STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2011-195606

The State,

Respondent,

vs.

Freddie Edwards,

Appellant.

FINAL BRIEF OF RESPONDENT

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I.

Did the lower court err in failing to grant a directed verdict where the State's case against Mr. Edwards was entirely circumstantial and the State failed to present substantial evidence of guilt?

II.

Did the lower court err when it allowed the State to "open on the law" during closing argument thereby denying the defense any opportunity to respond to the State's closing argument on the facts?

(FBOA, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge erred in denying Appellant's motion for directed verdict of acquittal for lack of evidence of malice aforethought where there was eye witness testimony of Appellant's expressed threat to kill victim immediately before Appellant pinned victim to the ground and shot him in the mouth.

II.

Whether the trial judge erred in not requiring the prosecution to present full argument prior to Appellant's argument when Appellant lost his right to last closing argument by presenting witnesses and introducing evidence.

RESPONDENT'S STATEMENT OF THE CASE

The instant appeal arises from a re-trial subsequent to Appellant's grant of post-conviction relief. The charges were originally brought in August of 2005.

A Greenwood County Grand Jury indicted Appellant, Freddie Edwards, in August 2005 for the murder of George Freeman, (2005-GS-24-1003), and possession of a firearm or knife during the commission of a violent crime, (2005-GS-24-1004). (R. p. 200-202). Appellant's first trial was held August 28-31, 2006, before the Honorable Cordell M. Maddox. E.P. Godfrey, Jr., represented Appellant at that trial. The jury convicted Appellant as charged and the trial judge sentenced Appellant to thirty (30) years imprisonment for murder and two (2) years, concurrent, for the weapon charge. Appellant did not appeal. Appellant subsequently filed an application for post-conviction relief complaining, in part, that he was denied the right to direct appeal. On January 4, 2008, the Honorable William P. Keesley granted a belated appeal, and denied and dismissed the remainder of the application.[1] Appellant appealed to obtain the belated review. On March 1, 2010, the South Carolina Court of Appeals granted certiorari to review the direct appeal issue, and, upon review of the issue, reversed the convictions and remanded for a new trial.[2] *Edwards v. State*, Unpublished Op. No. 2010-UP-173 (S.C.Ct.App. filed March 1, 2010).[3] The State sought rehearing which

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[1] Judge Keesley accepted Appellant's request to withdraw the remaining grounds, finding his request was voluntary and made with the assistance of counsel.

[2] Appellant argued that the trial judge erred in denying his request to charge involuntary manslaughter.

[3] Though this jurisdiction does not generally allow citation to South Carolina unpublished opinions, an unpublished South Carolina appellate court opinion may be

the Court denied on April 22, 2010. The State subsequently petitioned the Supreme Court of South Carolina for review. The Supreme Court of South Carolina denied the State's petition on March 2, 2011, and issued the remittitur on March 29, 2011.

On June 20, 2011, the State called the charges for a second time. A jury trial was held June 20-23, 2011, before the Honorable Frank R. Addy. Rauch Wise, Esq., represented Appellant at this second trial. The jury convicted Appellant of murder and the possession of a weapon charge. (R. p. 175, lines 1-6). The judge sentenced Appellant to thirty (30) years imprisonment for murder, and five (5) years, concurrent, on the weapon charge. (R. p. 178, lines 3-8). This appeal follows.

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cited in a case where the opinion is directly involved. See Rule 268, SCACR (d) (2).

RESPONDENT'S STATEMENT OF FACTS

On July 16, 2005, a group of men gathered to play poker in Appellant's detached building next to his home. The group of men included, in addition to Appellant, victim's brother Gregory Harrison, Clyde Marshall, Derek Saxon, and Ben Smith. Victim, George "Meat" Freeman, arrived after the game began. Appellant instituted a new rule for the game – that if one folds out of turn, the offender must pay a two dollar fine. This rule became a point of contention between Appellant and victim.

Gregory Harrison testified that no one told victim about the new rule until approximately thirty (30) minutes after victim arrived. (R. p. 6, lines 11-20). He testified victim only became aware of the rule when "one of the guys folded out of turn and he seen what Fred was telling the other guy to pay the two dollars...." (R. p. 6, lines 20-22). According to Harrison, victim stated if "he folds out of turn he ain't going to pay the two dollars." (R. p. 6, lines 22-23). Harrison testified that Appellant "got real angry" and the two "had words" but did not hit each other. Things settled after this initial confrontation between Appellant and victim, and the group resumed play. Approximately ten (10) minutes later, "they had words again." (R. p. 7, lines 1-5; p. 8, lines 8-12). Victim again indicated he would not pay the two dollar fine if he folded out of turn. (R. p. 7, lines 8-15). Both victim and Appellant were "on their feet" and shouting at each other after victim's second statement, but, again, did not exchange blows. (R. p. 7, line 17 - p. 8, line 7; p. 8, lines 20-24). Harrison testified that after the second exchange, Appellant "hit the table ... and said everybody get out of my house." (R. p. 9, lines 3-4; p. 9, lines 12-14). Appellant then

immediately "ran out of the door" of the "entertainment house" and went into his residence. (R. p. 9, lines 4-5; p. 9, lines 15-20; p. 10, lines 11-17). Harrison testified he told victim, his brother, that Harrison thought Appellant was "going to get a gun." Harrison and victim thereafter exited the building to go to victim's van to leave together as Harrison did not have a car at the house. (R. p. 9, lines 6-8; p. 10, lines 18-23; p. 12, lines 12-15). Victim was walking toward the van counting his money. (R. p. 12, lines 18-24). Harrison testified he was "trying to get out of there quick because [he] kn[e]w he was going to get a gun." (R. p. 13, lines 14-15). As the two were leaving, Harrison testified he saw Appellant "running down the steps" from the home "with a gun." (R. p. 14, lines 4-15). Harrison testified that victim tried to "get away from him and ... ran around the corner" of Appellant's home. (R. p. 14, lines 16-17). Appellant ran after victim with Appellant's gun visible, "down by his side." (R. p. 17, lines 1-6). Though Harrison initially ran another way from victim, he "went back around the house to make sure he was okay...." (R. p. 15, line 11- p. 16, line 21; p. 17, lines 7-15). Harrison testified when he went around the house, he saw Appellant on top of victim. (R. p. 16, lines 23-25; p. 18, lines 13-14). Harrison testified that victim was on the ground, money still in one hand. (R. p. 19, lines 19-20). Harrison testified:

> ... Fred was telling him stuff like, I am going to kill you and all of that stuff like that. So I went around to try to stop him and I told Fred, I said, just leave him alone, you know. And my brother told him, please don't kill me, like that. And the next thing I know, boom.

