THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Clyde N. Davis, Jr., Special Referee

Case No. 2009-CP-46-03996
Appellate Case No. 2013-001930

JPMorgan Chase Bank, National Association, ... Respondent,

v.

Leah B. Sample and JP Morgan Chase Bank, National Association s/b/m to Providian National Bank, ... Defendants

Of Whom Leah B. Sample is ..... Appellant.

Respondent's Brief

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Statement of the Case and Facts[1]

Chase initiated this foreclosure action against Appellant Leah B. Sample ("Sample") in September 2009. {Special Referee's Order and Judgment of Foreclosure and Sale p. 2; R. 4}. Sample was represented at all times in the litigation by counsel who is also her husband. At the outset of the action, Sample's counsel provided an address of Post Office Box 12340, Rock Hill, South Carolina, as counsel's address for service. {Transcript p. 3-4; R. 21-22}. Chase served the Notice of Mortgagor's Right to Foreclosure Intervention, the Notice of Sale, and other notices at the last known address of Sample's counsel. {Transcript of Hearing dated May 23, 2013, p. 8; R. 26}. Counsel for Sample admitted that this Rock Hill Post Office Box address was the address provided to Chase "when I made my first appearance or notified counsel that I was involved in the case." {Transcript p. 3-4; R. 21-22}. Sample's counsel never provided counsel for Chase with any other address for service of notices.

The special referee entered a foreclosure judgment in favor of Chase and directed sale of the property in December 2009. {Special Referee's Order and Judgment of Foreclosure and Sale; R. 3-12}. Prior to the sale, Chief Justice Toal issued Administrative Order 2011-05-02-11. Chase served the Notice of Mortgagor's Right to Foreclosure Intervention on counsel for Sample at his last known address. {Notice of Mortgagor's Right to Foreclosure Intervention, Certificate of Service; R. 17}. The action was stayed to allow completion of that process.

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[1] Chase combines the Statement of Case and Statement of Facts in order to reduce repetition and for clarity. The Statement of the Case and Statement of Facts are one and the same for this matter.

Thereafter, the special referee noticed the sale of the property for February 2013. {Notice of Sale; R. 18}. Chase served the notice of sale on Sample's counsel at his last known address **and** served the notice of sale at Sample's home address. {Transcript p. 8; R. 26}. Sample's counsel admitted to the special referee that Sample still lived in the home where notice of sale was mailed. {Transcript p. 3; R. 21}.[2] Neither Sample nor her counsel appeared at the sale. {Transcript p. 9; R. 27}.

Sample then file a motion to set aside the foreclosure sale. {Motion to Set Aside; R. 13}. Sample argued she did not receive notice of the foreclosure sale because her counsel changed address since the inception of the action, and Chase's service violated her due process rights. {Motion to Set Aside p. 1; R. 13}. Chase defended against the motion, arguing all notices in the case were sent to the last known address of Sample's counsel pursuant to Rule 5(b)(1) of the South Carolina Rules of Civil Procedure. {Transcript p. 8; R. 26}.

Ultimately, the special referee denied the motion to set aside the foreclosure sale. {Order Denying Motion to Set Aside; R. 1-2}. The special referee found (1) that Chase properly served counsel for Sample at his last known address and (2) that counsel for Sample failed to provide any other address to Chase for service. {Order Denying Motion to Set Aside p. 1-2; R. 1-2}. The special referee did not rule on any due process argument advanced by Sample. {Order Denying Motion to Set Aside p. 1-2; R. 1-2}. Sample did not file any motion to reconsider or other applicable post-trial motion. Instead, Sample filed a notice of appeal. {Notice of Appeal}.

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[2] Counsel further admitted that Sample and counsel received the notice of the hearing on the motion to set aside at the home address addressed to Sample. {Transcript p. 17; R. 35}.

Scope of Review

Our courts have repeatedly held that it "is undoubtedly the policy of the law to maintain judicial sales." Wingard v. Hennessee, 206 S.C. 159, 170, 33 S.E.2d 390, 395 (1945). "The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final." Spillers v. Clay, 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958). Thus, it is well-settled that "the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court." Wells Fargo Bank, NA v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008); Investors Sav. Bank v. Phelps, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990).

