STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge

THE STATE,

Respondent,

vs.

GREG K. ISSAC,

Appellant.

Appellate Case No. 2013-002168

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

Whether the exclusion of a co-defendant's plea deal was error under the rules of evidence and the Confrontation Clause?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in excluding testimony regarding a non-testifying co-defendant's plea negotiation when the witness did testify to his own status of a plea deal at the time of trial, and where there was substantial direct evidence that the Appellant committed the murder.

STATEMENT OF THE CASE

Appellant Greg K. Isaac was indicted by the Richland County Grand Jury on for the charges of murder, burglary in the first degree and attempted armed robbery in May 2012. (R. pp. 576-81). Prior to trial, Isaac requested and was denied a hearing to determine whether he was immune from prosecution under the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to -450 (Supp. 2012). Isaac's interlocutory appeal on this issue was dismissed by the South Carolina Supreme Court. *State v. Isaac,* 405 S.C. 177, 747 S.E.2d 677 (2013).

Mark Schnee represented Isaac at a jury trial which began September 30, 2013, before the Honorable Clifton Newman. (R. p. 1). Deputy Fifth Circuit Solicitor Kathryn Luck Campbell and Assistant Solicitors Nichole Simpson, John Steadman and Meghan Walker prosecuted the case. (R. p. 1). Isaac was convicted by a jury of all three charges. (R. p. 560, line 23 – p. 561 line 11). Judge Newman sentenced Isaac to a term of life imprisonment without parole for the murder of Antonio Corbitt and concurrent twenty-year terms on the charges of burglary first degree and attempted armed robbery. (R. pp. 568-70). This appeal follows.

STATEMENT OF FACTS

Appellant Isaac took part in forcibly invading the home of victim Antonio Corbitt the night of October 27, 2005, resulting in the victim's death from a gunshot wound. (R. p. 341, lines 9-17; R. p. 428, line 6 – p. 429, line 3). The case at bar went cold until 2012, when a previously unknown fingerprint was matched with the Appellant's left middle finger. (R. p. 77, lines 3-16; R. p. 104, line 12 – p. 106, line 10; State's Exhibit #78). At that point, Richland County Sheriff's Office questioned the Appellant about the incident. (R. p. 305, lines 7-22). Initially, the Appellant denied involvement. (R. p. 305, line 10 – p. 306, line 5; R. p. 349, line 21 – p. 350, line 9; R. p. 359, lines 10-12; R. p. 572). Law enforcement then informed Isaac about the matching fingerprint.[1] (R. p. 350, lines 10-12). The Appellant provided both a verbal confession and a written statement admitting that he was the shooter and implicating co-defendants Tavares World, a/k/a "Murder," and Vernorris Dickson. (R. p. 346, line 12 – p. 366, line 17; R. pp. 573-75).

The Murder

At trial, both Isaac and co-defendant Dickson testified as to the series of events. Isaac, World and Dickson arrived at 3200 Fernandina Road during the 9:00 PM hour on October 27, 2005. (R. p. 253, lines 17-21). Dickson drove the pair to the apartment complex at World's direction. (R. p. 252, lines 1-4). According to Dickson and Isaac's testimony, World was shorted when he purchased marijuana from the victim and was going to sort out the deal. (R. p. 251, lines 6-25; R. p. 420, lines 13-15). The victim was not at the apartment when they first arrived. (R. p. 254, line 11). The co-defendants sat in

[1] Appellant stated that the lamp where the fingerprint was found fell and he reached out to stop it. (R. p. 317, lines 6-10).

the car waiting for him to return. (R. p. 254, line 10 – p. 255, line 8).

When the victim did come home, the Appellant testified that he and co-defendant World forcibly entered the victim's apartment, kicking in the front door and asking "where my money at."[2] (R. p. 423, line 10 – p. 424, line 21). An altercation ensued between the victim[3] and World wherein the Appellant entered the apartment to try to break up the fight. (R. p. 425, lines 6-17). At that point, the Appellant stepped back toward the entrance to the apartment, World ran past him outside the front door, and victim appeared to the Appellant to be pulling out a gun. (R. p. 428, lines 4-24). The Appellant fired two shots. (R. p. 429, lines 2-3). After firing, the Appellant fled the scene with World and Dickson. (R. p. 429, lines 6-13; R. p. 463, lines 1-5). Throughout the course of events, the victim's out-of-sight seven-year-old son observed from the top of the apartment stairs. (R. p. 287, line 25 – p. 290, line 24; R. p. 315, lines 4-7).