(R. p. 17, lines 17-22). (See also Tr. p. 19, lines 19-23; p. 20, lines 12-15).

Harrison described how Appellant had his knees on victim as victim was on the ground and how Appellant was "shoving the gun down in" victim's mouth, attempting "to

shoot him in the mouth." (R. p. 20, lines 1-8). Harrison also described Appellant's reaction immediately after Appellant shot victim:

> He got up and put his head down like this and was shaking his head like this right here saying he messed his life up. And I told him, I said, I don't know if I can say the words I said or what. I said motherf****r, you killed my brother. And then he pointed at me like this and then he put it back down and he kept on going around the house with his head down.

(R. p. 21, lines 2-8).

Harrison testified his brother was "still breathing" when he reached him, but that "[t]he side of his head [was] blowed off." Harrison called 911. (R. p. 21, lines 17-23).

Clyde Marshall testified similarly as to the arguments preceding the shooting. Marshall testified victim arrived after the new rule was instituted, and after one of the players, "Sax," had already paid the two dollar fine. (R. p. 25, lines 14-24). He recalled Appellant later told victim about the rule and victim stated he would not comply. Words were then exchanged, but no blows were exchanged. Marshall testified that he offered to pay the fine if victim folded early "to keep peace." (R. p. 26, lines 8-21). Shortly after, the two stood again and started arguing again. (R. p. 26A, lines 6-13). Appellant left. Marshall testified he heard Harrison tell victim, "let's go because Fred gone to get a gun," and saw them both leave. (R. p. 26A, lines 16-18). Marshall later heard shots, but did not see the shooting. (R. p. 26A, lines 19-20). After the shots were fired, Harrison came back to Marshall and stated, "Fred done killed my brother." (R. p. 26A, lines 20-22). Marshall testified he told Harrison, "Fred ain't killed your brother, Fred might have shot him in the leg. And so that is the way it was. I never did go out there." (R. p. 26A, lines 22-24).

Marshall testified that he also saw Appellant after the shooting. Appellant was "at the doorway to go back up the steps on the patio," and "said, I done messed up my life." (R. p. 27A, lines 3-9). Marshall testified that victim had been drinking that night. (R. p. 28, lines 4-10).

Derek "Sax" Saxon also testified about the new rule at the card game and the resulting argument. Saxon testified that he was the one who reminded Appellant to tell victim about the new rule. (R. p. 29A, line 13 - p. 30, line 2). Saxon testified that after Appellant told victim about the new rule, victim "said he ain't going to pay no two dollars," victim "jumped up" as did Appellant, and a verbal argument ensued. (R. p. 30, lines 5-24). Saxon recalled Appellant told everyone to leave and people started to leave. (R. p. 31, lines 7-11). Saxon testified that Harrison "said, let's go Meat, I believe he is going to get his gun. And Meat said, well, I will get my gun," but Appellant had already left and could not have heard victim's comment. Moreover, Saxon testified that he never saw victim with a gun. (R. p. 31, lines 11-22). Saxon testified that, approximately five minutes after Appellant left, he saw Appellant "come out with a gun on the side." Harrison and victim also saw him approach and "started running." Appellant "started jogging right behind them." (R. p. 32, lines 1-3; p. 34, line 12- p. 35, line 18). He saw the brothers split in different directions. (R. p. 32, lines 5-6). He later heard a gunshot, but could not see the shooting. (R. p. 33, lines 10-13). After the gunshot, he saw Appellant "came back around the house with the gun on his side and said, the gun, the damn gun went off and it f****d my life up," or "I f****d my life up." (R. p. 33, lines 21-23; p. 39, lines 8-9). Saxon testified that Appellant was very upset. (R. p. 39, lines 20-25). Saxon testified that victim was intoxicated that night. (R. p.

38, lines 6-11).

Ben Smith testified that victim had been playing cards with the group for a while before Appellant explained the new rule. (R. p. 40, lines 20-24). Smith testified that victim did not agree with the rule, stated he would not abide by the rule, and a verbal argument with Appellant followed. (R. p. 41, line 8-12; p. 42, lines 7-19). The game broke up shortly thereafter with Appellant stating "the game was over with." (R. p. 43, lines 2-11). He saw Appellant go into the house. (R. p. 44, lines 5-6). Maybe "a minute or so" later, Smith saw Appellant come back out of the house with "something in his hand...." (R. p. 45, lines 1-5; p. 51, lines 10-22). Smith testified that victim and Harrison were already in the process of leaving. (R. p. 45, lines 13-25). He, too, heard the shot but did not see the shooting. (R. p. 46, lines 1-4). Smith testified he saw Appellant after the shooting, and heard him "say, the SOB have done F'd my life up." (R. p. 46, lines 9-15). He appeared upset. (R. p. 46, lines 17-24). Smith recalled that his impression was that victim had been drinking and was "pretty high when he come in I think." (R. p. 47, lines 8-9). Smith testified that he never saw victim with a weapon. (R. p. 52, line 6-7). Smith also recalled that Harrison stated right before the shooting, "If you kill my brother" or "shoot my brother I am going to shoot you, one or the other." (R. p. 49, lines 9-19).