Argument

I. This Court should affirm the order denying the motion to set aside the foreclosure sale because Sample failed to preserve her argument for appellate review.

Sample claims to this Court that the special referee "failed to properly apply the law of due process" in denying her motion to set aside the foreclosure sale. See Appellant's Br. p. 5-6. This argument lacks merit. The special referee did not rule on this constitutional argument in the order denying Sample's motion to set aside the foreclosure sale. Therefore, Sample's due process argument is not preserved for appellate review. This Court should affirm the special referee's order denying the motion to set aside the foreclosure sale.

"Preserving issues for appellate review is a fundamental component of appellate practice." Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court

erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. Id.; Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (holding that an appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court).

The first step in preserving an issue for appellate review is to present the ground with specificity to the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The trial court must also rule upon the issue for it to be preserved for review. Id.; see also Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000). If the trial court fails to rule on an issue, then it is incumbent on the party to seek a ruling by filing the appropriate post-trial motion in order to preserve the issue for appellate review. I'On, 338 S.C. at 422, 526 S.E.2d at 724; see also Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993). Therefore, when a party raises the issue, the trial court fails to rule on the issue, and the party fails to raise the court's failure to rule by way of the appropriate post-trial motion, then the issue is not preserved for appellate review. Great Games, Inc. v. S.C. Dep't. of Rev., 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000).

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On, 338 S.C. at 422, 526 S.E.2d at 724. "The requirement also serves as a keen incentive for a party to prepare a case thoroughly." Id. Importantly, "[i]t

prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

Moreover, our courts have clearly and repeatedly held that constitutional arguments are no exception to the rules of issue preservation and are deemed waived if not raised to the trial court. A constitutional issue must be raised to and ruled upon by the trial court to be preserved for appeal. See Grant v. S.C. Coastal Council, 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) (finding appellant's argument that the hearing below was conducted in such a way as to deprive him of his constitutional due process rights was never mentioned prior to his appeal, and consequently, was not preserved for review); Fraternal Order of Police v. S.C. Dept. of Revenue, 352 S.C. 420, 435, 574 S.E.2d 717, 724 (2002) (holding that the failure to plead or obtain a ruling from the trial court on a constitutional argument renders the issue unpreserved); Bickerstaff v. Prevost, 380 S.C. 521, 525-26, 670 S.E.2d 660, 662 (Ct. App. 2009) (holding that constitutional arguments are no exception to the rules of issues preservation and are deemed waived if not raised to the trial court).

Sample failed to comply with these well-established rules of error preservation in two ways. First, Sample did not raise this due process argument with the required specificity to the special referee. In the motion to set aside the foreclosure sale, Sample merely made the cursory and unsupported statement that "[f]ailure to properly serve [Sample] with notice of hearings . . . violates her rights under the Due Process Clause . . . ." {Motion to Set Aside p. 1; R. 13}. Sample did not provide any further argument, facts, or authority in support of that bald assertion. {Id.; R. 13}. Such an

unsupported claim failed to raise the issue with the specificity required to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. See, e.g., Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (2004) (stating that an issue must be "raised to the trial court with sufficient specificity" to be preserved for appellate review). Thus, the issue is not preserved for appellate review.

Second, even if Sample properly raised the issue, the due process argument is still not preserved for appellate review. The special referee did not rule on this argument in the order denying the motion to set aside. {Order Denying Motion to Set Aside p. 1-2; R. 1-2}. Sample did not file any motion to reconsider, or other appropriate post-trial motion, that raised the special referee's failure to rule on the due process argument. Thus, Sample failed to preserve the argument for appellate review. See I'On, 338 S.C. at 722, 526 S.E.2d at 724; Great Games, 339 S.C. at 85, 529 S.E.2d at 9. Accordingly, this Court should affirm the order denying the motion to set aside the foreclosure sale on this basis alone.

II. This Court should affirm the order denying the motion to set aside the foreclosure sale because there is no requirement that a party to a foreclosure action be given personal notice of a judicial sale.

In her brief, Sample claims that the foreclosure sale should have been set aside because she was never personally served with the notice of foreclosure sale. See Appellant's Br. p. 4; 5-6. This argument is a red herring and is manifestly without merit. South Carolina law contains no requirement that a party to a foreclosure action be given personal notice of a judicial sale. See Cumbie v. Newberry, 251 S.C. 33, 37,

159 S.E.2d 915, 917 (1968); Peoples Fed. Sav. & Loan Assn. v. Graham, 291 S.C. 178, 182, 352 S.E.2d 511, 514 (Ct. App. 1987).

