

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County  
The Honorable William H. Seals, Jr., Circuit Court Judge  
Appellate Case No. 2011-199367

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

HERBERT CAUSEY,

APPELLANT.

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

The specific issues Appellant now raises on appeal are not preserved for review where Appellant did not make these specific arguments to the trial judge. In any event, Appellant's argument that the trial court should have suppressed testimonial and photographic evidence of "the pre-trial identification of Appellant" is without merit where there was, in fact, no pre-trial identification of Appellant since the victim was unable to select any one person out of the photographic lineup. Further, even if the victim's pointing out of two individuals as persons who might possibly be the perpetrator could be considered an "identification" of Appellant such that a Neil v. Biggers analysis was appropriate, the identification process was not suggestive in any way. Finally, where other overwhelming evidence conclusively established that Appellant was the perpetrator, and where Appellant conceded that he was the perpetrator in closing argument, any error with respect to admission of the purported "identification" testimony was harmless beyond a reasonable doubt.

## STATEMENT OF THE CASE

Appellant was indicted in Horry County in May 2011 for first-degree burglary, kidnapping, armed robbery, and assault with intent to commit first-degree criminal sexual conduct. On September 6-8, 2011, he proceeded to trial before the Honorable William H. Seals, Jr., and a jury. The jury found Appellant guilty of the first three charges but not guilty of assault with intent to commit criminal sexual conduct. Judge Seals imposed a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 for first-degree burglary, thirty years, concurrent, for kidnapping, and thirty years, concurrent, for armed robbery. A timely notice of appeal was served and filed.

## ARGUMENT

The specific issues Appellant now raises on appeal are not preserved for review where Appellant did not make these specific arguments to the trial judge. In any event, Appellant's argument that the trial court should have suppressed testimonial and photographic evidence of "the pre-trial identification of Appellant" is without merit where there was, in fact, no pre-trial identification of Appellant since the victim was unable to select any one person out of the photographic lineup. Further, even if the victim's pointing out of two individuals as persons who might possibly be the perpetrator could be considered an "identification" of Appellant such that a Neil v. Biggers analysis was appropriate, the identification process was not suggestive in any way. Finally, where other overwhelming evidence conclusively established that Appellant was the perpetrator, and where Appellant conceded that he was the perpetrator in closing argument, any error with respect to admission of the purported "identification" testimony was harmless beyond a reasonable doubt.

### Issue Preservation

Appellant now contends that the trial court should have suppressed the victim's purported pre-trial identification of Appellant, arguing that Chief Vaught's comments to the victim rendered the identification procedure unduly suggestive and arguing that the identification was unreliable under the totality of the circumstances. However, Appellant never made these arguments to the trial judge below. (See R. p. 18; p. 30-36). The only argument made was as follows: "Either there was an identification or there wasn't. I don't think you can sit six pictures in front of a person and them coming to court and say well it's one of these two or three but I don't know which one." (R. p. 18, lines 6-9). Defense counsel admitted he had no case law to support his position that admission of the purported identification would be improper.<sup>1</sup> (R. p. 18, lines 10-13). Additionally, when the victim and Chief Vaught testified before the jury, Appellant raised no further arguments. (See p. 73-77; p. 169-72). Therefore, the specific arguments being raised on appeal are not preserved for review. See, e.g., State v. Adams, 332 S.C. 139, 144, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (argument not preserved for appeal where precise

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<sup>1</sup> Notably, the judge pointed out that "it would be a credibility issue that might even work in your favor that somebody cannot fully identify who it was." (R. p. 18, lines 14-16).

issue not presented to the trial court); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not argue one ground at trial and another ground on appeal).

#### Relevant Facts

Chief Vaught was the only witness who testified in the pre-trial identification hearing. (See R. p. 30-36). The pre-trial hearing testimony reflects that Chief Vaught went to the victim's residence about five hours after the crime to show her a photographic lineup of six individuals. (R. p. 32-33; p. 35, lines 9-13). Chief Vaught explained to the victim that he was going to show her a piece of paper containing photographs and ask her if she could pick out the person who burglarized her home that day. (R. p. 33, lines 1-3). Chief Vaught specifically informed the victim that he could not provide her any assistance in selecting a possible perpetrator and that she would have to make her own decision. (R. p. 34, lines 4-9). The victim initially stated that it was very confusing and traumatic and that she was unable to focus on any one individual. (R. p. 33, lines 5-7). She then took some time to look at the photographs and subsequently commented that the perpetrator could possibly be either the person in photograph # 5 or the person in photograph # 6. (R. p. 33, lines 8-16). Appellant's picture was one of those two. (R. p. 34, lines 1-3).