The Appellant testified in his defense that he visited the victim's apartment under duress[4] and acted in self-defense[5] by firing the fatal shot. (R. p. 420, line 15 – p. 422,

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[2] Dickson corroborates this testimony, stating that World and the Appellant told Dickson about what transpired at the victim's apartment. (R. p. 258, lines 22-24). Richland County investigator Ray Livingston testified as to evidence of force used to open the front door. (R. p. 55, line 23 – p. 56, line 7).

[3] Livingston testified as to a wound on the victim's chin and indications of a struggle within the apartment, including a downed lamp. (R. p. 54, line 25 – p. 55, line 5; R. p. 57, line 22 – p. 58, line 22). Richland County latent print analyst Trisha Odom also observed indicia of a scuffle in the apartment living room, including skewed cushions and coffee table. (R. p. 118, lines 16-20). Forensic pathologist Dr. Clay Nichols testified as to observing scratches on the victim's face and neck consistent with fingernail marks indicative of a physical altercation. (R. p. 332, line 21 – p. 333, line 25).

[4] The Appellant testified that he and World got into an altercation the first time they met, as well as one at least one other occasion. (R. p. 416, line 23 – p. 418, line 24). World later apologized and Isaac "kind of chilled" with World from that point on "from a time to time basis." (R. p. 419, lines 4-10). Dickson testified that Isaac and World were "good friends." (R. p. 253, line 8).

line 23; R. p. 425, lines 19-25). According to the Appellant, World threatened him to go to the victim's apartment by putting a gun to his face. (R. p. 421, lines 8-12). The Appellant then took that gun, and World pulled out a second gun. (R. p. 421, lines 13-17). Dickson's testimony does not corroborate the Appellant's statements regarding those threats. (R. p. 255, lines 12-21). On cross-examination, the State impeached the Appellant based upon his initial denial of involvement in the incident, as well as his failure to include World's threats in his 2012 statement to law enforcement. (R. p. 469, lines 8-18). As to his claim of self-defense, Isaac testified that he believed that the victim was reaching for a gun at the point in the altercation where the shots were fired. (R. p. 428, line 6 – p. 429, line 3).

Co-Defendant Testimony

World did not testify at trial. The driver co-defendant, Dickson, testified for the State. (R. p. 248, lines 8-9). Deputy Solicitor Campbell questioned Dickson as to any deal the State may have made with Dickson in exchange for his testimony, to which he replied no deal had been made at the time of trial. (R. p. 262, lines 13-25). Dickson was also questioned about his knowledge of the penalties carried by his current charges for murder, attempted armed robbery, conspiracy and first-degree burglary, to which Dickson answered with the correct penalties for each. (R. p. 261, line 12 – p. 262, line 10).

On cross-examination, Mr. Schnee asked Dickson if he wanted "a deal similar to what Tavares World got?" to which Dickson answered: "I don't know what deal he got."

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[5] No gunshot residue was found on the victim's hands. (R. p. 219, lines 17-21). Isaac indicated in his verbal admission to law enforcement that the victim did not have a gun. (R. p. 363, lines 12-17).

(R. p. 266, lines 11-13). The State objected to the exchange *in camera,* stating its grounds:

> MS. CAMPBELL: Your Honor, we would object to any mention of what the co-defendant got. Plea negotiations on a co-defendant are not admissible, certainly, not as impeachment on this witness in this case. I don't know under what theory he thinks he gets to get into that in front of the jury as far as any negotiations or pleas. With co-defendants, certainly, it would not be admissible, Your Honor, and I can get the case law to support that.
> THE COURT: All right. Mr. Schnee.
> MR. SCHNEE: Judge, I simply asked if he would like a deal similar to the co-defendant. It could have been already received. I'm not asking him about the plea deal. I was asking if he wanted a similar deal, which would be a reduction in charge.
> THE COURT: Reduction in charge?
> MR. SCHNEE: The State reduced the murder charge to voluntary manslaughter.
> THE COURT: All right.
> MS. CAMPBELL: I don't understand under what theory Mr. Schnee thinks he's allowed to cross-examine on this issue any witness. What a co-defendant or other person got is not admissible in front of this jury, just like what this Defendant is going to get is not admissible in front of this jury.

(R. p. 267, line 2 – p. 268, line 2). The court "moved on from what [defense counsel asked] to what law supports it," to which Mr. Schnee replied "[t]he law of fully cross-examining this witness." (R. p. 268, lines 12-15). The court sustained the objection. (R. p. 268, lines 17-18). In doing so, the court allowed defense counsel another opportunity to present additional authority to support his line of questioning. (R. p. 268, lines 18-20). The trial court then ruled on the matter:

> THE COURT: I sustained the objection that you have no authority for the proposition that you can cross-examine this witness based on the sentence of a co-defendant, that's the State's objection.
> MR. SCHNEE: Okay. That's fine.

