

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

RECEIVED

OCT 04 2012

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ALONZA DENNIS,

APPELLANT

APPELLATE CASE NO. 2011-192370

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENT I.....	5
ARGUMENT II	10
ARGUMENT III	12
ARGUMENT IV	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000).....	16
<u>Michigan v. Mosley</u> , 423 U.S. 96 (1975)	13
<u>State v. Chisolm</u> , 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011)	8
<u>State v. Curry</u> , 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006)	11
<u>State v. Franklin</u> , 390 S.C. 535, 702 S.E.2d 568 (Ct. App. 2010)	14
<u>State v. Geiger</u> , 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006).....	10
<u>State v. Gourdine</u> , 322 S.C. 396, 472 S.E.2d 241 (1996).....	10
<u>State v. Jones</u> , 133 S.C. 167, 130 S.E.2d 747 (1925).....	11
<u>State v. Knoten</u> , 347 S.C. 296, 555 S.E.2d 391 (2001)	11
<u>State v. Lee</u> , 298 S.C. 362, 380 S.E.2d 834 (1989).....	11
<u>State v. Lindsey</u> , 355 S.C. 15, 583 S.E.2d 740 (2003).....	16
<u>State v. Rye</u> , 375 S.C. 119, 651 S.E.2d 321 (2007)	11
<u>State v. Smith</u> , 315 S.C. 547, 446 S.E.2d 411 (1994)	11
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	8
<u>Taylor v. United States</u> , 495 U.S. 575 (1990).....	17
<u>United States v. Peterson</u> , 629 F.3d 432 (Fourth Cir. 2011).....	16, 17

Statutes

S.C. Code Section 17-25-45.....	15
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Other Authorities

<u>The Criminal Law of South Carolina</u> , Fifth Edition 207 (2007).....	11
---	----

Rules

Rule 402, SCORE.....	8
----------------------	---

Constitutional Provisions

U. S. Const. amend. VI	15
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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing the state's witness, Trevor Gibbs, testify that Dennis tried to sell a gun to him which Dennis allegedly said he had stolen the night before, and to testify that Dennis allegedly said he needed a blast (crack), where these statements were prejudicial to Dennis and put his character into evidence?
2. Did the trial court err in refusing to charge the jury on ABHAN when Dennis testified that he did not intend to shoot the victim but was only trying to scare him?
3. Did the trial court err in sentencing Dennis to LWOP when the state did not provide sufficient documentation that that his out of state conviction for rape in the first degree qualified as a most serious offense under S.C. law because it did not meet the elements to be a strike offense which violated Dennis's Sixth Amendment rights?
4. Did the trial court err in admitting Dennis's two statements into evidence when he told the investigators after the first statement that he did not want to talk, and was coerced into making the second statement when the investigator threatened to send his case to the federal authorities?

STATEMENT OF THE CASE

On October 5, 2009, the Charleston County Grand Jury indicted Alonza Dennis on the charges of assault and battery with intent to kill (ABWIK), attempted armed robbery, and possession of a firearm during a crime of violence. On March 14 – 16, 2011, Dennis proceeded to trial before the Honorable Roger M. Young and a jury. Dennis was represented by Andrew Grimes and Megan Ehrlich, and the state was represented by Jennifer Shealy and Timmy Finch, assistant solicitors. The jury returned a verdict of not guilty on the attempted armed robbery, and a verdict of guilty on the ABWIK and possession of a firearm during a crime of violence. Judge Young sentenced Dennis to the mandatory sentence of life without parole (LWOP) based on a 1987 conviction in the state of New York for rape in the first degree. R. 497, ll. 5 – 25; R. 498, ll. 1 – 25; R. 499, ll. 1 – 25; R. 500, ll. 1 – 25; R. 501, ll. 1 – 22. Dennis' attorney filed a Motion to Reconsider the Sentence on March 25, 2011. Judge Young issued an Order on May 11, 2011 denying the Motion to Reconsider. Dennis' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in allowing the state's witness, Trevor Gibbs, to testify that Dennis tried to sell a gun to him which Dennis allegedly said he had stolen the night before, and to testify that Dennis allegedly said he needed a blast (crack), where these statements were prejudicial to Dennis and put his character into evidence.

Appellant Alonza Dennis testified that on June 22, 2009, he left his job raking straw at Santee Straw near McClellanville, and went to the home of an acquaintance, Quan (La Seto Gibson) because he was walking to see another friend when Quan called him. R. 357, ll. 20 – 25; R. 358, l. 1 – 3; R. 370, ll. 15 – 25; R. 371, ll. 1 – 25; R. 372, ll. 1 – 25; R. 373, ll. 1 – 25. Quan and two others, Kaylab and Trevor, were talking about robbing a man who was coming to McCellanville to sell clothes. Dennis did not want to be involved. R. 374, ll. 1 – 25; R. 375, ll. 25. Dennis caught a ride back to the Kangaroo Store with Quan's grandfather who was leaving. R. 375, ll. 1 – 25.

