene they found David Lee Walker outside of the trailer and Johnny Lee Cheeks inside of his trailer. Both men had been shot. (R. pp. 160-166). Investigator Marty Crain testified that Cheeks told him that Walker shot him. (R. p. 174, lines 7-16). According to Investigator Bryant Cheek, Walker stated that he had been attacked by two guys he did not know. (R. p. 276, lines 5-20). Cheeks later died as a result of blood loss from a gunshot wound to the abdomen. (R. p. 263, lines 2-4). Walker survived.

Kelly Ball testified that sometime between 10:30 PM and 11:00 PM on the night of October 31, 2013, she was with Cheeks inside of his trailer when someone knocked on the door. (R. pp. 118-119). Ball testified that Cheeks sold drugs and liquor from his trailer. (R. p. 114, lines 1-11). Cheeks answered the door and went outside when Ball heard a verbal altercation and then gunshots. (R. p. 119, line 9 – p. 120, 121, lines 1-6). Ball called 911 and then went outside to check on Cheeks. (R. p. 122, lines 6-10). Ball found Cheeks lying on the ground and noticed another person on the ground by Cheeks' Suburban SUV. (R. p. 123, lines 22-25). At trial she identified that person as Walker. (R. p. 124, lines 1-9). Ball claimed to have seen another individual standing in the driveway that night. (R. p. 124, lines 12 – 25). She told police that the person in the driveway resembled Ty, a large, dark skinned black male. (R. p. 292, lines 7-11). Ball, however, identified the individual as Appellant. (R. p. 125, lines 13-21).

Investigator Cheek admitted that Appellant was not dark skinned. (R. p. 292, line 20- p. 293, lines 1-5). Appellant's complexion on the Department of Corrections website is noted as medium brown.

Ball claimed that when she pulled Cheeks inside the trailer after the shooting that he handed her his gun from his holster and she put the gun under the mattress. (R. p. 132, lines 19 – p. 133, lines 1-3; p. 140, line 5 – p. 141, lines 1-16). The gun found inside the trailer under the mattress was a revolver with two live rounds and two spent rounds. (R. p. 199, lines 1-24). A Lorcin 380 semi-automatic handgun was found outside in the yard. (R. p. 196, lines 3 – p. 197, lines 1-4). Officers additionally found three 380 shell casing in the yard and a slug inside the trailer. (R. p. 197, lines 6-25). The firearms examiner from the South Carolina Law Enforcement Division [SLED] testified that the casings came from the same gun but he could not conclusively say that the casings were fired by the 380 found in the yard. (R. p. 250, lines 9 – p. 251, lines 1-10). The examiner was, however, able to testify that the slug found inside the trailer was fired by the 380 found in the yard.

Ball testified that the individual she saw in the driveway turned, ran up the hill and got into the back passenger seat of a brown older model box style car and left. (R. p. 125, line 23 – p. 126, 127, lines 1-25). Despite Balls' description of the car as brown, Officer Ashley with the Laurens City Police Department claimed that he received information that an older model dark blue car had been involved in a shooting. (R. p. 205, lines 7-14). Based on the blue car description, Officer Ashley followed a blue car and eventually found it parked at Appellant's girlfriend's house. (R. p. 210, line 2 – p. 211, lines 1-6). Appellant consented to a search of his vehicle and nothing of evidentiary value was found. (R. p. 211, lines 11-21).

Toris Moore testified that she saw her uncle, co-defendant David Walker, Appellant and Johnny Lee Saxon together on Halloween night. (R. p. 100, line 20 – p. 101, 102, lines 1-5). According to Moore, Walker told her they needed another gun because they were going to rob an old man who stayed with a white lady and sold liquor and drugs from his house. (R. p. 102, lines 6- 24).

At the start of the case the judge stated:

I also indicated in chambers the State had hoped to get into the fact that the co-defendant had already been convicted and I just explained in chambers that we just need to stay away from that. Obviously, it's standard provision of law that every – the evidence against each defendant must stand on its own. And the fact that a co-defendant has previously been found guilty of murder in this case, obviously, is not evidence that the gentleman did anything wrong. That's simply proof that somebody else in front of a different jury was found guilty of the offense of murder. Obviously, the prejudicial effect to Mr. Wells [Appellant] would outweigh any probative value of allowing the prior conviction.

