

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARQUAL DEVINE GRIFFIN,

APPELLANT

APPELLATE CASE NO 2017-001960

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt?

STATEMENT OF THE CASE

On March 22, 2016, a Greenville County grand jury indicted Appellant for attempted armed robbery (2016-GS-23-2330), assault and battery in the first degree (2016-GS-23-2331), two counts of kidnapping (2016-GS-23-2332; -2333), murder, and possession of a weapon during a violent crime (2016-GS-23-2335). R. (478-479, 481-482, 484-485, 487-488). On June 27, 2017, the grand jury indicted Appellant for burglary in the first degree (2016-GS-23-2334). R. (490-491). The state, represented by Andrew Culbreath and Elizabeth Gary, called the case to trial before the Honorable Perry Gravely and a jury on September 11-13, 2017. R. 1. Randall L. Chambers and Edward H. Dawson, III, represented Appellant. R. 1. At the conclusion of the trial, the jury found Appellant guilty as charged. R. 458, l. 18 – R. 460, l. 6. Judge Gravely sentenced Appellant to forty-five years for murder, ten years for armed robbery, ten years for assault and battery first degree, fifteen years for burglary first, ten years for each count of kidnapping, and five years for possession of the weapon. R. 469, ll. 2-9; R. (480, 483, 486, 489, 492, 495, 496). He ordered all sentences to be served concurrently. R. 469, ll. 9-10; R. (480, 483, 486, 489, 492, 495, 496).

On September 22, 2017, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

“The standard of review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.” State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing Estelle v. McGuire, 502 U.S. 62 (1991)). “Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.” State v. Lemire, 406 S.C. 558, 572 (Ct. App. 2013).

STATEMENT OF FACTS

On December 27, 2015, April Green was living in a home owned by her boyfriend, Gerald "Cincinnati" White. R. 90, ll. 3-15. April was addicted to heroin, and Gerald was a drug dealer. R. 90, ll. 3-15; R. 91, ll. 11-13. When Gerald went to jail on drug charges, April took over his business. R. 91, ll. 8-20. She also invited her ex-boyfriend and fellow drug addict, Nathan Crouch, to move into Gerald's house with her. R. 90, l. 3 – R. 91, l. 7. April's brother, Shane Barron, was at Gerald's house visiting on December 27, 2015. R. 94, l. 18 – R. 95, l. 4; R. 168, ll. 11-21.

Earlier in the day on December 27, 2015, April claimed that a black male knocked on the door. R. 96, ll. 6-10. The man asked for Cincinnati. R. 96, ll. 14-15. She told the man that Cincinnati was not there and then told the man to leave. R. 96, ll. 13-15. The man left. R. 97, ll. 17-20.

One of April's frequent customers was Kevin Hoffman. R. 93, ll. 12-20; R. 203, ll. 24-25. Kevin purchased some heroin from April on December 27, 2015. R. 205, ll. 2-12. Later, Clinton Nalley called Kevin and indicated he could get some money and drugs. R. 206, ll. 12-18. Kevin picked up Clinton and the two went to a store where Clinton talked to someone in a SUV. R. 207, ll. 3-7.

Thereafter, Kevin called April wanting to buy more heroin. R. 98, ll. 8-14; R. 208, ll. 18-24. When April noted that Kevin had "just" purchased drugs from her, he responded that he had "run into some more money." R. 98, ll. 14-16. Five minutes later, Kevin knocked on the door. R. 98, ll. 17-21; R. 208, ll. 24-25. April opened the door and exchanged drugs for money with

Kevin. R. 98, ll. 21-23; R. 209, l. 14.¹ To April's surprise, Kevin entered the house with a man following closely behind him. R. 98, ll. 24-25. According to April, the man was waving a gun and making demands. R. 98, l. 25. This was the same man who had been at her house earlier asking for Cincinnati. R. 112, ll. 20-25.

Kevin claimed that after he received the drugs from April, he heard someone approach him from behind. R. 209, ll. 15-17. Kevin claimed that he entered the house and then got down on the floor pursuant to the man's instructions. R. 209, l. 25 – R. 210, l. 1. Kevin crawled to the laundry room and shut the door. R. 211, ll. 20-21. He never saw the man. R. 211, ll. 11-15. Kevin heard a scuffle and a gunshot. R. 211, l. 23- R. 212, l. 3. Kevin got behind the dryer. R. 212, l. 6. When things got quiet, Kevin ran out the front door. R. 212, ll. 12-16. Kevin jumped in his car with Clinton and left. R. 212, l. 24 – R. 213, l. 4.²

Shane was sitting on the couch when Kevin and the man entered. R. 100, l. 7. Shane claimed the man had a gun pointed to the back of Kevin's head as the two entered. R. 170, ll. 7-10.