When he got to the store, he waited under the community oak tree for a ride. Then Quan and Kaylab and Trevor rode up in Quan's Crown Vic. Quan told him to get in the car. When he did, he saw a gun on the back seat. R. 377, ll. 1 – 25; R. 378, ll. 1 – 25; R. 379, ll. 1 – 3.

Quan and the other two told him to take the gun and rob the man, Moses Alford, who was at the Kangaroo. R. 379, ll. 4 – 25. Dennis had no intention of robbing Alford, but he was afraid that Quan and the others had other guns in the car they would use against him. R. 380, ll. 1 – 25.

Dennis and Quan and Kaylab got out of the car to look at the clothing Alford had in his car to sell. R. 381, ll. 1 – 25. Dennis heard Quan say to Alford: “Give me your clothes and money.” R. 382, ll. 1 – 25. Alford then began to run about 40 feet when he stopped and turned. Alford pulled up his sweat shirt and Dennis saw Alford’s gun. Alford went for his gun, and Dennis pulled his gun and fired five shots because he feared that Alford was going to shoot him. Three shots hit Alford. Dennis said he was not trying to hit Alford, but just wanted to scare him. R. 383, ll. 1 – 25; R. 384,, ll. 1 – 25; R. 385, ll. 1 – 25; R. 387, ll. 1 – 2; State’s Exhibit 76, Dennis’ statement June 29, 2009..

Dennis then took off running. When law enforcement arrived, they called the K-9 unit who found Dennis in the neighboring woods. R. 386, ll. 1 – 25.

Moses Alford testified that he had his own clothing business in Georgetown, but would take clothes to customers sometimes. R. 112, ll. 1 – 25; R. 113, ll. 1 – 25. On June 22, 2009, Quan called him to see clothes. They agreed that Alford would stop in McClellanville where they would meet. R. 116, ll. 1 – 25; R. 117, ll. 1 – 25; R. 118, ll. 1 – 17.

Alford carried two guns in his car for protection. He had a concealed weapons permit for them. R. 121, ll. 1 – 25; R. 122, ll. 1 – 6. When Quan and Kaylab drove up, Alford became suspicious of the way they were acting so he put his nine millimeter pistol on his side. R. 123, ll. 1 – 25; R. 124, ll. 1 – 25; R. 125, ll. 1 – 12. Quan and Kaylab came to his car and looked at the clothing. R. 127, ll. 1 – 25.

Alford leaned into the back seat to get an article of clothing when another man approached. R. 129, ll. 1 – 25. This man had a gun in his hand and told Alford to give him everything. Alford later identified this man as Dennis from a photo lineup. R. 130, ll. 1 – 25;

R. 131, ll. 1 – 24. Alford then started reaching for his gun when the man shot him in the arm, leg and back when he turned. R. 132, ll. 1 – 21.

Detective Charles Lawrence, the lead investigator, testified that Dennis was arrested the first time on June 22, 2009 for trespassing on the Kangaroo property because he was suspected of shoplifting. He gave a statement at that time that he knew nothing about the shooting. R. 290, ll. 19 – 25; R. 291, ll. 14 – 25; R. 292, ll. 1 – 24; R. 295, ll. 6 – 25; R. 296, ll. 1 – 25; State's Exhibit 75.

After Alford identified Dennis from a photo lineup while Alford was in the hospital, Detective Lawrence again questioned Dennis about the shooting. Dennis gave a second statement on June 29, 2009 and admitted to shooting Alford because he feared Alford was going to shoot him. R. 306, ll. 11 – 25; R. 309, ll. 10 – 17.

Quan, Kaylab, and Trevor Gibbs were also arrested and charged. R. 306, ll. 19 – 24; R. 308, ll. 23 – 25; R. 309, ll. 1 – 9.

Trevor Gibbs testified for the state at Dennis' trial. His testimony was that Quan was a drug dealer who sold weed and crack. Gibbs also sold weed and crack as neither of them had a job. R. 168, ll. 22 – 25; R. 169, ll. 1 – 25; R. 170, ll. 1 – 5. On June 22, 2009, Gibbs and Quan and Kaylab were together and went to the Kangaroo where, according to Gibbs, Dennis approached them. They went to Quan's house where Dennis allegedly tried to sell them a pistol. Gibbs' story was that Dennis said he had stolen the pistol the night before. R. 173, ll. 1 – 25; R. 176, ll. 1 – 25; R. 177, ll. 1 – 25. Dennis allegedly told them he wanted to sell the gun because he needed a "blast" or some crack. R. 178, ll. 1 – 25. Dennis' attorney objected to the testimony about the gun and the crack. R. 176, ll. 17 – 20; R. 178, ll. 17 – 21.