(R. p. 74, line 23 – p. 75, lines 1-10).

After Appellant's cross examination of Investigator Cheek, the State, outside the presence of the jury, stated:

Your Honor, at this point, since Mr. Richey is casting speculation on other people that might have done the shooting, I think it would be appropriate for the jury to know that 12 jurors in Laurens County have found David Walker guilty beyond a reasonable doubt of murder of Johnny Lee Cheeks. And I would submit that the State should be allowed to enter into evidence the certified copy of the indictment and sentencing sheet in his case.

(R. p. 296, lines 16-24). Appellant argued, "Judge, I didn't open the door. I just said these people shoot. I said nothing about any other person. I was talking about Walker and this individual, who we've all said – he put in evidence – there's no way I even remotely opened the door to let that conviction in." (R. p. 297, lines 1-5). After a short break the judge determined that the door was opened to a degree by the "last series of questions concerning drug dealers and isn't it possible that this is a drug-on –drug-type of a thing." (R. p. 298, line 25 – p. 299, lines 1-

2). The judge ruled, "I will allow you to ask this witness is it your understanding that Mr. Walker is currently in the Department of Corrections serving a sentence for murder in this incident." (R. p. 299, lines 12-15). After a brief explanation the judge told Appellant, " And you do not need to contemporaneously object, you are covered." (R. p. 301, lines 18-19).

On re-direct examination, the prosecutor asked Investigator Cheek, "Are you familiar with the fact that David Walker is in the South Carolina Department of Corrections serving time for this homicide?" (R. p. 304, lines 12-14). Investigator Cheek answered, "Yes, sir." In closing argument the prosecutor referenced Walker's conviction stating, "Mr. Richey has also talked about an anonymous phantom rival of Johnny Cheeks doing the killing when we know David Walker has been convicted of this homicide. David Walker, who was with the other two, Saxon and Wells, that night planning out the robbery." (R. p. 333, lines 21-25). At the close of the case Appellant renewed all objections and the judge again denied the motions. (R. p. 378, lines 16-25). The judge erred in allowing Investigator Cheek to testify that Walker had been convicted of the murder of Johnny Lee Cheeks.

In regard to reference to the guilty plea of a non-testifying co-defendant, the Fourth Circuit Court of Appeals in United States v. Blevins, 960 F.2d 1252, 1260 (4th Cir. 1992) wrote:

Courts have generally agreed that evidence of a non-testifying co-defendant's guilty plea should not be put before the jury. See, e.g., United States v. Leach, 918 F.2d 464, 467 (5th Cir.1990); United States v. De La Vega, 913 F.2d 861, 866 (11th Cir.1990). The reason for this prohibition is twofold. First, by not having the opportunity to cross-examine the co-defendant who entered the guilty plea, the defendant on trial is unable to probe the motivations for entry of the plea. This significantly undercuts the defendant's right to have a jury's verdict based only upon evidence that is presented in open court and is thereby subject to scrutiny by the defendant. See United States v. Griffin, 778 F.2d 707, 711 (11th Cir.1985) (citing Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965)). Second, introduction of such guilty pleas raises the concern that a defendant might be convicted based upon the disposition of the charges against the co-defendants, rather than upon an individual assessment of the remaining defendant's personal culpability. See Griffin, 778 F.2d at 711.

In regard to reference to a conviction after jury trial of a testifying co-conspirator, the Fourth Circuit Court of Appeals in United States v. Mitchell, 1 F.3d 235, 240 (4th Cir. 1993) wrote:

It is a well-accepted principle that “evidence about the conviction of a co-conspirator is not admissible as substantive proof of the guilt of a defendant.” United States v. Leach, 918 F.2d 464, 467 (5th Cir.1990), cert denied, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed.2d 976 (1991). In criminal cases, it is the province of the defendant's jury to resolve questions of credibility; referring to what another jury may have done is clearly improper because the defendant's jury cannot permissibly rely on what they may assume a previous jury to have found. See United States v. Samad, 754 F.2d 1091, 1100 (4th Cir.1984) (observing that a prosecutor may not argue evidence not presented to the jury). Such conduct “raises the concern that a defendant might be convicted based upon the disposition of the charges against the [co-conspirator], rather than upon an individual assessment of the remaining defendant's personal culpability.” Blevins, 960 F.2d at 1260. Indeed, improper use of a co-conspirator's conviction infringes on the principle that the “central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.” Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