Nathan entered the main room from the bedroom, pushing April away from the man. R. 100, ll. 10-13; R. 173, l. 25 – R. 174, l. 2. According to Shane, Nathan tried to grab the gun. R. 174, ll. 4-7. "When he went to grab, the gun went off." R. 174, l. 11. Both men then fell behind the couch. R. 174, ll. 14-17. When April re-entered the living room, Shane started fighting with the man. R. 176, ll. 10-15. Shane knocked the gun from his hand. R. 177, ll. 1-14. April heard

¹ When April initially opened the door for Kevin, she was on the phone with Gerald, who was still in jail. R. 100, ll. 16-19. When Nathan pushed her back, she hung up with Gerald and called 911. R. 100, ll. 21-23. By the time of the trial, Gerald was dead. R. 108, ll. 5-10.

² A day or two after the shooting, Kevin returned to April to buy more heroin. R. 221, ll. 13-16. The police were watching, and they arrested Kevin. R. 221, ll. 16-18.

a gunshot, but did not see the shooting. R. 101, ll. 5-8; R. 108, ll. 2-4. When April returned to the living room, she saw Nathan on the ground and her brother fighting with the man. R. 102, l. 25 – R. 103, l. 2. April joined the melee as well. R. 103, ll. 3-9.

When Shane got the man off of him, he ran outside. R. 177, l. 20 – R. 178, l. 5. Shane saw two people sitting in a SUV outside. R. 178, l. 22 – R. 179, l. 3. Shane screamed, “why did you bring him here?” R. 178, ll. 6-7. The occupants of the SUV just watched as Shane and the man battled. R. 179, ll. 20-25.

After fighting with the man, April entered a bedroom, and talked with the 911 operator. R. 109, ll. 11-17. While April was in the bedroom, the man, who was unarmed, kicked in the door. R. 109, ll. 18-23; R. 111, ll. 2-7. The man punched her and stomped her. R. 110, ll. 5-9. Shane heard April “start screaming again” so he ran back inside. R. 180, ll. 20-22. Shane saw the man beating April. R. 181, l. 3. Shane hit the man as hard as he could, which allowed him to drag the man off April. R. 111, ll. 8-9; R. 181, ll. 6-7. At some point, the man ran out of the house. R. 112, ll. 14-17.

Shortly thereafter, Shane heard sirens and saw the man run out the door. R. 181, ll. 15-17. Shane saw the gun, and his “first thought” was “to hide it.” R. 181, ll. 21-25. Fearing he would leave his fingerprints if he grabbed the handle of the gun, Shane grabbed the gun by the barrel. R. 182, ll. 12. He threw the gun behind the TV. R. 182, ll. 2-3.³ Then, the police arrived. R. 182, ll. 8-11.

At trial, Shane opined that Kevin had engaged in “a setup deal.” R. 190, ll. 20-25. In Shane’s view it was “kind of obvious” because Kevin initially had a gun to his head, but then

³ During their initial search of the house, the police were unable to find the gun the man allegedly had inside the home. R. 230, ll. 10-23. One of the officers claimed that Shane informed them that he threw it behind a dresser. R. 231, ll. 1-4. Eventually, the police found the gun behind a dresser. R. 231, ll. 7-8. Appellant’s DNA was found on the gun. R. 246, ll. 3-20.

just walked away once the two men entered the residence. R. 190, ll. 1-5. Kevin denied any involvement, explaining that he knew Nathan, even recognized him when he jumped over Nathan's body to get out of the house, and would not have wanted anyone to get hurt. R. 212, ll. 15-16; R. 214, ll. 8-15.

On January 4, 2015, the police interrogated Appellant regarding the shooting incident. R. 238, ll. 3-10. Appellant explained that he bought drugs from April on December 27, 2015. State's Exhibit #23. When he used the drugs, he realized the drugs were "bad." State's Exhibit #23. Obviously unhappy that he had been cheated, Appellant returned to April in order to get a refund. State's Exhibit #23. Understanding the "indisputable nexus between drugs and guns," Appellant carried a small handgun with him. State's Exhibit #23; see State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006). When he arrived at April's house, a very large man attacked him. State's Exhibit #23. The two then struggled over the gun. State's Exhibit #23. During the struggle, the man was shot. State's Exhibit #23. Appellant tried to leave, but April and the other man in the house were beating on him, preventing him from leaving. State's Exhibit #23. Eventually, Appellant was able to leave. State's Exhibit #23.

ARGUMENT

The trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt.