Before Gibbs testified, the state advised the trial court *in camera* that defense counsel objected to two issues that the state wanted Gibbs to testify about. R. 162, ll. 13 – 25; R. 163, ll. 1 – 15. Defense counsel argued that both of these issues would be more prejudicial than probative to Dennis. Counsel argued they were not relevant as motive was not an element of the crime. R. 163, ll. 16 – 25; R. 164, ll. 1 – 25. The judge ruled that the state could go into that testimony on both issues as they were probative as to establishing motive for the robbery. R. 165, ll. 1 – 14.

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

In State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009), the Supreme Court held that unfair prejudice means an undue tendency to suggest decision on an improper basis.

In State v. Chisolm, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), the Court of Appeals held that all relevant evidence is admissible pursuant to Rule 402, SCRE; however, relevant evidence must be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence.

Rule 404(a)(1), SCRE provides that character evidence generally is not admissible to prove action in conformity therewith on a particular occasion. One exception to this rule is evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same.

It was prejudicial to Dennis for the judge to allow the testimony from the state's witness that Dennis had the gun initially and tried to sell it. The witness, Gibbs, was biased

as he was a co-defendant. There was evidence that Quan, Kaylab, and Gibbs had the gun especially since Gibbs admitted they sold drugs. The biased witness testifying that Dennis used drugs was not reliable evidence. Nothing had been introduced by Dennis concerning his use of drugs. Therefore, the state was not introducing the testimony to rebut evidence that Dennis did not use drugs as Dennis had not testified at that time.

The state argued in their closing argument at least twice that Dennis stole the gun to sell for crack. R. 466, ll. 12 – 25; R. 467, ll. 1 – 25; R. 468, ll. 1 – 25; R. 469, ll. 1 – 16. There was no evidence to support this.

ARGUMENT

II.

The trial court erred in refusing to charge the jury on ABHAN when Dennis testified that he did not intend to shoot the victim but was only trying to scare him.

At close of the evidence, defense counsel asked the judge to instruct the jury on assault and battery of a high and aggravated nature (ABHAN) which was a lesser included charge of ABWIK. Counsel argued that the shooting incident occurred under a “heat of passion and sudden provocation.” Counsel argued that Dennis was there only as part of the robbery as he had no ill will towards the victim. Dennis was scared and panicked so he started shooting. He wanted to scare the victim. R. 445, ll. 11 – 25; R. 446, ll. 1 – 4.

The state was opposed to the ABHAN charge because shooting a gun was not ABHAN. R. 446, ll. 5 – 12.

The judge agreed with the state and ruled that drawing a weapon and shooting did away with the lesser included charge of ABHAN. R. 446, ll. 13 – 25. Defense counsel argued that in murder cases, voluntary manslaughter was given as a jury instruction in heat of passion cases as a lesser included charge of murder. Therefore, ABHAN should be given as a lesser charge in ABWIK cases when it was a heat of passion case. He again argued that Dennis did not intend to shoot the victim but was shooting to scare him. R. 446, ll. 1 – 4; R. 447, ll. 12 – 25.

After the judge charged the jury, defense counsel renewed his objections concerning his requested jury charges. R. 494, ll. 1 – 7.

The law to be charged is determined by the evidence presented at trial. State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006) citing State v. Gourdine, 322 S.C.

396, 398, 472 S.E.2d 241 (1996); State v. Gaines, Op. No. (S.C. Supreme Court filed October 6, 2008) citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charge as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). In State v. Williams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005), the Court ruled that if there was any evidence to support a requested jury charge, the trial court should grant the request.

In State v. Jones, 133 S.C. 167, 179, 130 S.E.2d 747, 741 (1925), the Supreme Court held that ABHAN was a lesser included offense of ABWIK. William McAninch, W. Gaston Faurey, Lesley Coggiola, The Criminal Law of South Carolina, Fifth Edition 207 (2007). The Supreme Court in State v. Jones, id., also defined ABHAN as "an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation such as the use of a deadly weapon, the infliction of serious bodily injury."

Therefore, the jury instruction of ABHAN as a lesser included offense would have been appropriate.

ARGUMENT

III.