In Graham, this Court addressed this same issue in the context of a foreclosure sale. After the plaintiff purchased the property at a foreclosure sale, Graham and two lien holders moved to have the foreclosure sale set aside based on the fact that they were not served with notice of the foreclosure sale. Id. at 180, 352 S.E.2d at 512. The trial court denied the motion, reasoning the lack of service "is not the sort of unfairness which will void the sale . . . the lack of personal service [is] insufficient grounds upon which to vacate the judicial sale." Id. at 181, 352 S.E.2d at 513. This Court affirmed, holding "there is no requirement of law that parties to a suit for foreclosure be given personal notice of a judicial sale." Id. at 182, 352 S.E.2d at 514.

Sample's argument also fails for an additional reason. Chase sent the notice of sale to Sample's attorney at his last known address **and** to Sample (and to her attorney, who is her husband) at her home address. Chase presented evidence that the notice was mailed to Sample at her residence. {Transcript p. 8; R. 26}. Thus, the burden of proof shifted to Sample to rebut the presumption of receipt. Once evidence of mailing is shown, the burden of proof shifts to the party claiming that he did not receive a mailing to offer evidence to rebut a presumption of receipt. See Bakala v. Bakala, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) ("Evidence of mailing establishes a rebuttable presumption of receipt."); Foster v. Ford Motor Credit Co., 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990) ("Evidence that a letter is properly addressed and mailed raises a presumption it was received by the addressee . . . ."). Simply stating she did not receive the notice cannot overcome this presumption. Notably, Sample's

counsel admitted to the special referee that (1) Sample still lived in the home where notice was mailed {Transcript p. 3; R. 21}, and (2) Sample and counsel received the notice of the hearing on the motion to set aside addressed to Sample at the home address {Transcript p. 17; R. 35}. Therefore, it is incongruous for Sample to contend she did not receive the notice of sale sent to her home address.

Therefore, any purported lack of service of the notice of sale cannot provide a basis to set aside the foreclosure sale. As a result, the special referee properly rejected this argument. This Court should affirm.

III. Even if notice was insufficient in this action, this Court should affirm because Sample failed to prove she suffered any resulting prejudice.

Even if Sample could establish that she failed to receive the notice of sale, this Court should still affirm the order denying the motion to set aside because Sample failed to demonstrate any resulting prejudice from the purportedly deficient service. Accordingly, this Court must affirm the special referee's order. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

As a general rule, where a party receives inadequate notice, he or she must demonstrate prejudice resulting from the insufficient notice. Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 15, 577 S.E.2d 190 (2003); Ballenger v. S.C. Dept. of Health & Envtl. Control, 331 S.C. 247, 500 S.E.2d 183 (Ct. App. 1998). "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her

case." Chastain v. Hiltabidle, 381 S.C. 508, 518, 673 S.E.2d 826, 831 (Ct. App. 2009) (citing Gardner, 353 S.C. at 14, 577 S.E.2d at 197). "Even where a party receives no notice, he must establish that, had he received notice, he would have taken pertinent action and could have reduced his liability." Gardner, 353 S.C. at 15, 577 S.E.2d at 197.

In this matter, Sample failed to argue or otherwise introduce any evidence of prejudice. She offered no evidence or argument that she was unable to bid on the property at the foreclosure sale due to any allegedly insufficient notice. Sample put forth nothing that would establish that she would have attended the sale, bid on the property, or otherwise done anything different than that which occurred in this matter. In fact, Sample never even mentioned the prejudice requirement in her motion to set aside the foreclosure sale or in argument to the special referee. In sum, Sample offered no evidence of prejudice to the special referee. As a result, Sample failed to establish an essential element required for her motion to set aside the foreclosure sale based on deficient notice. This Court must affirm.[3]

IV. The special referee properly found that Chase properly served Sample with the Notice of Mortgagor's Right to Foreclosure Intervention.