Mike Martin, formerly a captain with the Greenwood City Police Department, testified that when he arrived on the scene, he saw the victim's body in the side yard, and saw Appellant seated inside the home. (R. p. 54, lines 3-5; p. 57, lines 18-21). Martin testified that Appellant was "visibly upset," and was crying, but told the officer, "he had an argument,

Meat grabbed the gun and it went off." (R. p. 58, line 4- p. 59, line 10; p. 60, lines 4-18). A second officer, Mike Murdock, similarly testified that while taking Appellant's statement at City Hall, Appellant "broke down, he was crying uncontrollably." (R. p. 61, lines 10-19). Murdock testified that Appellant eventually gave a statement and related he followed victim into the side yard where victim was trapped by a locked fence. Victim attempt to run back past Appellant, but Appellant "clotheslined" him. Appellant then stated victim "grabbed the gun or at the gun and the gun discharged." (R. p. 62, line 16-p. 63, line 1). Another officer, Travis Clark, testified that Appellant's house was neat with the exception of one area in the bedroom: "one single dresser where the items were seemed to be hastily pulled out and thrown to the floor." (R. p. 63A, lines 20-24). A box of ammunition was also found in that same room. (R. p. 63A, lines 13-18). A shoulder holster was found by the back door. (R. p. 63A, lines 1-3). Clark also testified that victim's body was in the side yard, his money still clutched in his left hand. (R. p. 64, lines 8-17).

Gunshot residue ("GSR") testing was performed for both Appellant and victim. Agent Joseph Powell, formerly of SLED, testified that Appellant had a concentration of residue on the left hand with fewer particles found on the back of the right hand. (R. p. 69, line 19 - p. 70, line 7). The agent testified that this was consistent with both hands being near or on the gun as it fired. (R. p. 70, lines 10-19). It is not, however, consistent with the gun being held in one hand to one side. (R. p. 71, line 23 - p. 72, line 8). He further testified that there was no residue on victim's palms, but a high concentration on the back of the right hand, and a lesser amount on the back of the left hand. (R. p. 73, lines 11-19). Agent Powell testified that this was consistent with the left hand being closed. (R. p. 74, lines 1-8).

Further, it is inconsistent with one hand grabbing a wrist, or grabbing the cylinder or barrel of the gun. (R. p. 74, line 19 - p. 77, line 12).

Tracey Thrower, a firearms expert from SLED, testified that he examined Appellant's weapon. He first noticed what appeared to be"skin type material" present on the "right side of the barrel near the muzzle area...." (R. p. 81, lines 13-17). Another SLED division confirmed, after DNA testing, that the skin matched to victim. (R. p. 88, line 1-8). Agent Thrower testified that he examined the gun to determine whether it was properly functioning. He found the gun "has two internal automatic safeties, " which were properly functioning. (R. p. 83, line 19 - p. 85, line 3). He testified that "unless this trigger is held to the rear at the time of firing this gun cannot fire." (R. p. 85, lines 5-6). The agent attempted to make the gun fire accidentally but to no avail:

> ... during my testing I want to see if there is any way I can make these fire unintentionally without pulling the trigger. Something else that I will do is with the hammer cocked to the rear I will tap the trigger and that is how I test these two safeties to see if this spring, the springs that operate these two systems are strong enough and fast enough to be quicker than the fall of the hammer. So I will cock it and I will tap the trigger causing it to release without any pressure on the trigger. They worked.

(R. p. 85, lines 6-15).

Further, Agent Thrower testified he even attempted to accidentally discharge the weapon by hitting the gun in various places, again to no avail:

> ... I will cock the hammer to the rear and I will take a non-marring, typically a rubber mallet and I will start tapping the gun in various places to see if I can jar it lose. And on this gun I was able to do so. Okay. By tapping on the rear of this back strap or on the rear of this hammer I was able to cause this hammer to fall. Okay. However, these two internal safeties that I have been

> talking about were fast enough that every time I did it they prevented this gun from firing....

(R. p. 85, lines 16-25).

Further, the gun has a "long heavy trigger pull," requiring "around twelve and a half pounds" to pull the trigger. (R. p. 87, lines 17-22).

Dr. Joel Sexton, a forensic pathologist, testified that his autopsy review of the victim revealed:

> ... a gunshot wound of the left side of the face that entered, well there was injury at the corner of the mouth on the left side which consist of tearing of the flesh at that location. There were also some tears on the inside of the, not the eye itself but the tissue around the eye between the eye and the nose. And there was a devastating fracture of the upper jaw which we refer to as the maxilla. And a gunshot wound that passed through his brain and out the back of his head on the right side above and slightly behind the ear.

(R. p. 92, line 23 - p. 93, line 7).

Dr. Sexton found no injuries at all to the hands. (R. p. 93, line 25 - p. 94, line 6). Dr. Sexton opined, due to lack of tattooing or stippling, "the gun was either right against the skin or as I mentioned earlier since it was the corner of the mouth, just inside of the mouth or at a distance far enough away that the powder could not reach the skin. And in this particular gun's case it could be a foot and half, it could be two and a half feet." (R. p. 95, lines 2-7). (See also R. p. 95, lines 8-20). The mouth also exhibited torn or split skin which was indicative of the muzzle being close to or inside the mouth. (R. p. 96, lines 11-21). He also opined, "[t]he path of the bullet is from the corner of the mouth on the left side up to the right and to the rear coming out above and behind the right ear where I am pointing at this

location. So it is going upward to the rear and to the right." (R. p. 96, line 24- p. 97, line 3). Dr. Sexton also opined that the injury is consistent with victim on the ground, and the gun being shoved into his mouth before firing. (R. p. 100, lines 1-24). Further, Dr. Sexton not only confirmed that victim had a .186 blood alcohol level, but also that such a level could "reduce his ability to defend himself" as "they may not react as quickly or perhaps not even with much strength," depending on their level of tolerance. (R. p. 102, lines 12-13; p. 107, line 19-p. 108, line 3).