> THE COURT: And that objection is sustained since you have no authority to support your position other than the law of cross-examination, I think, is what you've just said.
> MR. SCHNEE: It's a basic rule of evidence, Your Honor, yes, and basic Sixth amendment to fully confront my client's accusers.
> THE COURT: Okay. The objection is sustained.

(R. p. 269, lines 5-20). During the remainder of Dickson's cross-examination, Dickson stated that he had not talked to his attorney about a plea deal in exchange for testimony. (R. p. 270, lines 3-15).

A similar objection was raised during the cross-examination of State's witness, chief investigator David Wilson, who testified as to co-defendant World providing a statement to law enforcement. (R. p. 386, lines 6-7). Defense counsel followed by asking: "Were you present in court approximately three months ago when Tavares [World] pled guilty . . . ?" (R. p. 386, lines 7-9). Another *in camera* hearing occurred, during which the State presented its grounds:

> Objection [to] plea by the co-defendant, any sentence of the co-defendant, anything of that nature. We do not think it is proper . . . our position, Your Honor, respectfully, that it is not admissible for this jury. It has no relevance in this case. Specifically, [defense counsel] will argue that he as a right to a meaningful cross-examination, that does not mean, however, that the trial courts conducting criminal trials lose their discretion and limit the scope. And it's not appropriate for cross-examination since it has nothing to do with their investigation of the Defendant's guilt and . . . to further try to get any type of plea negotiations in front of this jury would be inappropriate.

(R. p. 386, line 18 – p. 387, line 7). The court sustained that objection, ruling:

> *Mr. World is not the testifying witness in this case. If Mr. World testifies, then it would be appropriate cross-examination of Mr. World. It's not appropriate cross-examination of other witnesses as to what the co-defendant pled guilty to.* And I sustain the objection and you're not going to ask this witness what charges Mr. World pled guilty to.

(R. p. 387, line 23 – p. 388, line 9 (emphasis added)).

ARGUMENT

I. The trial judge did not err in excluding testimony regarding World's plea deal because World did not testify at trial.

Appellant postures that he should have been allowed to impeach Dickson's testimony regarding any plea deal made with the State. (Final Br. of Appellant, p. 11). Dickson testified during both direct and cross examination that no deal had been made at the time of trial as well as to the penalties carried by the charges he faced. (R. p. 262, 264). However, Dickson went further during the examination, stating he was looking for a deal "if the judge grant [him] leniency." (R. p. 266).

Objections must be made at the time the evidence is presented and with sufficient specificity to inform the court of the point being urged by the objector. *State v. Byers,* 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). In this case, the State timely objected upon the first question eliciting an answer implicating co-defendant World on two separate occasions.[6] The trial judge heard from both parties before sustaining each objection. Not only did the trial judge re-state the State's specific grounds in its ruling, but the State fully articulated its position on the record at the commencement of each *in camera* hearing, stating its objection upon the first occasion "to any mention of what the co-defendant got. Plea negotiations on a co-defendant are not admissible, certainly not as impeachment on this witness in this case." (R. p. 267, lines 2-5). Upon the second occasion, the State further supported its position that the testimony elicited "has no

[6] Objection was timely made upon defense counsel's asking Dickson if he "want[ed] a deal similar to what [co-defendant] Tavares World got." (R. p. 266, lines 11-12). Dickson answered that he didn't know, and the State timely objected, asking for an *in camera* ruling on "any mention of what the co-defendant got." (R. p. 266, line 13). A similar timely objection was made upon defense counsel's asking Chief David Wilson if he was present during World's plea. (R. p. 386, lines 8-12).

relevance in this case. (*See* R. p. 386, line 19 – p. 387, line 7).

Standard of Review

"It is well settled that the scope of cross-examination is within the trial judge's discretion, and this Court will not interfere absent a showing of prejudice by the complaining party." *State v. Sherard,* 303 S.C. 172, 399 S.E.2d 595 (1991). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

A. Because World did not testify, any reference to his plea deal is inadmissible as improper for purposes of impeachment and as irrelevant.

Appellant postures that he "should have been able to show that Dickson had a significant incentive to lie about whether World coerced Isaac with evidence of the reduction of World's charge from murder to manslaughter." (Final Br. of Appellant, p. 11). The trial judge did not err in limiting the scope of cross-examination to exclude specific references to World's plea deal. "A co-defendant's guilty plea is neither relevant nor admissible as substantive evidence of the defendant's guilt or innocence, but instead is admissible only on the issue of the credibility of a *testifying* co-defendant." *State v. Moore,* 337 S.C. 104, 106 n.2, 337 S.E.2d 354, 355 (Ct. App. 1999) (emphasis in original). Appellant claims that the trial court's exclusion of this testimony violates Rule 608(c), which provides that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE.