The trial court erred in admitting Dennis's two statements into evidence when he told the investigators after the first statement that he did not want to talk, and was coerced into making the second statement when the investigator threatened to send his case to the federal authorities.

Pretrial, defense counsel made a motion to suppress both statements made by Dennis. The court held a hearing pursuant to Jackson v. Denno, R. 3, ll. 18 – 21.

Detective Albert Casales testified that when he arrived on the scene shortly after the shooting, he received information that Dennis may be involved. After Dennis was detained by the dog team, Detective Casales read him his *Miranda* rights. R. 5, ll. 6 – 25; R. 6, ll. 1 – 25; R. 7, ll. 1 – 19. Dennis did not make any statements to him because he told the detective that he did not want to talk at that time. Dennis did not ask for an attorney. R. 17, ll. 12 – 23; R. 18, ll. 1 – 25; R. 19, l. 1 – 15.

Detective Kip Cooke testified that Dennis was arrested the first time for trespassing. R. 20, ll. 18 – 25. Dennis was taken to the sheriff's office on June 22, 2009 where Detective Cooke read the *Miranda* rights to him again. He told Dennis that he was arrested for trespassing, but that there had been a shooting they wanted to question Dennis about. R. 20, ll. 24-25; R. 21, ll. 1 – 25; R. 33, ll. 6 – 25; R. 34, ll. 1 – 12.

Then Detective Charles Lawrence, who was the lead investigator in this case, came in and started questioning Dennis. R. 20, ll. 24 – 25; R. 21, ll. 1 – 25; R. 34, ll. 8 – 12. Detective Lawrence testified that it was his understanding that on June 22, 2009, Dennis was being detained for a shooting incident. However, he had been arrested for trespassing.

R. 44, ll. 8 – 25; R. 45, ll. 1 – 25. On June 22, 2009, Dennis gave a statement to the investigator that he did not know anything about the shooting. R. 49, ll. 1 – 25.

On June 29, 2009, Detective Lawrence brought Dennis in for questioning again about the shooting incident because the victim had identified Dennis from a photo lineup as being the shooter. R. 50, ll. 13 – 25; R. 51, ll. 1 – 21. Detective Lawrence read Dennis his *Miranda* rights again. R. 52, ll. 1 – 25. Dennis gave a statement on June 29 admitting that he shot Alford but he did it because he feared that the victim was going to shoot him. State's Exhibit 76; June 29, 2009 Statement; R. 72, ll. 6 – 25; R. 73, ll. 1 – 25.

Dennis testified at the hearing that he got scared when Detective Lawrence told him that the Feds could pick up his case, and that it would be harder on him then. He would get more time with the Feds. When Detective Lawrence told him this was his last chance to make a statement, then Dennis decided to give a statement. R. 77, ll. 1 – 25; R. 78, ll. 1 – 25; R. 79, ll. 1 – 6.

Detective Lawrence admitted that he and Detective Cooke may have talked outside the interview room about offering Dennis' case to the Feds, and that Dennis may have overheard this. R. 71, ll. 1 – 25; R. 72, ll. 1 – 2.

Defense counsel argued that the June 22, 2009 statement should be suppressed because Dennis told Detective Casales that he did not want to talk, and therefore invoked his right to remain silent. That information was not passed on to the other detectives. Detective Lawrence then questioned Dennis later that same day. Counsel argued the case of Michigan v. Mosley, 423 U.S. 96 (1975) which held that if an accused invoked his right to remain silent, the police could resume questioning as long as the original request to cease questioning was "scrupulously honored." R. 88, ll. 24 – 25; R. 89, ll. 1 – 12.

Counsel argued that the June 29, 2009 statement should be suppressed because Dennis was threatened by Detective Lawrence saying the Feds could take his case, and he would get more time. R. 89, ll. 13 – 25; R. 90, ll. 1 – 25; R. 91, ll. 1 – 14.

The judge denied the motion to suppress both statements. R. 95, ll. 22 – 25; R. 96, ll. 1 – 24.

The Court of Appeals held in State v. Franklin, 390 S.C. 535, 702 S.E.2d 568 (Ct. App. 2010), that when reviewing a trial court's ruling concerning the voluntariness of a statement, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence.

The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to constitute an abuse of discretion. Id.

In Dennis' case, the trial court abused its discretion in admitting the statements because Dennis had invoked his right to remain silent on the first statement, and this should have been honored throughout the case.

ARGUMENT

IV.

The trial court erred in sentencing Dennis to LWOP when the state did not provide sufficient documentation that the out of state conviction qualified as a most serious offense under S.C. law because it did not meet the elements required to be a strike offense which violated Dennis's Sixth Amendment rights.