The trial judge ruled that "based on what I have seen and heard," the identification process was not unduly suggestive and was reliable. (R. p. 36, lines 1-4). He stated that the fact that the victim picked out two individuals, one of which was the defendant, simply goes to credibility. (R. p. 36, lines 4-6). He concluded that "[t]he process itself I find very reliable." (R. p. 36, lines 6-7). No further arguments or objections regarding the identification issue were raised by Appellant.

Later, during trial, the victim testified that the man who tricked her into allowing him entry into her home, tried to tie her up, and stole her money while threatening her with a stun gun was a “kind of tall” white man with tattoos on his arm and “up his neck.” (R. p. 49-50; see also p. 49-57). She stated he was wearing work boots, jeans, a gray shirt and a red cap. (R. p. 50, lines 2-5). She also recalled that the man had acne scars on his face. (R. p. 50, lines 8-12). The victim believed that she recognized this man as a former neighbor from her street. (See R. p. 50-51). The victim testified that she met with Chief Vaught later that day and he presented her with a photographic lineup. (See R. p. 73-74). She stated that it was her understanding that Chief Vaught was “wanting me to identify the person that broke, that come in.” (R. p. 74, lines 10-14). She stated that when she was looking at the photos, she was “trying to be sure she had the right one.” (R. p. 74, lines 19-23). The victim testified that, although she was not able to positively identify anyone since “they looked so much alike,” she was able to “narrow it down” to photographs # 5 and # 6. (R. p. 75-77). The lineup was admitted at trial, over Appellant’s prior objections, as State’s Exhibit # 2. (R. p. 75, lines 12-23; p. 324). The victim did not identify Appellant at trial. (See R. p. 46-94).

Chief Vaught testified before the jury that he showed the victim the lineup around 9:30 pm on the day of the crime and that he informed her to “review the six photographs on this sheet and determine if the person who had entered her house was on the sheet.” (R. p. 171, lines 1-7). He reiterated his pre-trial testimony that the victim initially made comments that she was having a difficult time focusing but that after spending some time studying each photograph, she stated she “could not identify any one individual.” (R. p. 172, lines 1-6). However, Chief Vaught stated that she did point to photographs # 5 and # 6 as possible perpetrators. (See R. p. 172, lines 6-13). He testified that Appellant’s

picture was photograph # 6. (R. p. 172, lines 14-18).

### Argument

#### **There was No Identification**

First, assuming the issues raised on appeal are preserved for review, Appellant's arguments regarding applying Neil v. Biggers<sup>2</sup> to the victim's pre-trial "identification" are without merit because, Respondent submits, the victim in fact made no pre-trial identification of Appellant. Although the victim pointed to photographs # 5 and # 6 in the lineup as persons who could possibly be the perpetrator, she did not make an actual, positive, out-of court identification of Appellant. Furthermore, she also did not identify Appellant at trial. Thus, Appellant was not identified by the victim either prior to or during trial, and Appellant cites no case law supporting that the victim's mere narrowing of possibilities constituted an "identification" such that it would be subject to a Neil v. Biggers analysis.<sup>3</sup> (See Brief of Appellant, p. 5-11; see also R. p. 18, lines 5-13). Accordingly, since the victim never made an identification, Appellant's arguments are without merit and the appeal should be dismissed. See Neil v. Biggers, 409 U.S. 188, 195 (1972) (victim's earlier statement to police that one of the men in the photographic lineup had features similar to those of her assailant did not constitute an "identification"); compare State v. Frazier, 394 S.C. 213, 219-23, 715 S.E.2d 650, 652-54 (Ct. App. 2011) (defendant's argument that witness's in-court identification was tainted by an impermissibly suggestive show-up was manifestly without merit, where, although the police conducted a show-up with the witness, he was unable to identify the defendant at

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<sup>2</sup> 409 U.S. 188 (1972).

<sup>3</sup> Although the trial court apparently treated the victim's testimony about her response to the lineup as "identification" testimony, this Court can affirm for any grounds appearing in the record. (See R. p. 18; p. 30-36). Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

the show-up and did not identify the defendant in court; the witness's statement at the show-up that the defendant was wearing shoes and a jacket similar to those worn by the perpetrator did not constitute an "identification"); see also State v. Nance, 315 So. 2d 695, 701 (1975) (pointing out that the failure of the witness to make a positive identification would preclude any finding of prejudice or error); Hernandez v. State, 7 Md. App. 355, 363, 255 A.2d 449, 454 (Md. 1969) ("[t]here was, in fact, no identification" where the witness made it plain that, at most, the defendant was "similar in appearance" to one of the robbers); Crawley v. U.S., 328 A.2d 777, 778-79 (D.C. 1974) (identification procedure was not unduly suggestive where the witness failed to make a positive identification of the defendant in a photographic lineup but instead selected not one, but two photographs of men whom he thought resembled the robber).