"Courts have generally agreed that evidence of a non-testifying co-defendant's

guilty plea should not be put before a jury." *United States v. Blevins,* 960 F.2d 1252, 1260 (4th Cir. 1992). The Fourth Circuit delineated two reasons for prohibiting the testimony:

> First, by not having the opportunity to cross-examine the co-defendant who entered the guilty plea, the defendant on trial is unable to probe the motivations for entry of the plea. This significantly undercuts the defendant's right to have a jury's verdict based only upon evidence that is presented in open court and is thereby subject to scrutiny by the defendant. Second, introduction of such guilty pleas raises the concern that a defendant might be convicted based upon the disposition of the charges against the co-defendants, rather than upon an individual assessment of the remaining defendant's personal culpability.

Id. (internal citations omitted). In *Blevins,* testimony of six non-testifying defendants' guilty pleas occurred on three occasions during trial. *Id.* at 1261. The court found any discussion of those pleas improper, but affirmed the convictions on harmless error. *Id.* at 1265 ("we are convinced beyond a reasonable doubt that the jury's verdict would not have been different had the minimal discussion of the non-testifying co-defendants' guilty pleas not taken place").

Appellant supports its contention by citing cases in which it was reversible error to exclude testimony regarding a witness' own potential sentence. (Final Br. of Appellant, p. 13-14 (citing *State v. Mizzell,* 349 S.C. 326, 332, 563 S.E.2d 315, 318 (2002) (finding harmless error where trial judge excluded testimony concerning a testifying co-defendant's potential sentence if convicted of the same charges as the defendant); *State v. Brown,* 303 S.C. 169, 399 S.E.2d 593 (1991) (holding defendant unfairly prejudiced by exclusion of co-defendant's testimony regarding his own plea deal, which garnered a mandatory minimum three times less than that of original charge). *Mizzell* and *Brown* do not control the instant case because the impeachment testimony

sought elicited one co-defendant, Dickson, to focus on the penalties faced by *another,* non-testifying co-defendant. Further, in *Mizzell*, the testifying co-defendant was "the only witness to testify as an eyewitness to petitioners' burglary of the home. The lack of physical evidence placing petitioners at the scene enhances the importance of [that] testimony." *Mizzell, supra* at 334, 563 S.E.2d at 319. To the contrary, this case comports with the holdings in *Mizzell* and *Brown.* Dickson was duly cross-examined regarding his own charges and the possible sentences he faced, as well as to whether or not he had been offered a plea deal. *See State v. Curry,* 370 S.C. 674, 636 S.E.2d 649 (2006) (finding harmless error in the trial court's exclusion of cross-examination of co-defendants regarding the possible sentences they faced); *State v. Sherard,* 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Sherard amply demonstrated any bias on the part of [two testifying co-defendants], and, therefore, has shown no prejudice in the trial court's refusal to allow further inquiry into the sentences they avoided").

Though not controlling authority, *Blevins'* general rule is directly on point. Just as in *Blevins,* World did not testify at trial, rendering his plea deal inadmissible. Firstly, any introduction of World's guilty plea risks biasing the jury's decision based upon the disposition of other co-defendants' charges, making it inadmissible. Second, any mention of World's deal could not have been probed by the Appellant for bias, prejudice or motive to misrepresent because World did not take the stand. *See* Rule 608(c), SCRE. Therefore, introduction of non-testifying defendant World's plea deal was properly excluded for purposes of impeachment because its introduction risks biasing the jury, and because its credibility could not be tested by the appropriate party.

Moreover, World's plea deal was irrelevant and thus properly excluded by the

trial judge during both Dickson and Wilson's testimony. *See* Rule 402, SCRE. "'The purpose of preventing disclosure of the potential sentence facing the defendant is that such evidence is irrelevant to the jury and could possibly prejudice the State's right to a fair trial.'" *State v. Mizzell, supra* at 331, 663 S.E.2d at 317 (2002) (quoting *Illinois v. Brewer,* 245 Ill.App.3d 890, 615 N.E.2d 787, 790 (1993)). Potential sentences are irrelevant to the jury's role in determining guilt or innocence. *Id.* at 332, 363 S.E.2d at 318. World did not testify at trial. As a result, World's credibility was never an issue, and any evidence tending towards World's credibility is irrelevant and properly excluded at trial. *See* Rule 401, SCRE; Rule 611(b), SCRE.

