THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Judge

Case Nos. 2009-CP-26-1281
2009-CP-26-3127
2009-CP-26-3128

J. Gregory Hembree, Solicitor, Fifteenth Judicial Circuit, on behalf the Horry County Police
Department.....Respondent,

v.

Taurus ,38 Special Pistol, SN: SF53109; 1994 Monaco RV, VIN: 1RF120611R1010972; and One Thousand Eight Hundred Forty-Seven ($1,847.00) Dollars U.S. Currency, Defendant property, and Michael James
Albin.....Appellant,

Of whom Michaela Albin, as personal representative of the estate of Michael J. Albin is the Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. The trial court did not err when it awarded personal property to Respondent under South Carolina code of laws § 44-53-520(a)(4).

2. The trial court's error in applying The Honorable Steven John's summary judgment ruling as the law of the case amounted to harmless error, as it did not affect the outcome of the trial.

3. The Defendant's counterclaims were properly dismissed by the trial court.

STATEMENT OF THE CASE

The seizures which were the subject of this case were performed pursuant to a drug investigation initiated by the Horry County Police Department (HCPD). In particular, the Taurus handgun, the $1,847.00 in U.S. currency, and the 1994 Monaco RV (RV), were seized as a result of the drug investigation done by the Horry County Police Department.

The Appellant moved the court for summary judgment on the grounds that the State should not be allowed to seize the money or the handgun, as they had not been used in the facilitation of the sale or distribution of controlled substances, or the RV, as it had not recovered at least one pound of marijuana in its operation at Appellant's place of business, and inside the RV. The Honorable Steven John stated that he would have granted summary judgment to Appellant on the issue of the seizure of a conveyance under the minimum of one pound of marijuana established under 44-53-520(a)(6). Before that became necessary, however, the Respondent consented to striking that section of its complaint. Judge John did, however, rule that the State may go forward on the

seizure of the RV under 44-53-520(a)(3), use as a container, and 44-53-520(a)(4), personal property used to facilitate the distribution or sale of a controlled substance.

On July 28, 2011, a bench trial was held before the Honorable Larry B. Hyman. Judge Hyman heard arguments with regard to the seizures, the law of the case, and the counterclaims, before the trial of the case. Both sides then presented evidence and witnesses. Finding Judge John's ruling to be the law of the case, and that the requirements of (a)(4) had been met, Judge Hyman awarded the RV to the Horry County Police Department. The Taurus handgun and the $1,847.00 were returned to the Appellant by order of Judge Hyman. It was determined by the court that the handgun had not been used in the facilitation of the sale or distribution of drugs, and that the Appellant had a legitimate source from where the $1,847.00 came. Judge Hyman ordered that the RV be forfeited to HCPD under § 44-52-520(a)(4), finding that it was used in the facilitation of the distribution of illegal controlled substances.

The Appellant moved the court to amend its judgment in a motion filed on August 26, 2011. The motion was denied by the court.

FACTS OF THE CASE

SLED initiated an investigation into possible gambling occurring at Putter's, a bar and restaurant located on Horry County, South Carolina. SLED wired two agents and sent them to Putter's to gather any information regarding the use of "video poker" machines at the location. Those agents were able to gather such evidence, as well as evidence of possible drug use and distribution in an RV parked outside the establishment. SLED obtained a search warrant to search the premises and its curtilage for evidence of

gambling. Agents of the Horry County Police Department's Narcotics and Vice section provided tactical support for the execution of the search warrant.

Pursuant to that search warrant, HCPD Agents searched the RV that was on the property for evidence of gambling. They found approximately 137 grams of marijuana, in five separate baggies, a Taurus handgun, rolling papers, a grinder, a pipe, and a roller. Agents also found money in the RV, which SLED seized as gambling proceeds. Those other items were seized and taken by HCPD to its precinct in Conway, SC. Approximately six days later, while performing a search for perishables in the RV, under his duty to maintain it in a reasonable manner, Captain William Rutherford found an additional 38 grams of marijuana and $1,847.00 in cash. HCPD made all drug charges with regard to this operation, it held all evidence at its facility, and completed paperwork for all of the items that it seized as a result of its drug investigation. Specifically, those items are the Taurus handgun, the $1,847.00 in cash, and the RV.