**Assuming Neil v. Biggers Applies, There was No Suggestive Conduct by the Police**

"Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012) (citation omitted). Under Neil v. Biggers, 409 U.S. 188 (1972), there is a two-prong inquiry used to determine the admissibility of out-of-court identifications. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784 (2003). First, the court must determine if the identification process was unduly suggestive. Id. (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Second, if the court finds that a suggestive procedure has in fact been used, the court should determine whether the identification was nonetheless reliable, and therefore admissible in evidence, under the totality of the circumstances. Id. (citations omitted).

In this case, assuming the victim's pointing out of two photographs in the lineup qualified as an "identification" of Appellant such that a Neil v. Biggers analysis was

applicable, the trial judge properly ruled that the victim's testimony regarding her response to the lineup was admissible because there was no coercive or suggestive conduct on the part of the police. (See R. p. 36, lines 1-7). Appellant now argues - for the first time on appeal - that the "identification procedure" was unduly suggestive because Chief Vaught "suggested that the assailant would be in the photographic lineup" when he explained to the victim that he was going to show her a piece of paper containing photographs and ask her "if she could pick out the individual who had entered her house earlier in the day." (Brief of Appellant, p. 7-8; see R. p. 32, line 25 - p. 33, line 3). Appellant cites no case law supporting the proposition that Chief Vaught's comments were improper or suggestive, nor does Appellant explain why, even assuming the Chief's comments in fact implied that the perpetrator's photograph was contained in the lineup, such an implication would be "suggestive" considering that, per the victim, the photos "looked so much alike" and that the Chief never suggested *which* of the photographs to pick. (See R. p. 33-34; p. 76, line 3). (See Brief of Appellant, p. 8).

Indeed, in State v. Davis, our Supreme Court held that an officer's instruction to the witness, made while handing a witness a photographic lineup, to "see if she recognized anyone," was not unduly suggestive since there was "no suggestion in the record that the police officer in any manner insinuated *which* photograph belonged to [the defendant]" and since witnesses are "clearly" aware that "the reason [they are] requested to view [a] photographic lineup [i]s because the police ha[ve] a suspect." State v. Davis, 309 S.C. 326, 339, 422 S.E.2d 133, 141 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) (emphasis added); see also State v. Mansfield, 343 S.C. 66, 74-76, 538 S.E.2d 257, 261-62 (Ct. App. 2000) (it was apparently not suggestive for the police to tell a witness that they "have a suspect" for the

witness to look at in a one-man show-up). Numerous cases from other states have reached similar conclusions. See, e.g., Clark v. State, 271 Ga. 6, 13, 515 S.E.2d 155, 162 (Ga. 1999) (although a police officer displaying a lineup to a witness should avoid expressly telling the person that the lineup contains the police officer's suspect, "such a statement does not make a lineup impermissibly suggestive since the very fact that a lineup is being conducted suggests that a suspect is contained therein"); Rimmer v. State, 825 So. 2d 304, 317 (Fla. 2002) ("the fact that the police told [the witness] prior to his viewing the physical lineup that they had included a suspect in the lineup does not taint [the witness's] identification" where the photo spread consists of six men with similar characteristics and there is no evidence that the police directed the victim's attention to the defendant's photograph); Kelly v. State, 18 S.W.3d 239, 243 (Tex. App. 2000) ("a lineup is not rendered impermissibly suggestive merely because the complainant is informed that it contains a 'suspect,' because a complainant would 'normally assume that to be the case.'") (quotation omitted); State v. Timmons, 956 S.W.2d 277, 283 (Mo. App. 1997) ("Mr. Timmons further argues that the lineup was suggestive because the police had stated to the victims that a possible subject was in the lineup. Whether the police suggested a suspect was present is moot, however, as 'it is implicit in a line-up or photographic array that one of the persons shown is a suspect.'") (quotation and citation omitted); State v. Smith, 681 So.2d 980, 986 (La. App. 1996) ("Even if the officers told the witnesses a suspect would be in each lineup, such a statement does not, in itself, constitute suggestiveness as it is assumed that, when a person is asked to view a lineup, a suspect will be included.") (citation omitted); State v. Boutte, 447 So. 2d 1229, 1231 (La. App. 1984) ("The defendant claims that the lineup was suggestive since the victims were told that a suspect would be in the lineup. This, in itself does not constitute