The defense presented Appellant's stepson Jovan Dawson who testified that after the shooting Appellant "was in a state of shock," and told Dawson to call 911 because "someone had accidentally been shot." (R. p. 112, lines 1 - 24). Appellant also took the stand. Appellant testified similarly about the new rule and victim's resistance to the rule. Appellant testified that victim stood up to argue, balled up his fists, but did not hit him. In fact, Appellant testified he did not do anything at that point because he wanted to continue the card game. (R. p. 114, line 1 - p. 115, line 7). Appellant testified that victim was not acting his normal, fun self that night. Appellant testified that during the exchange, victim called him "Freddie" when "he normally called [the elder man] Mr. Edwards." (R. p. 115, line 15 - p. 116, line 4). Appellant testified that "scared" him and prompted him to tell victim to leave. According to Appellant, victim replied he would not leave. Appellant testified that Harrison, trying to calm Appellant down, approached Appellant from behind and Appellant felt "jammed in." (R. p. 116, line 8 - p. 117, line 22). Appellant testified he went into his house and "started throwing clothes out of the drawer looking for my gun." (R. p. 119, line 18 - p. 120, line 6). He retrieved the gun, found victim and Harrison standing by their van

in the process of leaving. Victim ran, and Appellant chased victim. Victim was trapped in the yard by virtue of a locked gate. Victim was attempting to climb over the fence, but could not. Victim turned and attempted to run toward Appellant. Appellant testified he was concerned victim might take the gun from him. Appellant testified he clotheslined victim, dropping to one knee as he hit victim. He recalled victim said, "Freddie, don't shoot me," but also "went for the gun," reaching for it with both hands. (R. p. 120, line 23-p. 126, line 24). Appellant pulled back and the gun fired. (R. p. 127, line 18 - p. 128, line 5). He did not recall either pulling the trigger intentionally or even having his finger on the trigger. (R. p. 128, lines 11-23). Lastly, in his defense, Appellant presented two witness who testified to general good character.

As noted above, the jury found Appellant guilty of murder.

ARGUMENT

I.

The trial judge properly denied Appellant's motion for directed verdict where there was direct evidence in the form of eye witness testimony that Appellant chased the victim, threatened to kill the victim, pinned the victim on the ground, put a .44 pistol in victim's mouth, and fired causing victim's death.

Relevant Facts:

At trial, defense counsel argued that the State failed to present any evidence supporting malice aforethought:

> ... taking the evidence from the light most favorable to the State there is no showing of malice aforethought in this case to justify a murder conviction. I think when you listen to the audio tape it is quite obvious that there was anything but malice aforethought in this case. And without having that, of course, the State has not met its burden of proof.

(R. p. 109, lines 5-12).

The State responded:

> ... in the light most favorable to the State there is evidence of malice. I know there is not any, no longer a jury instruction in regard to arming yourself with a firearm. I think the State will argue going and getting a firearm, chasing this man down, clotheslining him, you take the testimony of the pathologist there are scenarios where this was an intentional act. I believe in the light most favorable to the State there is evidence of malice.

(R. p. 109, lines 15-24).

The trial judge denied the motion, noting there was "evidence from which a reasonable finder of fact may conclude that malice was present thereby justifying a conviction on the indicted charge." (R. p. 110, lines 1-4).

Appellant renewed his motion at the close the case. (R. p. 132, line 25 - p. 133, line 8). The trial judge again denied Appellant's motion, without response from the State, noting, "I ... find that there is substantial evidence from which a jury could find that the defendant is in fact guilty of murder in this case." (R. p. 133, lines 9-12).

On appeal, Appellant submits that "there is simply no substantial evidence from which malice can be proved." (FBOA, p. 12).

Discussion:

A defendant is only entitled to a directed verdict of acquittal if the State fails to offer proof of the offense charged, or its proof merely raises a suspicion of guilt. *State v. Buckmon*, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). Here, there is direct, eye witness testimony on not only the shooting, but Appellant's expression of his malice immediately prior to the shooting – specifically, Appellant's statement to victim that Appellant intended to kill the victim moments before putting a gun in victim's mouth and pulling the trigger. The trial judge properly denied the defense motion, and his ruling should be affirmed.

When reviewing the trial judge's denial of a motion for a directed verdict, the appellate court will view the evidence in the light most favorable to the State. *Id. See also State v. Frazier*, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the

accused, the Court must find the case was properly submitted to the jury." *State v. Freiburger*, 366 S.C. 125, 136, 620 S.E.2d 737, 743 (2005). *See also State v. Weston,* 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005), *cert. denied* (Jan. 31, 2007). Conversely, "[t]he trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Frazier*, 386 S.C. at 531, 689 S.E.2d at 613. "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." *State v. Stanley*, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005). There is no absence of evidence here. In fact, Appellant's argument on appeal does not rest on the lack of evidence, but an asserted lack of credible evidence of malice aforethought. Appellant is mistaken in law and fact.

Appellant concedes many of the facts of record – the game, the disagreement, Appellant's leaving the entertain shed to enter the house and retrieve a gun, Appellant chasing the victim and eventually shooting the victim. In Appellant's view, "[t]he only question in this case was Mr. Edwards' state of mind at the moment that Mr. Freeman was shot." (FBOA, pp. 12-13). The state of mind in question would be the necessary criminal intent to support murder, *i.e.*, the intent to deliberately act with malice aforethought. S.C. Code §16-3-10 ("'Murder' is the killing of any person with malice aforethought, either express or implied.").