ARGUMENTS

I. Giving words their plain, ordinary meaning, so as to determine the intent of the legislature with regard to a statute, the trial court did not err when it awarded personal property to Respondent under South Carolina code of laws § 44-53-520(a)(4).

Illegal drugs are a scourge upon our society. As such, it was clearly the intent of the legislature that those who would be involved in the sale, distribution, transportation, or manufacturing of illegal, controlled substances should be held accountable both civilly and criminally. The statute at issue here is the forfeiture statute in § 44-53-520 in the South Carolina Code of Laws. More specifically, it is items (a)(3), (a)(4), and (a)(6). The statute, in relevant part, reads as follows:

(a) The following are subject to forfeiture:

(3) all property which is used, or which has been positioned for use, as a container for property described in items (1) or (2);

(4) All property, both real and personal, which in any manner is knowingly used to facilitate production, manufacturing, distribution, sale, importation, exportation, or trafficking in various controlled substances as defined in this article;

(6) all conveyances including, but not limited to .... motor vehicles which are used or intended for use unlawfully to conceal, contain, or transport controlled substances and their compounds, except as otherwise provided, must be forfeited to the State. No motor vehicle may be forfeited to the State under this item... involving at least on pound or more of marijuana.....

S.C. Code Ann § 44-53-520(a)(3), (4), and (6). "An issue regarding statutory interpretation is a question of law." Ranucci v. Craine, 397 S.C. 168, 171, 723 S.E.2d 242, 243 (2012), citing S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 249, 250, (2010). "'When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to corrections of errors of law.'" Ranucci, quoting Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E 2d 710, 714 (2005).

"The cardinal rule of statutory interpretation is to determine the intent of the legislature." Ranucci at 244, quoting Bass v. Isochem, 356 S.C. 454, 469, 617 S.E.2d 369, 377 (Ct.App. 2005). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed *in light of the intended purpose of the statute*." (emphasis added) Ranucci, quoting McClanahan v. Richland Cnty. Council, 350 S.C.

433, 438, 567 S.E.2d 240, 242 (2002). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Anderson v. S.C. Election Commission, 397 S.C. 551, 556-7, 725 S.E.2d 704, 707 (2012), quoting Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

A. The failure to be allowed to proceed under (a)(6) does not preclude proceeding under any other section of § 44-53-520.

In the Respondent's complaint, it claimed that the RV was subject to seizure under § 44-53-520(a)(3), (a)(4), and (a)(6). Eventually, the claim under (a)(6) was stricken from the complaint, although summary judgment as to that item would have been granted to the Appellant. The Respondent was allowed to proceed under the other two items in the statute. The crux of the Appellant's argument is that, because the legislature established a minimum of one pound of marijuana under item (a)(6), that precludes the State from proceeding under any other item in that particular statute. A close examination of the statutory language in each item is warranted.

Item (a)(6) states that motor vehicles are subject to forfeiture if they are used to "conceal, contain, or transport, or facilitate the unlawful concealment, possession, containment, manufacture, or transportation of controlled substances..." S.C. Code Ann § 44-53-520(a)(6). The item then goes on to state that no motor vehicle may be forfeited to the State *under this item*, unless it is used..." (emphasis added) Id. There are two things that bear pointing out in this language.

First is the fact that the legislature clearly limits these conditions to this one item, that being (a)(6). There are examples throughout the statutes where the legislature refers

to "statute," "article," "section," or "item." When the legislature wants to refer to an entire statute or article, it does so by stating "this statute," or "this article." It must, then, be the case that when the legislature wants to limit something to a particular item within a statute, it does so by stating "under this item." The word "item" refers to each object in a list. The items in this statute have been clearly delineated and separated from each other.