B. Any reference to a non-testifying co-defendant's plea deal is not in violation of the Confrontation Clause.

Exclusion of testimony involving World's deal is not in violation of the Confrontation Clause because World did not take the stand. *See* U.S. Const. amend. VI. "The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." *State v. Gillian,* 360 S.C. 433, 449, 602 S.E.2d 62, 71 (Ct. App. 2004) ("the Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility"). The trial judge appropriately excluded testimony relating to World's plea deal because he was not available for cross-examination and, therefore, the Appellant could not challenge World on that subject. Appellant could have subpoenaed World to testify had Appellant so chosen.

Further, a violation of the Confrontation Clause occurs upon a defendant's

showing that "he was prohibited from engaging in *otherwise appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness . . . ." *State v. Graham,* 314 S.C. 383, 384, 444 S.E.2d 525, 527 (1994) (emphasis in original) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 680, 106 S.Ct. 1431, 1436 (1986)). In this case, cross-examination on the topic of a non-testifying co-defendant's plea deal was not appropriate for the reasons stated by Respondent throughout. Because testimony on that topic was inappropriate for purposes of impeachment and as irrelevant, no Confrontation Clause violation occurred.

C. Any error was harmless beyond a reasonable doubt due to impeachment testimony existing in the record and due to the strength of the State's case.

Even if not properly excluded, Appellant cannot show prejudice since Dickson's additional impeachment testimony could not reasonably have affected the result of the trial. *See State v. Sherard,* 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"); *State v. Curry,* 370 S.C. 674, 680, 636 S.E.2d 649, 652 (2006) ("A violation of a defendant's Sixth Amendment right to confront a witness is not *per se* reversible error if the error is harmless beyond a reasonable doubt" (citing *State v. Graham,* 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)).

Factors to consider in determining harmless error are: "the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. McLeod*, 362 S.C. 73, 83, 606 S.E.2d 215, 220 (Ct. App. 2004).

The following exchange highlights Dickson's admission to seeking clemency during cross-examination:

> Q. So in order for you to get leniency on that charge at all, the solicitor would have to make you a deal and reduce the charge?
> A: We didn't talk about no deal.
> Q: You want a deal though?
> A: If the judge grant me the leniency.

(R. p. 266, lines 5-10). Had it been allowed, further impeachment regarding third co-defendant World would merely be cumulative. As a result, the exclusion of World's plea deal constitutes harmless error; Dickson's direct admission to pursuing leniency is just as damaging to his credibility as if he were able to testify to any leniency afforded the third co-defendant.

The absence of prejudice is underscored by the overwhelming proof of the Appellant's guilt. *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (error "is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached"). Where a testifying co-defendant provides "competent evidence upon which a rational verdict of guilty could be based," and where that defendant's guilt or innocence does not hinge solely on that co-defendant testimony, "the error on the part of the trial judge in limiting the scope of cross-examination could not have reasonably affected the outcome of the trial." *Curry,*

supra at 682, 636 S.E.2d at 653. In that case, the trial judge excluded cross-examination testimony delving into penalties faced by testifying co-defendants. *Id.* at 678, 636 S.E.2d at 651. In line with *Curry's* holding, Dickson did testify as to the possible penalties he faced. Also as in *Curry,* Dickson's testimony was not the only evidence of the Appellant's involvement in the shooting and, as a result, the Appellant's guilt or innocence did not hinge solely on Dickson's testimony. It is undisputed that the Appellant fired the only shots on October 27, 2005. Appellant confessed the same in both verbal and written statements to law enforcement and during his trial testimony, as well as in a recorded phone call between the Appellant and his mother. (R. p. 312-19; R. p. 346-70; State's Exhibit #169). Direct evidence showed the Appellant's fingerprint on a lamp inside the victim's apartment, placing him inside at the time of the events leading to the shooting. (R. p. 110-11). The evidence shows and the Appellant testified as to being the one to fire a gun at the scene. (R. p. 429; R. p. 463). Dickson was not even at the apartment to witness the shooting in this case; his testimony related to the conditions upon which the Appellant arrived at and remained on the scene and the relationship between World and the Appellant. Moreover, Dickson's credibility as to his own plea deal was addressed during his testimony and any error in excluding further impeachment testimony stemming from another plea deal remains harmless.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the appellant's convictions.

Respectfully submitted,

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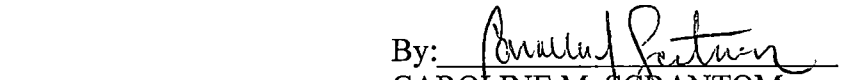
By: 
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CERTIFICATE OF COMPLIANCE

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, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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