suggestiveness, for it is generally assumed that when one is called to examine a physical lineup there is a suspect in the crowd.”) (citations omitted); State v. Garcia, 235 Neb. 53, 59-60, 453 N.W.2d 469, 474 (Neb. 1990) (“Though Detective Salak advised Otto that a suspect was pictured in the photographic array, a police officer’s comment that a lineup or photographic array contains a suspect or a suspect’s picture does not render the identification procedure unduly suggestive inasmuch as a witness would assume that to be the case.”) (citations omitted); People v. Williams, 117 Ill. App. 2d 34, 43, 254 N.E.2d 81, 86 (Ill. App. 1969) (“When a witness is asked to view a line-up, there is, necessarily, an implied suggestion that the police investigation has led them to believe that one of the persons exhibited in the line-up may have committed the crime. . . . The remarks complained of in the instant case were not unfairly suggestive or prejudicial to defendants; they merely verbalized the obvious.”).

In any event, the fact that the victim *did not make a positive identification of Appellant* establishes that Chief Vaught’s comments could not have been unduly suggestive. See State v. Nance, 315 So. 2d 695, 701 (La. 1975) (pointing out that the failure of the witness to make a positive identification would preclude any finding of prejudice or error); Hernandez v. State, 7 Md. App. 355, 363, 255 A.2d 449, 454 (Md. App. 1969) (while it is improper for an officer to implore a witness to make an identification, “the fact that [the witness] made no positive identification indicates that he was not influenced” by the police officer’s comments); Crawley v. U.S., 328 A.2d 777, 778-79 (D.C. 1974) (holding that the defendant could not have been prejudiced by the fact that the officer informed the witness that a particular suspect’s photo was contained in the lineup where “the suggestion was clearly ineffective” since the witness failed to

identify the defendant in the lineup and instead selected two photographs of men whom he thought resembled the robber).

Accordingly, since there were no suggestive or coercive methods employed by the police in showing the victim the photographic lineup, the trial court properly concluded that the identification procedure was not unduly suggestive and therefore properly admitted the testimony regarding the victim's response to the lineup.<sup>4</sup>

### **Harmless Error**

Even assuming, for argument's sake, that the trial court erred in admitting testimony about the victim's response to the lineup, such error would be utterly harmless considering that identification was not a critical issue and trial and where other evidence - including Appellant's own statements to others - conclusively and overwhelmingly established that Appellant was the perpetrator and where Appellant conceded that he was the perpetrator in closing argument and requested that the jury convict him of a lesser-included offense. Appellant argues that the alleged error in admission of the "identification" testimony was not harmless because the State elicited testimony from both the victim and Chief Vaught, entered the lineup into evidence, and mentioned the lineup in closing argument. (See Brief of Appellant, p. 10-11). However, Appellant's argument overlooks the plethora of evidence placing Appellant at the scene of the crime as the perpetrator. First, after he was arrested, Appellant told Chief Vaught that the armed robbery and kidnapping charges were "wrong," since he "asked to use the

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<sup>4</sup> Notably, since there were no suggestive methods utilized by the police, the lower court did not, and needed not, reach the second prong of Neil v. Biggers regarding reliability under the totality of the circumstances. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447-48 (2000) ("Only if [the procedure] was suggestive need the court consider the second question - whether there was a substantial likelihood of irreparable misidentification."). Moreover, it is not possible to properly apply all of the reliability factors in this case, since, as discussed above, the victim did not actually make an identification. (See *supra* p. 8-9).

bathroom and was invited in by that woman” and since he “did not have a weapon.” (R. p. 186, lines 9-12). He later stated that his girlfriend Tonia was not involved in the incident. (R. p. 188, lines 9-11). Second, Appellant’s girlfriend Tonia told the police that Appellant had related to her some of the events that took place in the course of the crime, including that Appellant lost his stun gun in the victim’s front yard when he was fleeing the scene.<sup>5</sup> (See R. p. 231-37; p. 325-27).