Second, at no place in § 44-53-520(a)(6) does the legislature contemplate the sale or distribution of illegal drugs. These actions are conspicuous by their absence. By doing so, the legislature recognizes the difference between someone who simply conceals, possesses, or contains illegal drugs in a motor vehicle, and someone who puts drugs out into society by distributing or selling them. By having the one pound of marijuana threshold in (a)(6), there has been a higher burden placed upon the police to seize property used in violation of the enumerated actions. The legislature has drawn a bright line there. Therefore, not allowing the State to proceed under (a)(6) does not preclude it from proceeding under any other item in the statute.

B. The State was properly allowed to seize the Appellant's RV under (a)(4).

The plain language of (a)(4) allows for the seizure of "all property, both real and personal, which in any manner is knowingly used to facilitate ...distribution, sale,...various controlled substances..." S.C. Code Ann. § 44-52-520(a)(4). In this item, the legislature requires only the knowing facilitation of distribution or sale of controlled substances in order to be able to lawfully seize either real or personal property. These are different circumstances than those contemplated in (a)(6). The Court of Appeals recognizes that property facilitates the sale or distribution of a controlled substance when

there is a substantial connection between the property and the underlying drug activity. Condon v. One 1985 BMW, 4 door, VIN# WBAAE6403F0704170, 312 S.C. 431, 432-3, 440 S.E.2d 895, 896 (Ct.App. 1994). "It is...irrelevant whether the property's role in the crime is integral, essential, or indispensible. The term facilitate implies the property need only make the prohibited conduct 'less difficult or more or less free from obstruction or hinderance.'" *Id*, at 896, citing U.S. v. Schiffereli, 895 F.2d 987 (4TH Cir. 1990).

With regard to "distribution," the trial court properly recognized that "distribution does not mean sale, distribution is simply the passing or providing of the marijuana from one person to another." (R. p.132, lines 22-24) This understanding is reinforced by Black's Law Dictionary in its definition of distribution. Aside from the application to the division of an estate, "distribution" means "the act or process of apportioning or giving out." Black's Law Dictionary 508 (8th ed. 2004). There need not be an exchange of money in order to accomplish a distribution. A "sale" is defined as "the transfer of property or title for a price." Black's Law Dictionary 1364 (8th ed. 2004). Therefore, all sales are distributions, but not all distributions are sales.

The Appellant cites Ducworth v. Neely for the proposition that forfeiture statutes are penal statutes that must be strictly construed. This favors the Respondent. While case law does hold that to be true, "courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 623 (2011). Moreover, Ducworth also stands for the idea that "in rem forfeiture statutes must be interpreted in light of the evil sought to be remedied and in a manner consistent with the statute's purpose." Ducworth v. Neely, 319 S.C. 158, 163, 459 S.E.2d 896, 899 (Ct.App. 1995). It is clear from the statutory scheme that the

legislature intended severe criminal and civil penalties for those who facilitate the distribution or sale of illegal drugs. Those who pursue that life were meant to pay with their freedom and with the property used in the pursuit, sale, or distribution of illegal drugs.

In deciding the case of Nelson v. Ozmint, the State Supreme Court kept in mind the rule that "all rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010). In that case, The Supreme Court construed the criminal domestic violence statute under S.C. Code Ann. § 16-25-20. Specifically, the Court looked at items (B)(2) and (B)(3) under that statute. Item (B)(2) generally states that, for a second offense of criminal domestic violence, one must receive a mandatory minimum sentence of at least thirty days in prison. S.C. Code Ann. § 16-25-20(B)(2). The item also goes on to state that a person under this sentence may serve weekend time, or may be eligible for early release due to work credits or good time credits. Id. Item (B)(3) states that a person who is found guilty of a third offense "must be imprisoned not less that a mandatory minimum of one year but not more than five years." S.C. Code Ann. § 16-25-20(B)(3).