In the present case Walker was a non-testifying co-defendant, like the co-defendant in Blevins, but was convicted after jury trial like the co-conspirator in Mitchell. As in Blevins and Mitchell, it was improper to allow testimony that Walker had been convicted of the murder of Johnny Lee Cheeks. Appellant's jury had to make their own decisions in regard to credibility without reference to what they may have presumed another jury found in regard to Walker's conviction. As in Blevins and Mitchell, the improper testimony raises the concern that Appellant's conviction was based on Walker's conviction rather than an individual assessment of Appellant's guilt. The prosecutor, in effect, argued to the jury that Walker's conviction should be used as substantive evidence of Appellant's guilt. The argument was improper. The judge erred in allowing the testimony about Walker's conviction.

The trial judge initially and correctly found that evidence of Walker's conviction was inadmissible and more prejudicial than probative. (R. p. 74, line 23 – p. 75, lines 1-10). Later, however, the trial judge ruled that Appellant's questioning of Investigator Cheek in regard to the possibility that the shooting may have been a "drug-on –drug-type of a thing" opened the door to allow testimony about Walker's conviction. The trial judge erred. Appellant had every right, and counsel for Appellant had a duty to challenge the State's theory of the case by challenging the State's evidence that Walker was the shooter.

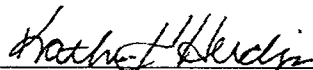
The error was not harmless. The State's case was based on the testimony of Toris Moore placing Appellant with Walker and Saxon on the night of the incident and her conversation with Walker about robbery plans and the questionable identification of Appellant and the car by Kelly Ball. The State's evidence was not overwhelming. In Blevins the Fourth Circuit found that the minimal discussion of the non-testifying co-defendants did not warrant reversal and wrote, "If for whatever reason the jury does learn that co-defendants have pleaded guilty, the court upon request should issue a limiting instruction to jurors stating that the evidence of such guilty pleas is not to be taken as substantive evidence of guilt of the remaining defendants." 960 F.2d at 1260. In the present case the State was allowed to directly question the investigator about Walker's conviction and the State relied upon that testimony in closing argument. Additionally, in the present case, the only limiting instruction to the jurors is found in the judge's final instructions on the law when he stated:

Now, ladies and gentlemen, you've heard testimony that three individual were charged in connection with this incident. I emphasize to you that only Mr. Wells is on trial in this case. Therefore, the evidence against Mr. Wells must be considered separately and apart from the cases against any other defendant and the manner in which the case against any other defendant has been resolved. In short, you must consider the evidence in this case in its totality only as it relates to Mr. Wells without regard to the case of any other co-defendant for the manner in which that case against that other co-defendant was resolved.

(R. p. 358, lines 8-19). The instruction does not adequately tell the jury that evidence of Walker's conviction is not to be taken as substantive evidence of Appellant's guilt. Even if the judge had directly instructed the jury that evidence of a co-defendant's conviction is not to be taken as substantive guilt of the Appellant, the error in the present case cannot be deemed harmless in light of the weakness of the State's evidence.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's convictions and sentences and remand for a new trial.



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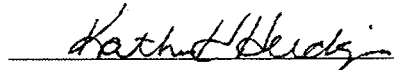
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This 29th day of March, 2017.

CERTIFICATE OF COUNSEL

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

March 29, 2017



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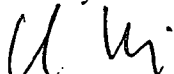
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief in the above referenced case has been served upon Ranee Saunders, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of March, 2017.



Kathrine H. Hudgins
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SUBSCRIBED AND SWORN TO before me
this 29th day of March, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2025

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LAURENS COUNTY
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2016-000950

THE STATE, RESPONDENT,

v.