To the extent that Sample argues that the sale should be set aside because the Notice of Mortgagor's Right to Foreclosure Intervention was not sent to Sample's

[3] Sample cannot simply allege prejudice in her reply brief to refute this lack of evidence. In order to prevail in this appeal, the evidence presented to the special referee must demonstrate the prejudice. Sample cannot do so on this record. Therefore, this Court must affirm the ruling of the special referee.

counsel's address, that argument also fails for two reasons.[4] First, Chase served the notice on Sample's counsel's last known address pursuant to Rule 5, SCRCP. Second, Chase filed the Notice of Mortgagor's Right to Foreclosure Intervention with court on June 8, 2011. {Notice of Mortgagor's Right to Foreclosure Intervention; R. 16}. Notably, Sample admits in her brief to this Court that the Notice of Mortgagor's Right to Foreclosure Intervention was filed on June 8, 2011. See Appellant's Br. p. 4. Sample's counsel took no action after filing of the notice.

Our rules of civil procedure allow service on a party to be made upon:

> [T]he attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court . . . . Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

Rule 5(b)(1), SCRCP. Chase served the Notice of Mortgagor's Right to Foreclosure Intervention on the last known address for Sample's counsel. {Notice of Mortgagor's Right to Foreclosure Intervention, Certificate of Service; R. 17; Transcript p. 8; R. 26}.

The South Carolina Supreme Court has "never required exacting compliance with the rules to effect service of process." Roche v. Young Bros., Inc. of Florence,

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[4] Sample's brief is unclear as to the basis she claims the special referee erred. Sample references the Notice of Mortgagor's Right to Foreclosure Intervention and "all subsequent notices" in her brief. See Appellant's Br. p. 4, 5. However, Sample never specifically states which notice is used to support her appellate argument. Chase believes that Sample claims relief based on failure to be served with the notice of sale because that is the type of motion she filed with the special referee. However, out of an abundance of caution, Chase also addresses any argument based on service of the Notice of Mortgagor's Right to Foreclosure Intervention.

318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995). "Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Roche, 318 S.C. at 210, 456 S.E.2d at 899. "To establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process." McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005). "When these rules are followed, there is a presumption of proper service." Id.

Chase sufficiently complied with the requirements of Rule 5(d)(1), SCRCP. Chase served the notice at counsel's last known address. Sample's counsel admitted the address used for service by Chase was the address "when I made my first appearance or notified counsel that I was involved in the case." {Transcript p. 3-4; R. 21-22}. Sample's counsel never provided counsel for Chase with any other address for service of notices. {Transcript; R. 19-37}. By sending to counsel's last known address, a presumption of proper service exists under Rule 5(b)(1), SCRCP. In addition, service was complete upon mailing. Because service was presumed and complete upon mailing, Sample had notice of the Notice of Mortgagor's Right to Foreclosure Intervention.

Moreover, the record indicates that Sample's counsel's several moves prevented service at any address other that the initial address provided by Sample's counsel. Sample's counsel never informed Chase of the relocation of his office. In fact, Sample's counsel acknowledged at the hearing that he had moved offices several times since the inception of this action. The foreclosure action was filed in 2009. At that time, counsel used the post office box address for service. {Transcript p. 3-4; R. 21-

22}. Chase served Sample at that address. {Notice of Mortgagor's Right to Foreclosure Intervention, Certificate of Service; R. 17}. Sample's counsel first move occurred in April 2010. {Transcript p. 4; R. 22}. Counsel relocated to an address in Fort Mill, South Carolina. {Transcript p. 4; R. 22}. Counsel did not inform Chase of this move or any new address associated with that move. Then counsel moved again sometime in 2011 to another address in Rock Hill, South Carolina. {Transcript p. 5-6; R. 23-24}. Counsel again did not inform Chase of this move or any new address associated with that move.

Despite the constant moves, counsel expected Chase to have undertaken an investigation to determine his last known address. {Transcript p. 6; R. 24}. This Court has previously rejected such a claim. In NCNB South Carolina v. Floyd, the lender served the borrower at the address borrower provided at the inception of the transaction with the lender. 303 S.C. 261, 262-64, 399 S.E.2d 794, 795-96 (Ct. App. 1990). The master affirmed the service. Floyd, 303 S.C. at 263, 399 S.E.2d at 794. On appeal, borrower argued that the lender did not properly serve notice of a foreclosure hearing because the service address was not his last known address, and therefore, the foreclosure sale should be set aside. Id. at 263-64, 399 S.E.2d 794, 795-96. This Court rejected that argument, cited Rule 5(b)(1), SCRCP, and held the "address to which notice was mailed was the last address known to NCNB." Id. at 264, 399 S.E.2d at 796. This Court affirmed because borrower failed "to give any specific address at which he could have been located." Id. Notably, this Court reasoned service was proper at the last known address provided by the borrower

because "[t]he record indicates that [borrower] had no specific address but was moving from place to place" during the litigation. Id.