In Nelson, the defendant pleaded guilty to two counts of criminal domestic violence, third offense, and was sentenced to concurrent terms of fifteen months in prison. See generally, Nelson. Although the judge ruled that he be given credit for pre-sentencing detention, the Department of Corrections set his eligibility for release date at one year after he was incarcerated with it. Id. Nelson's counsel asked the Department of

Corrections to reconsider its interpretation of the statute that the defendant must actually serve one year. Id. Nelson filed a writ of mandamus, directing Ozmint to apply good time and earned work credits to reduce his sentence below the mandatory one year. Id. Nelson's argument to the State Supreme Court was the same. The Court declined to adopt such a tortured reading of item (B)(3).

The Court found that the legislature expressly and intentionally provided that one who is convicted of a second offense of CDV is eligible for early release upon earning work credits or good time credits. Id, at 371. Because this provision was expressly left out of (B)(3), held the Court, the legislature clearly intended to make one convicted of a third offense of CDV ineligible for early release, despite having earned work or good time credits. Id. In its conclusion, The Court held that § 16-25-20(B)(3) means what it says it means-that one who is sentenced for a third offense must do at least one year in prison, period. Id.

No statute must be more strictly construed than that which deprives one of his or her freedom. Despite the fact that one item in this statute gives a person credit for good time, the other does not. Adhering to the rules of statutory construction, The State Supreme Court held that the conditions of one item do not govern the conditions of another, absent a clear directive by the legislature to the contrary. Such is the case here.

In the case at bar, there was testimony that Mr. Albin offered to have Agents come out to his RV and smoke marijuana with him. (R. p.68 lines 14-15) There was also testimony by an Agent that Mr. Albin agreed to sell her some marijuana. (R. p.68, lines 16-18) Additionally, Mr. Albin testified under oath that he bought marijuana from a man

known to him as "Costner," in his RV. (R. p.126, lines 2-25, R. p.127, lines 1-2) Albin also testified that this was not the first time that he had purchased marijuana in that RV. (R. p.127, lines 3-11) These acts alone satisfy the requirements of § 44-53-520(a)(4). Albin does, however, continue in his testimony, and admits to not only smoking marijuana in his RV, but also to supplying it to others as well. (R. p.127, lines 24-25, R. p.128, lines 1-11) Not only did he knowingly allow the distribution and sale of marijuana to take place in his RV, but he also distributed it to others. Mr. Albin was given one last chance to clarify his testimony with reference to buying and distributing marijuana in the RV. Again, he admitted to doing both. (R. p.129, lines 5-14) All of this activity took place in the RV, away from any prying eyes of other people or law enforcement. Thus, the RV made the activity less difficult and free from hindrance.

Recognizing the many serious issues that come up around illegal controlled substances and the drug trade, the legislature wrote criminal and civil laws that deal harshly with those who participate in that realm. Keeping in mind that the primary rule of statutory construction is to give effect to the intent of the legislature, and that the words that were written are the best evidence of their intent, the trial court properly awarded the State the 1994 Monaco RV in this case. In the absence of instruction by the legislature, not being able to proceed under one item clearly does not preclude the State from proceeding under another. This is especially true when the different items cover different actions that may be undertaken by a particular person, and there is language in an item that restricts conditions of seizure to that one item. Clear language must be construed in light of the statute's intended purpose. Ranucci, at 244. Respectfully, the Court should affirm the decision of the trial court, in awarding the RV to the State.

II. The trial court's error in applying The Honorable Steven John's summary judgment ruling as the law of the case amounted to harmless error, as it did not affect the outcome of the trial, not amounting to a prejudice to Appellant's rights.