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STATEMENT OF THE CASE

Appellant was indicted during the April 2015 term of the Laurens County Grand Jury for murder, armed robbery, possession of a weapon during the commission of a violent crime, and criminal conspiracy. (R.384-385; 387-388; 390-391; 393-394) Appellant proceeded to a jury trial before the Honorable Frank R. Addy. He was ultimately convicted of armed robbery, conspiracy, and possession of a weapon during the commission of a violent crime, but acquitted of murder. The court sentenced him to life without possibility of parole pursuant to Section 17-25-45 of the South Carolina Code (2014).

STATEMENT OF FACTS

Lieutenant Marty Crain of the Lauren County Sheriff's Office responded to a call reporting a possible shooting and arrived at the scene to find David Lee Walker slumped over on the porch swing of a mobile home. (R.160–164.) Walker initially indicated his arm was broken, but he had in actuality been shot. (R.174.) Lieutenant Crain then proceeded inside the home and there he discovered Johnny Lee Cheeks (Victim) bleeding profusely from gunshot wounds to his neck and abdomen. (R.160–165.) Investigator Bryant Cheek arrived shortly after and spoke with Victim, Walker, and Victim's girlfriend Kelly Ball, who was also present at the scene. (R.275–276.) Walker informed Investigator Cheek that he had been attacked by two men he did not recognize; however, Victim indicated Walker had come to rob him. (R.276.) Victim ultimately died of his wounds. (R.278.) During the course of the investigation, Investigator Cheek began looking into what company Walker kept and eventually arrested Walker, Appellant, and Johnny Lee Saxon.

Appellant was charged with murder, armed robbery, possession of a weapon during the commission of a violent crime, and criminal conspiracy. (R.13, 21.) Prior to the start of trial, the court noted for the record that during an *in camera* discussion the State had been instructed not to discuss the fact that Walker had already been convicted in connection with this incident. (R.74.)

At trial, the State called Walker's niece Toris Moore to testify. She stated that on the night of the incident, Walker, Appellant, and Saxon came to her home. (R.101.) Walker asked her for her gun, stating they planned to rob someone and the only gun they had was Appellant's. (R.103.) Moore did not have a gun and sent them away empty-handed. (R.103.) Investigator Cheek also testified about the evening and his investigation. During cross examination, he acknowledged that Victim was a known drug dealer. (R.293.) Defense counsel then posed

questions to the investigator about the nature of drug dealers, asking whether it was true that “these drug folk are dangerous” and “when they get mad, they shoot.” (R.295.) He then asked whether “this case right here . . . fits that description.” (R.296.) The State objected and, outside the presence of the jury, argued that defense counsel’s insinuation that some other people may have been responsible for the shooting opened the door for allowing the State to question Investigator Cheek about Walker’s murder conviction. (R.297.) Ultimately, the trial court concluded Appellant did indeed open the door for the admission of evidence about Walker’s conviction. (R.299.) It also stated it would give a jury instruction indicating that Appellant’s case must stand alone and Walker’s conviction has no bearing on Appellant’s guilt. (R.299.) Accordingly, on redirect, Investigator Cheek clarified Victim identified Walker as his assailant. (R.303.) The solicitor then asked whether Walker was currently “serving time for this homicide,” and Investigator Cheek answered in the affirmative. (R.304.) The State rested and Appellant offered no evidence in his defense. (R.305, 319.) Prior to charging the jury, the trial court indicated it was including language about how the evidence against Appellant must be considered “separately and apart from the cases against any other defendant and the manner in which the case against any other defendant was resolved.” (R.350.) Appellant made no objection to the adequacy of this charge. (R.315.) The trial court thereafter charged the jury and Appellant took no exceptions. (R.369.)

Ultimately, the jury acquitted Appellant of the murder charge but found him guilty of armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. (R.375.) The court subsequently sentenced him to life without possibility of parole pursuant to Section 17-25-45 of the South Carolina Code (2014).¹

¹ Appellant had a prior conviction for voluntary manslaughter.

ARGUMENT

The trial judge properly allowed Investigator Cheek to testify that co-defendant David Lee Walker was serving a sentence for murder for this same incident because Appellant opened the door to allowing this testimony and, more importantly, no prejudice emanated from the admission of this evidence.