"'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998),

citing State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987). It has also been"defined as a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *State v. Wilds*, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003). "Malice may be either express or implied." *Id.* The difference is a matter of proof, not designations of differing concepts of malice. *Id, citing State v. Milam*, 70 S.E. 447, 449 (1911) ("merely the manner in which the only kind known to the law may be shown to exists-that is, either by positive evidence or by inference"). Appellant concedes that the testimony from Gregory Harrison of the "circumstances of the shot" would "indicate malice." (FBOA, p. 13). Appellant then attempts, however, to dismiss the evidence by engaging in weighing the testimony, opining that the testimony "is entirely contradicted by the State's documentary and scientific evidence." Id. Respondent submits there are three preliminary flaws with Appellant's argument.

As a first matter, Appellant did not argue that the witness' testimony should be discounted based on a contradiction with other evidence of record. Therefore, the argument is not preserved for review. *State v. Curtis*, 356 S.C. 622, 634, 591 S.E.2d 600, 606 (2004), *citing State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (argument on appeal was not preserved for review where Appellant argued a different argument in support of the motion for direct verdict to the trial judge). As a second matter, the trial judge is prohibited from weighing the evidence when considering the motion. *Weston*, 367 S.C. at 292, 625 S.E.2d at 648 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."). The argument, even if preserved, would lack merit. As a third matter, the testimony must be taken in the light most favorable

to the State. *Id.* Appellant erroneous suggests that the evidence be evaluated in the light most favorable to the defendant – an incorrect statement of law. At any rate, the record well supports there was ample evidence of malice aforethought.

First, as conceded by Appellant, is Gregory Harrison's testimony. Mr. Harrison testified not only that Appellant chased the victim, restrained him and shot him in the mouth, (see R. p. 17, line 7 - p. 20, line 25), he also testified that Appellant stated to the victim, "I am going to kill you," immediately before chasing him down and shooting him in the face, (R. p. 17, lines 17-22). Clear statements of intent by the defendant will support a finding malice aforethought. For example, in *State v. Fields*, 264 S.C. 260, 267-268, 214 S.E.2d 320, 322 (1975), the state supreme court reviewed whether there was evidence of malice in the record to support the conviction and summarily found evidence of malice in the appellant's statement to "the deceased, 'I'm going to kill you, god damn it.'" *Id. See also* 40 C.J.S. *Homicide* § 45 (2012 Update) ("Malice is express when admitted or asserted, or shown by positive and direct evidence"). Here, like *Fields*, there was direct evidence of Appellant's malice aforethought. Harrison testified:

> ... Fred was telling him stuff like, I am going to kill you and all of that stuff like that. So I went around to try to stop him and I told Fred, I said, just leave him alone, you know. And my brother told him, please don't kill me, like that. And the next thing I know, boom.

(R. p. 17, lines 17-22). (See also R. p. 19, lines 19-23; p. 20, lines 12-15).

Consequently, Appellant's attempt to couch the evidence as solely circumstantial, (see

FBOA, p. 12), is not supported by the record.[4] *See State v. Meggett*, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct.App. 2012) ("whether a defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, *without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct.*") (emphasis added); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 867 (Ct.App. 2001) ("Nesbitt's statement referring to the perpetrators' agreement to 'do the store' constitutes direct evidence that the specific intent to rob the store existed"); *State v. Johnson*, 65 S.E. 1023, 1024 (1909) ("The intent with which an act is done denotes a state of the mind, and it can be proved only from expressions, or conduct, or both, considered in the light of the given circumstances."). Additionally, it was uncontested that Appellant went to his home, brought out a loaded .44 revolver, then went in search of victim. In fact, Appellant admitted as much in his voluntary statement. (See R. p. 62, line 3 - p. 63, line 1). Moreover, he specifically admitted victim was trapped by the locked fence, and, as victim attempted to run back toward the front of the house, Appellant clotheslined victim, bringing him down to the ground. (R. p. 62, lines 15-23). Such acts, Respondent submits, are surely circumstantial evidence of acting with malice aforethought. Moreover, the physical properties of the particular gun used would support that the trigger was pulled intentionally – most

[4] Appellant's argument that there was no direct evidence of malice was not raised below, either, and should be considered procedurally barred. *Curtis, supra.* To the extent the argument at trial may be construed as including a lack of direct or circumstantial evidence, Respondent has addressed the issue on the merits.

specifically, that it is highly unlikely that the gun could accidentally fire. (See R. p. 83, line 19 - p. 85, line 3; p. 85, lines 6-15; p. 85, lines 16-25). Agent Thrower testified the gun has a "long heavy trigger pull," requiring "around twelve and a half pounds" to pull the trigger. (R. p. 87, lines 17-22).

This Court has recently visited a similar issue, finding:

> ...applying the any evidence standard and viewing the evidence in the light most favorable to the State, we find sufficient evidence supports the family court's denial of Appellant's motion for a directed verdict. Evidence in the record demonstrates Appellant retrieved a deadly weapon from his brother's closet, walked to another room, opened a window, and pointed the gun. Moreover, the record indicates it required six pounds of pressure to fire the gun and the recoil on the specific firearm in question was "negligible," inferring accidental discharge of the second shot was unlikely. Because the family court could infer malice from a defendant's use of a deadly weapon or from the evidence that the discharge of the weapon was likely not accidental, this evidence was sufficient to overcome Appellant's motion for a directed verdict

In re Walter M., 386 S.C. 387, 391-392, 688 S.E.2d 133, 135 (Ct.App. 2009), *cert. denied* (2011).

The logic in *In re Walter M* is applicable here. Further still, the forensic pathologist, Dr. Sexton, confirmed that the characteristics of the wound would support Harrison's testimony of the event. (R. p. 100, lines 1-24). Likewise, the GSR expert also testified the GSR testing results were consistent with the witness' testimony, particularly with victim's left hand being closed and were inconsistent with victim's hand grabbing Appellant's wrist, or the barrel or cylinder of the gun. (R. p. 74, line 1 - p. 77, line 12). To the extent inconsistencies between Harrison's testimony and the experts' testimony could be considered

in a motion for direct verdict, there are none.[5] However, Respondent maintains that Harrison's testimony of the express intent to kill, and his account of the shooting is sufficient to overcome a directed verdict motion, particular the precise motion here where counsel vaguely argued simply a lack of malice aforethought. (R. p. 109, lines 5-12). This Court has previously articulated:

> "Malice aforethought" is defined as "the requisite mental state for common-law murder" and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. *Black's Law Dictionary* 969 (7th ed.1999). These four possibilities are *intent to kill*, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule).