The Respondent recognizes that the trial court erred when it held Judge John's summary judgment ruling to be the law of the case in this matter. That error, however, was harmless error. "The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not." LaSalle Bank Nat'l. Association v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009), citing State v. Mouzon, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." Visual Graphics Leasing Corp. v. Lucia, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct.App. 1993), citing Anderson v. Elliott, 228 S.C. 371, 90 S.E.2d 367 (1955). "An error not shown to be prejudicial does not constitute grounds for reversal." Davis v. Davis, 372 S.C. 64, 87, 641 S.E.2d 446, 458 (Ct.App. 2007), quoting Brown v. Peterson, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct.App. 1997). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct.App. 2009). See also State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012), (holding that "error is harmless when it could not reasonably have affected the outcome of the case.")

The materiality of the statute in question in this matter is not in dispute. The statute provides the entire authority for the State to seize one's property. Without the statue, there is no authority. The Appellant cannot, however, demonstrate how the trial court's ruling as to the law of the case prejudiced him, affecting the outcome of the trial.

Both sides in this case presented witnesses and sworn testimony. There is no dispute that there was no sale of marijuana by Mr. Albin to any law enforcement agent. Likewise, there is also no dispute that Mr. Albin knowingly distributed and allowed to be distributed an illegal controlled substance, in that RV. (R. p.126, lines 2-25, R. p.127, lines 1-2, R. p.127, lines 3-11, R. p.127, lines 24-25, R. p.128, lines 1-11, R. p.129, lines 5-14). The trial judge in this case also sat as the finder of fact. He saw evidence and witnesses, and heard pre-trial motions in this matter. The court made a finding of fact that the Respondent satisfied the requirements of § 44-53-520(a)(4), by and through the testimony of police officers and Mr.Albin himself. In his ruling with respect to the RV, the trial judge found that if (a)(4) applies..., it "was in some manner knowingly used to facilitate at the very least distribution as that term is defined in this state of marijuana." (R. p.132, lines 17-21)

In a case tried without a jury, the trial court's findings of fact are to be upheld by an appellate court when the evidence presented at trial reasonably supports those findings. Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 144, 719 S.E.2d 703, 706 (Ct.App. 2011), citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The trial court's findings in such a case are equivalent to a jury's findings in a law action." Id, citing Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 127-28, 631 S.E.2d 252, 255-56 (2006).

The record shows that the trial court believed Judge John's ruling to be the law of the case. (R. p.52, lines 10-13) As such, the trial court did not engage in any type of action construing the plain language of § 44-53-520(a)(4). Had he done so, the trial judge would have employed the rules regarding statutory construction, and found that the

exclusion of (a)(6) did not preclude Respondent from proceeding under (a)(4). The Respondent will not burden the Court with another analysis regarding statutory construction. Had he so found, under his finding of fact in this matter, he would have ordered the RV to have been seized.

Because the trial court's error amounted to harmless error when it held that Judge John's ruling was the law of the case, and its findings of fact support seizure under 44-53-520(a)(4), respectfully, the Court should affirm the lower court's order that the RV be seized.

III. The trial court correctly dismissed the Appellant's counterclaims, as the only matter before the trial court was that dealing with seizures pursuant to drug statutes.

A) The cases made by SLED and the Horry County Police Department were two, completely separate cases.

While it is true that SLED initiated a gambling case at Putter's, the Horry County Police Department initiated the drug case against Michael Albin. In the application for its search warrant for Putter's and its curtilage, SLED's sole allegation was that of gambling. (R. p.76, lines 15-21) Members of the Horry County Police Department (HCPD) and the Fifteenth Circuit Solicitor's Drug Enforcement Unit were there for security and tactical support. Further, HCPD was there for any kind of drug case that may come up. (R. p.98, lines 12-14) There was evidence of a drug element, but SLED's sole role in the operation was to recover evidence and proceeds of gambling. To that end, SLED did seize gaming machines and money from the premises.