Appellant argues the trial court erred in allowing into evidence testimony that Walker was currently incarcerated for the same homicide for which Appellant was on trial. However, defense counsel opened the door to the admission of this testimony through his questions to Investigator Cheek that suggested some unknown third party actually committed the crime. Further, and more importantly, Appellant can claim no prejudice as the testimony was consistent with defense counsel's characterization of the facts in his opening and closing statements and likely weighed in favor of the jury's ultimate acquittal of Appellant on the murder charge.

"It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." *Page*, 378 S.C. at 483, 663 S.E.2d at 360. To warrant reversal, the admission of evidence must not only be in error, but also result in prejudice to the appellant. *State v. Gault*, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007). Accordingly, an appellant must demonstrate "there is a reasonable probability the verdict was influenced by the challenged evidence." *Id.*

At the outset, Appellant has failed to demonstrate prejudice resulting from the admission of Cheek's testimony. The challenged evidence indicates no more than Walker is incarcerated for the murder of Victim—a factual conclusion Appellant himself invited when he informed the jury during opening statements that the evidence would indicate Walker killed Victim: "And the testimony is going to be that both gentleman [sic] got shot. That's the evidence. It's not that hard who shot who. That's what the testimony will be, that these two gentlemen shot each other and, unfortunately, one lived and one didn't." (R.91.) Appellant nevertheless contends this evidence is damning because the State's case was "based on the testimony of Toris Moore placing Appellant with Walker and Saxon on the night of the incident." (R.8.) Essentially, the claimed error is that evidence Walker killed Victim improperly invited the jury to conclude Appellant was also present for the murder because Moore's testimony placed Walker and Appellant together and looking for a gun earlier that night. However, not only is Walker killing Victim consistent with Appellant's characterization of the events that transpired, but it is also inescapable that Walker was found with the dying Victim and that Victim informed law enforcement Walker shot him. The fact a jury similarly concluded Walker participated in Victim's murder is merely cumulative. Importantly, it cannot be ignored that Appellant was ultimately acquitted of the murder. Thus, the evidence indicating Walker is imprisoned for this murder only bolstered the defense's theory of the case and further invited the jury's ultimate conclusion that Appellant did not murder Victim.

Moreover, admission of this evidence offered Appellant the opportunity to impugn the credibility of the solicitor—whom defense counsel aptly attacked in closing arguments. In his opening statement, the solicitor informed the jury that "we don't know who did the shooting," and that should not matter. (R.85.) However, not only did the solicitor elicit evidence that Walker was incarcerated for this murder, he also clarified through the investigator's testimony

that Victim, Moore, and Wells *all* indicated Walker was the shooter. (R.303–304.) Thus, defense counsel began his closing, “But when this prosecutor stood up in this opening statement and t[old] you he do[esn’t] know who shot [Victim], he does know. They told him, David Lee Walker.” (R.336.) Accordingly, Appellant likely benefitted from the admission of this evidence as it encouraged the jury to disbelieve the State’s characterization of the murder and scrutinize its candor.

Turning to the merits of the trial court’s ruling, there was no abuse of discretion in allowing the State to elicit testimony regarding Walker’s incarceration. Appellant’s questions to Investigator Cheek were designed to cast an inference that a dispute with an unknown drug dealer led to Victim’s murder. The trial court properly concluded within its sound discretion that the State was permitted to refute that suggestion with evidence that the assailant was Walker, as indicated by his present incarceration and all the other testimony elicited. Further, the trial court of its own accord included a prophylactic instruction clarifying that the jury was not to consider the result of Walker’s trial as proof of Appellant’s guilt. This explication was one of the first statements of the law given by the court. Moreover, Appellant never objected to the instruction as insufficient to ameliorate any conceivable prejudice that could emanate from the testimony. Accordingly, the trial court did not abuse its discretion in allowing in evidence that Walker was currently incarcerated for the murder of Victim.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 4, 2017

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b),
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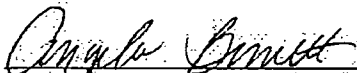
PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 4th day of April, 2017.



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