State v. Kinard, 373 S.C. 500, 503-504, 646 S.E.2d 168, 169 (Ct.App. 2007) (emphasis added).

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[5] Appellant's arguments by footnote on the credibility of the witness testimony are simply not applicable either. In Note 2, (FBOA, p. 6), Appellant argues witnesses indicated that Harrison was not where he could have seen the shooting; however, the testimony at trial established that the two brothers initially took separate paths when attempting to escape, but that Harrison then returned to aid his brother. (See R. p. 15, line 21 - p. 16, line 23). This is jury argument, which, actually, was presented as jury argument. (See R. p. 151, lines 1-13). Further, in Note 3, Appellant attempts to diminish the importance of the expert testimony, concluding "[t]hese facts prove only that Edwards shot Freeman, which is not disputed." (FBOA, p. 6). However, the circumstances of the crime, along with the expressed intent to kill, also support a finding of malice aforethought. Finally, in Note 4, Appellant contest the "probity" of the question regarding the GSR evidence and possibility of victim grabbing Appellant's wrist. (FBOA, p. 9). Appellant had previously testified in his prior trial that victim grabbed his wrist. He eventually admitted same in this trial when faced on cross-examination with his prior testimony. (R. p. 130, line 18 - p. 131, line 18). The State merely reviewed all known possible scenarios when the GSR expert testified. At bottom, Appellant's notes do not affect the evidence or the analysis here.

As demonstrated, an "intent to kill" was expressly stated by Appellant immediately before the shooting. An expressed intent to kill would appear to be direct evidence sufficient to defeat a motion for directed verdict. *Id. See also Fields, supra.* And, that was merely one portion of the evidence in the State's case – evidence that consistently pointed to Appellant's guilt. Again, there was more than ample evidence to submit the case to the jury. The trial judge did not err in denying Appellant's motion for directed verdict.

Appellant's argument to the contrary should be rejected.

II.

The trial judge did not err in denying the defense request to compel the State to open on the law and the facts in order to allow the defendant to respond to the State's argument on the facts. Precedent clearly dictates that when a defendant offers evidence, he loses the right to make the final closing argument.

Relevant Facts:

At the close of evidence, defense counsel "move[d] to require the State to open fully on the law and the facts in this case." (R. p. 133, lines 13-15). Counsel argued that the procedure was not followed for many years in the civil context, but is currently followed in civil cases, and procedure should be changed so that same format is followed in criminal cases. (R. p. 133, line 15-p. 134, line 3). Counsel argued:

> ... it is a denial of due process to not allow the, not require the State to open fully. It is a violation of the Fourteenth Amendment of the U.S. Constitution and due process clause of the State Constitution. And the reason for it being under the procedure that we are getting ready to undergo the State will hear my entire theory of the case before they ever have to utter the first word about their theory of the case. The will have ample opportunity to refute any theory that I put out there. I will never have an opportunity to refute their theory. If they are to require to open fully on the law and the facts then I can refute their theory and then they come in and refute my theory and I think it is a much fairer process for the jury to hear arguing in that order.

(R. p. 134, lines 2-15).

The State maintained that state practice dictates that if the defendant offers any evidence, the full prosecution argues follows the defense argument. (R. p. 134, lines 18-23). The trial judge agreed, and denied the defense request. (R. p. 135, lines 3-11). At the conclusion of both arguments, the defense proffered its "rebuttal" to the state's argument to

preserve his argument for prejudice for review on appeal:

> When Mr. Hodges argued that he was mad when he stood up and called him Freddie, I would argue that that was a concern by Mr. Edwards because he normally didn't call him Freddie and that showed he was, that Mr. Freeman was acting unnormally. When Mr. Hodges argued no reason to go get a gun I would have argued going to get a gun was not illegal. When he said that Freddie being mad when he left the house I would have pointed that Mr. Edwards never said anything as he came out of the house with the gun. Never made any threats against Mr. Freeman and never pointed the firearm at Mr. Freeman. When he said the carrying of the pistol is reckless disregard I would have pointed out that that would mean that anyone who walked upon their premises with a firearm could be guilty of murder for they would be in reckless disregard. When he was talking about, thinking about I am going to tell the police I would have argued that due to the emotion on the tape that wasn't true and if someone is so coldhearted as be able to murder somebody and then sit down and act like he did then they probably are really coldhearted. The defendant said a couple of different versions, I would have pointed out that in the statement he gave the police that night the really only version he gave them was that Mr. Freeman was on the ground first before the gun was grabbed. When he argued about the angle of the bullet I would have pointed out that if the head was titled back a little bit the bullet would have been at the same angle as shown on he diagram and was testified to by Dr. Sexton. I would have argued that when the gun, when he pointed out that the gun was pulled away from Mr. Freeman I would have argued that when the gun was pulled back that a reflex action easily could have pointed the gun directly at Mr. Freeman. He said grabbing the hand with money was not possible. I would have pointed out that we demonstrated through Mr. Edwards grabbing the paper that it was possible to grab the gun with the money in your hand. And when he argued that GSR was inconsistent with grabbing we would argue that the GSR was consistent with the gun being fired immediately upon Mr. Freeman's hand slipping off of it. And when he says talking about the blood on the t-shirt, I would have pointed out that Dr. Sexton testified the blood on the t-shirt could have been splattered on him and that had the gun occurred at contact range there should have been more blood on the t-shirt. And when he said the different versions of the defendant are not consistent with the forensic evidence. I would have testified that Dr. Sexton clearly said there were a myriad of versions that could have created the same bullet path and everything. And those are the things that I would have argued had he been required to open fully on the facts of the case.