Third, Tonia’s former best friend Lisa testified that she spoke with Tonia over the telephone shortly after the crime and overheard Appellant in the background admitting that he went into the victim’s house and took some money but insisting that he did not hurt anyone and did not do anything wrong. (See R. p. 163, lines 2-9). Tonia explained to Lisa that Appellant only did it because he had been unable to find a job. (R. p. 163, lines 9-11). Fourth, as mentioned previously, the victim believed that Appellant was a former neighbor who had recently lived on her street. (See R. p. 50-51). Neighbors and other witnesses confirmed that Appellant used to stay with his girlfriend Tonia in the house next door to the victim. (See R. p. 115-16; p. 124-30; p. 157, lines 17-25; p. 165-66; p. 197-98; p. 209-210). Finally, the victim described Appellant’s clothing, appearance, and tattoos in great detail and Appellant was captured on video at a local grocery store later that same day wearing the exact same clothing. (See R. p. 49-50; p. 73; p. 77-79; p. 88-89; p. 97; p. 102; p. 176-81; p. 213-15). Footage from the store’s surveillance camera was introduced at trial. (See R. p. 133-36; p. 176-81). In this footage, Appellant can be seen making purchases with money that his girlfriend stated he did not have that morning. (See R. p. 206-207; p. 235, lines 20-23).

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<sup>5</sup> The stun gun was found by responding officers in the victim’s yard shortly after the crime. (R. p. 103-105; p. 111-113).

In light of the above overwhelming evidence establishing that Appellant was the perpetrator, it is clear that the victim's identification or lack thereof was not a critical issue at trial. Indeed, defense counsel never once mentioned the victim's "identification" testimony in his closing argument. (See R. p. 293-97). Further, defense counsel, apparently recognizing the overwhelming evidence establishing that Appellant was the perpetrator, conceded the same and argued that the jury should find Appellant guilty only of the lesser offense of strong arm robbery. (See R. p. 294-97).

Appellant points out in his Brief that the State mentioned the lineup in its closing argument. (See Brief of Appellant, p. 10-11). However, significantly, the solicitor's mention of the lineup and the "identification" testimony took up only twelve lines in a closing argument that spanned twenty-two pages. (See R. p. 271-93; p. 289, lines 14-23). Moreover, the solicitor's argument was that the lineup testimony served only as "a little bit more confirmation" that Appellant was the perpetrator, but that "it gets better; we've got more than that." (R. p. 289, lines 23-25). It is also notable that neither the State nor the defense apparently viewed the "identification" as a legitimate issue inasmuch as neither party requested a jury charge on identification for the final instructions to the jury. (See R. p. 269-71; p. 298-314).

Accordingly, because the victim's identification or lack thereof was not a critical issue at trial, and since overwhelming evidence established that Appellant was the perpetrator, any error with respect to the trial judge's admission of the lineup and "identification" testimony was harmless beyond a reasonable doubt. See, e.g., State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial); see also State v. Singleton, 395 S.C. 6, 14-15, 716 S.E.2d 332, 336 (Ct. App. 2011) (any error in allowing the victim's

identification testimony was harmless in light of the overwhelming evidence of defendant's guilt); compare State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) (where a witness's identification was the *sole evidence* linking the defendant to the crime, a harmless error analysis would not be appropriate) (emphasis added). Therefore, Appellant's conviction must be affirmed.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

November 28, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County  
The Honorable William H. Seals, Jr., Circuit Court Judge  
Appellate Case No. 2011-199367

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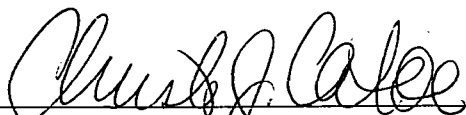
v.

HERBERT CAUSEY,

APPELLANT.

\_\_\_\_\_  
**CERTIFICATE OF COUNSEL**  
\_\_\_\_\_

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.

  
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November 28, 2012

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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
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Appeal from Horry County  
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THE STATE OF SOUTH CAROLINA,

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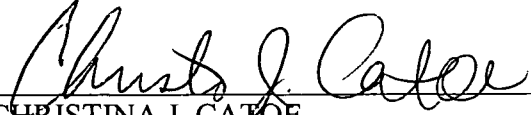
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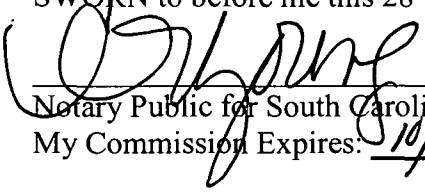
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **BREEN R. STEVENS**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **28<sup>th</sup> day of November, 2012**.

  
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SWORN to before me this 28<sup>th</sup> day of November, 2012.

  
Notary Public for South Carolina.

My Commission Expires: 10/28/2014