Floyd is analogous to this matter. Sample's counsel did not inform Chase of any of the moves or any new service addresses associated with the moves. The record supports a finding that counsel "had no specific address but was moving from place to place" during this litigation. Thus, the proper place, per Floyd, for Chase to serve the notices was the address that Sample's counsel provided (and admitted to the special referee that he provided) at the outset of the litigation.

Second, Sample has acknowledged that she was aware that Chase filed the Notice of Mortgagor's Right to Foreclosure Intervention on June 8, 2011. See Appellant's Br. p. 4. Thus, Sample had notice, and her claims to the contrary fail. See, e.g., Patel v. S. Brokers, Ltd., 277 S.C. 490, 494, 289 S.E.2d 642, 645 (1982) ("This Court has consistently overruled technical objections to service of process where the defendant has not been denied due process."); LaFrance v. LaFrance, 370 S.C. 622, 636, 636 S.E.2d 3, 10 (Ct. App. 2006) overruled on other grounds by Arnal v. Arnal, 371 S.C. 10, 636 S.E.2d 864 (2006) (stating that "the overriding purpose of service is notice," and where notice was given, refusal to address a motion because of technically improper service would not do substantial justice). This Court should affirm the order denying the motion to set aside the foreclosure sale.

V. The special referee properly found that the Attorney Information System did not provide a basis to set aside the foreclosure sale in this action.

Assuming Sections 1-4, supra, do not provide sufficient basis to affirm the special referee's order, this Court should still reject Sample's arguments regarding service. Sample contends that the special referee erred because her counsel had "updated his address . . . with the South Carolina Attorney Information System" prior to service of the notices at issue and that Chase should have served him at that address. See Appellant's Br. p. 5-6. This argument lacks merit for two reasons. First, Sample provides no authority for the proposition that the Attorney Information System ("AIS") supplanted the normal rules of service or relieved him of his obligation to inform counsel for Chase of his change in address. Second, AIS was not fully operational at the time of service in this matter. Thus, the information in AIS could not be used to serve Sample through her counsel.

As an initial matter, Sample has abandoned this argument because she does not cite any authority to support her claim. See, e.g., State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); Broom v. Jennifer J., 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned where the party's brief cited minimal authority and presented no argument as to how the ruling was an abuse of discretion or constituted prejudice pursuant to applicable authority).

Second, the AIS order affords no relief to Sample. The AIS order set forth an effective date of November 18, 2011. See Supreme Court Administrative Order 2011-

10-17-01. The AIS order plainly and unambiguously allowed South Carolina attorneys until "November 18, 2011" to "log-on, verify, and update their contact information on the AIS." Id. Thus, any information contained on AIS could not be considered accurate or reliable until the effective date of November 18, 2011. As the order plainly states, attorneys had until that date to alter, change, or update their information.

Chase effectuated service of the Notice of Mortgagor's Right to Foreclosure Intervention on Sample, through her attorney, on June 7, 2011. {Notice of Mortgagor's Right to Foreclosure Intervention and Certificate of Service; R. 17}. That was 164 days prior to the effective date of AIS. Chase could not be expected to rely on information in a system that was subject to change for another 164 days. Therefore, the special referee correctly found that it was incumbent on Sample's attorney to notify counsel for Chase of any change in address and that AIS did not obviate that requirement. This Court should reject Sample's unsupported argument and affirm the order denying the motion to set aside the foreclosure sale.

Conclusion

Based on the foregoing, this Court should affirm the order denying Sample's motion for relief from the foreclosure sale.

{Signature Page Follows}

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PROOF OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for JP Morgan Chase Bank, National Association, do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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Respondent's Brief

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CERTIFICATE OF COUNSEL

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

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