(R. 169, line 15-p. 171, line 15).

Appellant also moved for a new trial based, in part, on the order of argument. (R. p. 176, line 20 - p. 177, line 11).

In the appeal, Appellant complains the trial judge's ruling "depriv[ed him] of any opportunity to respond to the State's arguments" and "deprived him of the effective assistance of counsel and due process of law." (FBOA, p. 16).

Discussion:

In South Carolina, our courts have held that "[t]he right to open and close the argument to the jury is a substantial right, the denial of which is reversible error." *State v. Pinkard*, 365 S.C. 541, 543-544, 617 S.E.2d 397, 398 (Ct. App. 2005), *quoting State v. Rodgers,* 269 S.C. 22, 24-25, 235 S.E.2d 808, 809 (1977). Under state practice, "it is well established that where the defendant calls no witnesses and offers no evidence in his behalf, his counsel is entitled to have the concluding argument to the jury." *State v. Mouzon*, 321 S.C. 27, 31, 467 S.E.2d 122, 125 (Ct. App. 1995). Under this practice, the defendant never loses the right to argument. Rather, he merely loses the right to present his argument last. *See State v. Gellis*, 155 S.E. 849, 855 (1930) ("It is evident from the more recent decisions of this court that the rule is that if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments."). Historically, the right to closing argument follows the party with the burden of proof. Stein Closing Arguments § 1:6: *Right to open and close; order of argument* (2011-2012 ed.) ("Generally, the right to make opening and closing follows the person having the burden of proof"). Some jurisdictions also follow rules for rebuttal and for limitation on scope of

argument. Id. However, there is no right to a certain order of argument or certain scope of argument. Appellant's claim of a violation of due process is not support in law or fact. Further, his claim of deprivation of "effective assistance" is not preserved for appeal as it was not raised below. *See, e.g., State v. Freiburger,* 366 S.C. at 134, 620 S.E.2d at 741 (issue not preserved for appeal where one ground is raised below and another raised on appeal). At any rate, Appellant can show no error in the application of state practice.

As noted, the order of closing in criminal cases is determined by the testimony received at trial: "In a criminal prosecution, where a defendant is separately tried and introduces no testimony, he is entitled to the closing argument to the jury." *State v. Crowe*, 258 S.C. 258, 268, 188 S.E.2d 379, 384 (1972). In fact, where any co-defendant offers evidence in a joint trial, the structure of hearing the closing arguments changes and the State is allowed final closing. *See State v. Smith*, 387 S.C. 619, 625, 693 S.E.2d 415, 418 (Ct.App. 2010), *citing State v. Crowe*, 258 S.C. at 268, 188 S.E.2d at 384 ("When defendants are jointly indicted and any one of them introduces evidence, the State is entitled to the closing argument."). The only difference is in capital cases where, by the statute, the defense has the final closing. See S.C. Code § 16-3-28 ("Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument."). Even the joined non-capital counts do not affect this exception. *Cooper v.*

Moore, 351 S.C. 207, 218, 569 S.E.2d 330, 335 - 336 (2002) ("We find § 16-3-28 applies to non-capital charges when a defendant is on trial for a capital charge and that respondent was prejudiced by his attorneys' failure to inform him of his statutory right to make a guilt phase closing statement to the jury."). Given this is not a capital case, that statute, of course, does not apply. Consequently, the non-capital practice in South Carolina applies. This order was followed by the trial judge and there is no error in the application of common practice. Further, there is no constitutional error in the practice itself. Neither is the practice out of line with the practice in other jurisdictions.

Indeed, the South Carolina practice in non-capital cases conforms with practice in other jurisdictions that demonstrates flexibility in the order of argument. *See, for example, State v. Martinez*, 651 A.2d 1189, 1195 (R.I. 1994) ("agree[ing] with the states that have held that the order of argument lies within the sound discretion of the trial justice" and collecting cases). See also 75A Am.Jur. 2d Trial § 449 (Updated November 2012) ("A defendant loses the right to open and conclude closing argument when the defendant introduces evidence other than his or her own testimony."); Stein Closing Arguments § 1:6, *Right to open and close; order of argument* (2011-2012 ed.) (noting "variations" in practice, including allowing "a criminal defendant who introduces no evidence ... to open and close the final arguments, or at least to argue after the state."). If any "trend" may be detected, it is that the prosecution is always allowed the final argument.

For example, in Georgia, a pre-2005 statute provided "[i]f the defendant introduces no evidence, his counsel shall open and conclude the argument to the jury." By 2005

amendment, a Georgia state statute now provides the prosecution has last closing in all criminal cases. *McKenzie v. State*, 667 S.E.2d 43, 48 (Ga. 2008). See also Ga. Code § 17-8-71 (2005) ("After the evidence is closed on both sides, the prosecuting attorney shall open and conclude the argument to the jury. The defendant shall be entitled to make a closing argument prior to the concluding argument of the prosecuting attorney."). In Nevada, even in death penalty cases, the prosecution has the right to open and close argument. *Williams v. State*, 945 P.2d 438 (1997), *receded from on other grounds Byford v. State*, 994 P.2d 700 (2000) ("NRS 175.141 mandates that the State open and close the argument. The district court is bound by statute and does not have the authority to allow Williams to argue last."). Even so, in North Carolina, the criminal rules provide, much like South Carolina, that the criminal defendant may open and close if the defendant does not offer evidence. *See State v. Matthews*, 720 S.E.2d 829 (N.C.Ct.App. 2012). It is clearly a matter of state procedural preference which neither offends due process nor any other constitutional right. *See Hale v. United States*, 410 F.2d 147, 152 (5th Cir.), *cert. denied*, 396 U.S. 902 (1969) ("The order and extent of the argument is entirely within the discretion of the trial court.").