With regard to the seizure of the Taurus handgun, the One Thousand Eight Hundred Forty-Seven ($1,847.00) Dollars, and Monaco RV, the Horry County Police Department initiated that investigation and seizure as a result of illegal controlled substances being found in the RV. SLED initiated the gambling investigation and seized all the money and machines at Putter's as a result thereof. The Horry County Police Department initiated the drug investigation and seized all of the drugs, money, the handgun, and the RV as a result thereof. SLED made the gambling charges and HCPD made the drug charges. SLED is in possession of the gambling items, while HCPD was in possession of the drug items. There are simply two separate investigations.

B) The case pursued by Appellant's counterclaim was not properly before the trial court.

The Honorable Larry B. Hyman heard pretrial motions in this case, specifically with regard to the Appellant's counterclaims. The Appellants' position is that the Respondent must try all of the seizures together, including the seizures the SLED made as a result of its gambling investigation. (R. p.31 lines 13-25, p.32, lines 1-25, p.33, lines 1-17) The Respondent correctly pointed out that the monies that SLED seized were pursuant to separate gambling statues, and not drug statutes. (R. p.33, lines 21-25) The handgun, the $1,847.00, and the RV are HCPD seizures from HCPD cases. As of the time of this trial, SLED had not come to the Respondent and asked it to pursue seizure of the items that it seized as a result of gambling. (R. p.34, lines 4-7) The Respondent was only proceeding on the HCPD cases. (R. p.35, lines 4-25)

Further in the pretrial motions, Judge Hyman again addressed the issue of the counterclaim. Appellant's counsel was speaking to Judge Hyman regarding some Fifteen Thousand ($15,000.00) Dollars that his client alleges that SLED seized. This is the basis

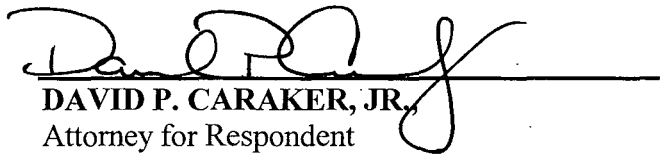
for the counterclaim. (R. p.57, lines 14-25) Judge Hyman inquired as to whether that particular money was at issue in this case, and was answered in the negative. (R. p.58, lines 2-9) The court then inquired as to whether Appellant's counsel filed a third party complaint naming SLED. He was answered in the negative again. (R. p.58, lines 10-12)

Judge Hyman heard the case without a jury. After hearing testimony from several witnesses, Judge Hyman, again, addressed the issue of the Appellant's counterclaim for the Fifteen Thousand ($15,000.00) Dollars. Judge Hyman found that those monies are in the possession of SLED, (R. p.94, lines 1-13), and further, that the matter is not properly before the court. (R. p.94, lines 13-14) Judge Hyman did rule that the Appellant was not prejudiced by the ruling, and that he would be free to pursue those monies when SLED has been properly served. (R. p.94, lines 14-25)

CONCLUSION

Construing § 44-53-520(a)(4) and (a)(6) so as to affect the intent of the legislature and its intended purpose, the Court of Appeals should affirm the trial court's order that the State may seize Appellant's RV. Although the trial court erred in holding a summary judgment ruling as the law of the case, that ruling amounted to nothing more than harmless error. The trial court made its own findings of fact after hearing testimony and observing evidence and witnesses, and found that the criteria for seizure under § 44-53-520(a)(4) had been met. The Court of Appeals should also uphold the trial court's dismissal of the Appellant's counterclaim, as the only case that was properly before the court was the drug case made by the Horry County Police Department, and SLED was never named as a party.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 31, 2012

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent on David J. Canty, Attorney for Appellant by depositing the original of it in the United States Mail, postage pre-paid, on November 1, 2012, addressed to the South Carolina Court of Appeals, Clerk of Court, 4612 Oleander Drive, Myrtle Beach, SC 29577.

November 1, 2012

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