After the verdict and at sentencing, defense counsel argued that the sentence of life without parole (LWOP), was not appropriate because the state had not submitted sufficient proof that the out of state charge which was used to enhance Dennis' sentence to LWOP that the charge met the elements required to be a strike offense in South Carolina. Counsel also argued that LWOP in Dennis' case would constitute cruel and unusual punishment. R. 498, ll. 3 – 25.

The state argued that the paperwork from New York indicated that Dennis was convicted of rape of his ten year old step niece. The court ruled that was a strike. However, he told counsel to submit a brief along with a motion to reconsider the sentence, but the judge was going ahead with sentencing. R. 499, ll. 1 – 25.

In his Motion to Reconsider which counsel filed March 25, 2011, counsel argued that the trial court violated the Sixth Amendment and S.C. Code Section 17-25-45 when it considered the computer printouts from New York as qualifying the offense as a most serious offense under South Carolina law. Counsel argued that Dennis' Sixth Amendment right to have a jury of his peers determine any disputed fact related to the LWOP sentence was violated. Counsel then argued that Section 17-25-45 was violated when the trial court

did not use the categorical approach to determine whether the 1987 conviction constituted a most serious offense.

Counsel cited the case of Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt.” In Apprendi, the sentence was enhanced on the basis that the “hate” crime was committed with a biased purpose. Memorandum of Law in Support of Motion to Reconsider, p. 4.

Dennis argued that his case was similar to Apprendi’s in that Dennis was not challenging his prior conviction in New York. He was challenging whether it constituted a most serious offense in South Carolina; and therefore a jury needed to determine that issue. Memorandum of Law in Support of Motion to Reconsider, p. 6.

In State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003), the Supreme Court held that the indictment of the prior conviction was insufficient to show that the prior conviction for rape was a most serious offense. The state had relied on a “form indictment” as evidence of the 1976 rape conviction. Memorandum in Support of the motion to Reconsider, p. 8.

Counsel also argued that the trial court violated Section 17-25-45 when it failed to use a categorical approach to determine if the 1987 New York conviction was a most serious offense. Counsel cited the Fourth Circuit case of United States v. Peterson, 629 F.3d 432 (Fourth Cir. 2011), where the Court discussed the procedure to follow in determining whether a prior conviction could be used to enhance a new conviction pursuant to the Sentencing Guidelines. Memorandum of law in Support of the Motion to Reconsider, p. 10.

The Fourth Circuit in Peterson described the categorical approach from Taylor v.

United States, 495 U.S. 575 (1990), The *Taylor* approach consisted of two steps. The first step consisted of developing a generic definition of the offense based on how the offense was defined in the criminal codes of most states. One state's definition could not be used because that could result in an enhancement in one state that would not meet the definition of that same crime in another state.

In the second step, after determining the generic definition of the predicate offense, the court if the prior conviction constitutes a conviction of the generic offense by comparing the elements of the conviction with the generic offense. United States v. Peterson, *supra*.

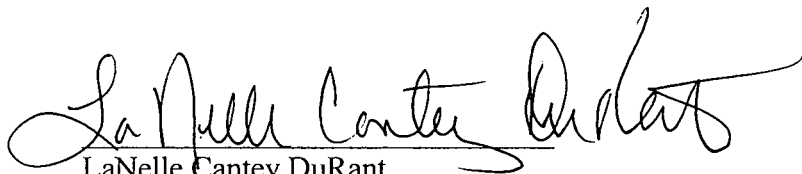
The trial court in Dennis' case erred in relying on the computer printouts instead of comparing the elements. The rape charge in New York was a Class B felony while the CSC with a minor in South Carolina is a Class A felony. The sentence in New York was six to eighteen years. CSC with a minor in South Carolina carries a mandatory minimum sentence of twenty-five years.

The trial court needed more information to determine that the New York conviction was a most serious offense in South Carolina.

CONCLUSION

Based on the above, the convictions and sentences should be reversed and the case remanded for a new trial on Issues 1, 2, and 3. Appellant should be resentenced without LWOP on Issue 4.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is fluid and cursive, with the first name "LaNelle" being the most prominent.

LaNelle Cantey DuRant
Appellate Defender

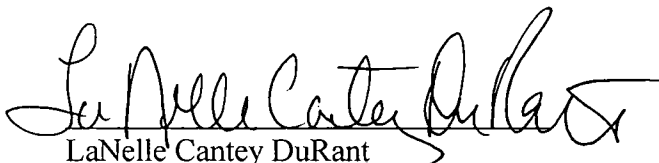
ATTORNEY FOR APPELLANT

This 4th day of October, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 4, 2012

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

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