

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Pickens County

Honorable Brian M. Gibbons, Circuit Court Judge

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APR 16 2019

THE STATE,

RESPONDENT,

SC Court of Appeals

V.

JIMMY BYRON KEITH CURLES,

APPELLANT

APPELLATE CASE NO 2016-002229

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ANDERS BRIEF OF APPELLANT

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KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

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**TABLE OF AUTHORITIES**

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**STATEMENT OF ISSUE ON APPEAL**

Did the sentencing judge err in failing to designate on one of the sentencing sheets that the sentence imposed was to be served concurrently?

## STATEMENT OF THE CASE

In April of 2015, the Pickens County Grand Jury indicted Appellant, Jimmy Byron Keith Curles, for one count of burglary first degree and two counts of burglary second degree, indictments #2015-GS-39-0601, 0603, 0605. On September 20, 2016, Appellant appeared before the Honorable Brian Gibbons and pled guilty to three counts of burglary second degree, nonviolent. Kenneth Roper represented Appellant at the plea. Courtney Landsverk represented the State. Judge Gibbons sentenced Appellant to ten (10) years concurrent on each charge. (R. p. 8). The judge, however, failed to check the concurrent box on the sentencing sheet for Indictment #2015-GS-39-0603. (R. p. 47).

On September 22, 2016, Appellant filed, *pro se*, documents with both the General Sessions Court in Pickens and the South Carolina Court of Appeals. (R. p. 23-27). On November 18, 2016, counsel filed an amended notice of appeal. (R. p. 29-30). In the cover letter for the amended notice of appeal counsel wrote, "On September 26, 2016, Mr. Curles wrote to me requesting a reconsideration of his sentence, which I then confirmed as properly and timely filed with the Pickens Clerk of Court. I was unaware Mr. Curles also filed with the Court of Appeals, but am responding with this Amended Notice as instructed by your office." (R. p. 28). In a letter dated April 1, 2017, counsel notified the Court of Appeals that the motion to reconsider sentence was still pending. (R. p. 31). E-mails between counsel for both the State and Appellant, Judge Gibbons' law clerk and the Court of Appeals reflect that the motion for reconsideration of sentence was scheduled for February 2, 2018. (R. p. 32-34).

On February 2, 2018, Appellant appeared before Judge Gibbons for the motion to reconsider sentence. Kenneth Roper again represented Appellant. Baker Cleveland represented the State. Judge Gibbons clarified that he intended to give Appellant credit for time served with

a sentence start date of February 3, 2014, as reflected in the amended sentencing sheets. (R. p. 49-51). The judge, however, once again failed to check the concurrent box on the sentencing sheet for Indictment #2015-GS-39-0603. (R. p. 50).

In a letter dated March 13, 2018, to Mr. Roper, the Court of Appeals asked counsel to advise the Court about the status of the motion to reconsider sentence or the direct appeal would be dismissed. (R. p. 35). In an e-mail dated April 9, 2018, counsel wrote to the Court of Appeals, "Judge Brian Gibbons heard and granted Mr. Curles' Motion for sentence reconsideration on February 2, 2018. My understanding from Mr. Curles is that he is satisfied with the Court's grant of his requested relief, and the matter should not be considered by the Ct. of Appeals." (R. p. 36). The Court of Appeals asked counsel to file a motion to dismiss the appeal. (R. p. 37). In a letter to the Court in June of 2018, however, Appellant indicated that he did not wish to drop the appeal. (R. p. 38). In a letter dated July 5, 2018, the Court of Appeals notified counsel that the appeal was no longer in abeyance and the transcripts needed to be ordered. The Office of Appellate Defense took over representation and the transcripts were ordered. This appeal follows.

### **STANDARD OF REVIEW**

“In criminal cases, the appellate court sits to review errors of law only.” State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009)(quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is “bound by the trial court’s factual findings unless they are clearly erroneous.” Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court “does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court’s ruling is supported by any evidence.” State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). “A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.” In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

## ARGUMENT

**The sentencing judge erred in failing to designate on one of the sentencing sheets that the sentence imposed was to be served concurrently.**

At the original sentencing the judge stated, "I'll go along with the recommendation here. I'll sentence you to ten years, concurrent, on all charges, giving you credit for all the time you have served." (R. p. 8 lines 7-11). At the hearing on the motion to reconsider sentence the judge stated, "And everything is concurrent." (R. p. 21 lines 10-11). The judge clearly indicated that all of the sentences should be served concurrently. The judge, however, neglected to check the concurrent box on the sentencing sheet for Indictment #2015-GS-39-0603. The judge erred.

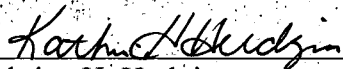
In Major v. S.C. Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 465–66, 682 S.E.2d 795, 799–800 (2009), the South Carolina Supreme Court wrote, ". . . [A] court's final judgment in a criminal case is the pronouncement of the sentence which includes the ability to designate whether sentences run concurrent or consecutive, subject to statutory restrictions. State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989); see De La Cruz, 302 S.C. at 15, 393 S.E.2d at 186 ("Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction."). There are no statutory restrictions preventing the judge from imposing concurrent sentences for the burglary charges in the present case.

In Bordeaux v. State, 410 S.C. 495, 500, 765 S.E.2d 143, 145 (2014), the South Carolina Supreme Court wrote, "An unambiguous sentencing pronouncement will control over an ambiguous sentence, whether oral or written, so long as giving effect to that pronouncement does not result in an illegal sentence or a deprivation of a defendant's constitutional rights. *See, e.g., Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) (declining to give effect to an

unambiguous sentencing sheet over an unambiguous plea colloquy because to do so would result in a deprivation of the defendant's right to due process)." The unambiguous sentencing pronouncement in the present case controls over the ambiguous sentencing sheet.

**CONCLUSION**

Based on the argument above, this Court should find that the sentence imposed for Indictment #2015-GS-39-0603, is to be served concurrent to the other charges.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2019.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

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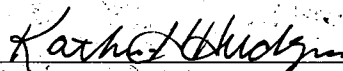
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jimmy Byron Keith Curles states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Brian M. Gibbons, which was held on September 20, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Jimmy Byron Keith Curles.

Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 16th day of April, 2019.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

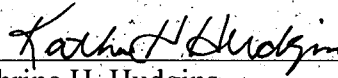
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Sentencing sheets;
- (3) Amended sentencing sheets;
- (4) Guilty plea transcript, September 20, 2016;
- (5) Transcript from motion to reconsider sentence, February 2, 2018;
- (6) *Pro se* documents;
- (7) Amended notice of appeal;
- (8) Cover letter for amended notice of appeal;
- (9) April 1, 2017, letter to the Court of Appeals;
- (10) January 2018 e-mails;
- (11) March 13, 2018, letter from the Court of Appeals;
- (12) April 2018, e-mails;
- (13) June 2018 letter from Appellant to Court of Appeals;
- (14) July 5, 2018, letter from the Court of Appeals

I certify that this designation contains no matter which is irrelevant to this appeal.

April 16, 2019



Kathrine H. Hudgins  
Appellate Defender

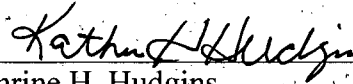
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ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 16, 2019.



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Appellate Defender

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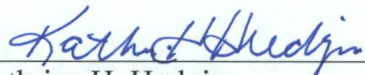
APPELLANT

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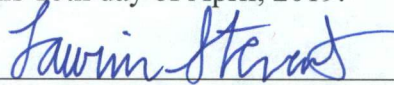
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jimmy Byron Keith Curles, #271032, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 16th day of April, 2019.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 16th day of April, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.