Appellant argues, however, that the practice in this State offends notions of fairness and due process because there is no basis for the practice (the prior rule having been repealed); and current civil rules require a different order. (FBOA, p. 18). Appellant has failed to show support for his contention there is any due process violation.

As noted, the order of closing is a matter of state procedural rule. The United States Supreme Court has consistently held that the States are free to shape their own rules of

procedure. *See, e.g., United States v. Scheffer*, 523 U.S. 303, 316 (1998), *quoting Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("we thus stressed that the ruling did not 'signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'"). The right to argument is even further removed from the right to present evidence, or rebut evidence, as argument is not evidence. *See, e.g., Sosebee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987) ("the solicitor's closing argument is not evidence"); *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006), *quoting S.C. Dept. of Transp. v. Thompson,* 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct.App.2003) ("'[a]rguments made by counsel are not evidence'"). However, the Supreme Court has recognized the right to a closing argument is an important right securing "a basic element of the adversary factfinding process in a criminal trial." *Herring v. New York*, 422 U.S. 853, 858 (1975). "[A] total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense." *Id* at 859. There is no such denial here. Defense counsel for Appellant presented a lengthy closing argument. (See R. p. 137-155). Again, Appellant has failed to show support for his position.

Further, the prior state court rule relied upon in *Atterberry v. State*, 129 S.C. 464, 124 S.E.648 (1924), and referenced by appellant, (See FBOA, pp. 16-17), while no longer in existence, did not even specifically address the order of argument – merely that "[t]he party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party." 129 S.C. at __, 124 S.E. at 651. Further, the Rule was subsequently changed to reflect: "The

party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." *State v. Lee*, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), *overruled on other grounds State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). Later case law clarified that the prosecution could choose whether to argue law or facts. *State v. Rodgers*, 269 S.C. at 25, 235 S.E.2d at 809 ("There is nothing in Circuit Court Rule 58 which limits the initial closing argument to the law of the case, it simply requires a discussion of the law to be included in that argument if demanded by the defendant. The solicitor is not required to make an opening argument to the jury on issues of fact....").[6] But that does not address the specific argument at issue here. Appellant's argument here suggests that the order and scope of closing argument be radically altered from well established common practice, which would also have the concomitant effect of eliminating the opportunity for a defendant to avail himself of the "privilege of concluding" argument. *See generally State v. Gellis*, 158 S.C. 471, ___, 155 S.E. 849, 855 (1930) (reference precedent from 1802 allowing "'in all cases where a defendant called no witnesses, he should have the privilege of concluding to the jury.'"). He offers no specific constitutional cause or basis for such a radical change, and none is readily apparent. The court and the parties below had the right to rely on well established precedent and long standing practice – a practice that never deprives any defendant of the opportunity to present a closing argument. That practice was

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[6] *Rogers* underscores that contest may be made to the order and scope of closing either way. In *Rogers*, the defendant contested the prosecutions right to open on law and facts, essentially, one assumes, being allowed two opportunities to present its case to the jury as compared to the defense's single opportunity. Appellant's suggestion of "unrebuttable argument," (FBOA, p. 18), will always be available where the State argues last.

adhered to in the instant case and there is no error. Even so, if the order of argument in the instant case is somehow deemed error, the error could only be harmless for several different reasons.

The Supreme Court of South Carolina has concluded that denial of the right to last argument "is not the kind of error that would affect the entire conduct of the trial from beginning to end," and is "subject [to a] harmless error analysis." *State v. Mouzon*, 326 S.C. 199, 485 S.E.2d 918 (1997). In *Mouzon*, the state supreme court concluded that, pursuant to state procedure, the defendant was entitled to the right to last closing because he actually did not present evidence. Further, the court concluded the error was not harmless as counsel concentrated "on the murder charge and was acquitted of murder; he did not focus on the conspiracy charge and was convicted." 326 S.C. at 205, 485 S.E.2d at 922. The court noted that the prosecution "devoted a significant amount of attention to the issues of drug dealing and conspiracy. If Mouzon had been allowed to argue last, then he could have more adequately addressed the issue of conspiracy to distribute crack cocaine." *Id.* There is no like situation here. First, according to well settled state procedure, Appellant lost the right to last argument as he introduced evidence. Second, the focus here remained on one event - the murder. Third, a comparison of the points defense counsel proffered as points he would have made if he was granted the right to last argument closely mirror the points previously made in his own argument. For instance, as to the suggested rebuttal argument that it not illegal to have gun on one's own property, counsel argued the same basic point in his closing, (R. p. 148, line 22 - p. 149, line 22); as to lack of threats, that is not supported by the record, yet, the defense did argue that Appellant did not point the gun at victim during the chase, (R.

p. 141, lines 17-21); as to emotion in the statements to police, the defense also argued that as well, (R. p. 139, line 16 - p. 140, line 5; p. 152, line 24 - p. 153, line 11); the defense also presented argument as to the angle of bullet, forensics, and GSR (R. p. 143, line 10 - p. 146, line 22). The record supports a fair opportunity to address each and every fact relied upon by the State as demonstrated by the evidence. There was nothing of substance left unaddressed. Again, error, if any, could only be harmless on this record.

However, Respondent submits there is no error. Appellant's argument to the contrary should be rejected.

CONCLUSION

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

Respectfully submitted,

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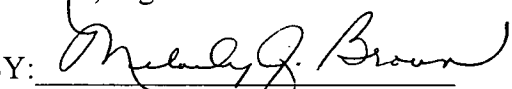
BY: 
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January 17, 2013.
Columbia, South Carolina.

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In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

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vs.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Melody J. Brown, Senior Assistant Attorney General, certify that I have served the *Final Brief of Respondent* on Appellant by depositing one copy of same in the United States mail, postage prepaid, to each of his attorneys, at the following addresses:

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