Relevant facts

Initially when the judge instructed the jury regarding murder, the judge defined malice as “hatred, ill will, or hostility toward another person.” R. 434, ll. 14-15. He further described it as “the intentional doing of a wrongful act without just cause or excuse, and with then intent to inflict an injury or under circumstances that the law will infer an evil intent.” R. 434, ll. 15-19. Regarding an inference of malice, the judge charged the jury on felony murder, explaining that if someone “intentionally kills another during the commission of a felony, the inference of malice may arise.” R. 435, ll. 17-19.

After instructing the jury on murder, the judge told the jury to consider involuntary manslaughter. R. 436, ll. 2-9. There was ample evidence in the record that Nathan was shot during a struggle over the gun.

When the judge permitted the attorneys to note any objections, the state argued the judge erred in failing to charge the jury that malice could be inferred from “possession of a weapon.” R. 446, ll. 6-9. The judge agreed to re-charge the jury regarding inferred malice. R. 446, l. 19. When the jury re-assembled, the judge instructed them that malice could be inferred “if one intentionally kills another with a deadly weapon.” R. 450, ll. 1-5.

While deliberating, the jury requested the judge “[w]rite out the law for each indictment.” R. 454, l. 12; R. 471. The judge “printed *only* the portions of [the] charge that talk[ed] about the

different indictment[s], the charges,” and sent those into the jury room with the jury. R. 454, ll. 15-18 (emphasis added). The written charges also included the inference of malice from the use of a deadly weapon. R. 475. Specifically, the written charges provided:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

R. 475.

Trial counsel posed no objection to the jury instruction regarding implied malice from the use of a deadly weapon despite evidence in the case reducing and mitigating the charge of murder. In fact, the judge instructed the jury regarding involuntary manslaughter without any objection by the state.

Discussion

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) (“[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment’s due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt.” (internal quotations omitted)); see also In re Winship, 397 U.S. 358 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); Jackson v. Virginia, 443 U.S. 307, 314 (1979) (“A

meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.”). When a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant, the Due Process Clause of the Fourteenth Amendment is violated. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-704 (1975).

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), the South Carolina Supreme Court overruled prior law and held “that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide.”

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. The Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id. Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state’s constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of the South Carolina’s jurisprudence in this area, the Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to “some qualification,” specifically “the recognition that some facts will not permit the inference of malice from the use of a deadly weapon.” Belcher, 385 S.C. at 604,

685 S.E.2d at 806. The Court stated, “We are persuaded . . . that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified.” Belcher, 385 S.C. at 605, 685 S.E.2d at 806. The Court recognized that it later “began a slow, and at first almost imperceptible, retreat” from above established law and that “by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that ‘malice is presumed from the use of a deadly weapon.’” Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflect the “proper application of the charge,” the Court concluded “that instructing a jury that ‘malice may be inferred by the use of a deadly weapon’ [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity.” Belcher, 385 S.C. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher’s trial and it was “conceivable that the only evidence of malice was Belcher’s use of a handgun,” the Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling “return[ed] to the rationale” of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id.

In conducting its harmless error analysis, the Court relied upon Lowry v. State, 376 S.C. 499, 510-511, 657 S.E.2d 760, 766 (2008). Belcher, 385 S.C. at 612, 685 S.E.2d at 810. In Lowry, the Court explained that “[c]ertain constitutional errors may be harmless in terms of their effect on the fact-finding process at trial.” Lowry, 376 S.C. at 507, 657 S.E.2d at 765. Thus, “an unconstitutional jury instruction will not require reversal of the conviction if the Court

determines ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” Id. (quoting Chapman v. California, 386 U.S. 18 (1967)). In Chapman, the United States Supreme Court placed the burden of proven harmless error on the “beneficiary of the error.” Chapman, 386 U.S. at 24.

Following Belcher, when examining whether a judge’s erroneous instruction concerning implied malice from the use of a deadly weapon constituted harmless error, the Court explained that “[j]ury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error.” State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013). However, before examining the jury instruction as a whole, the Court looked for “overwhelming evidence of malice, apart from the use of a deadly weapon.” Id. The Court found such – “uncontested evidence that [Stanko] shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer,” that Stanko “then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking,” and that Stanko was arrested in possession of the car and the gun used in the killing. Id.

Examining the jury charge as a whole, the Court explained the jury instructions were “consistent with the evidence presented,” including verdict options of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty. Id. at 265, 741 S.E.2d at 714. This Court emphasized that “[n]othing in the trial court’s inferred malice charge would have prevented the jury from reaching” the other verdict options. Id. Additionally, the trial court instructed the jury that malice could be inferred from conduct showing total disregard for human life. Id. at 265, 741 S.E.2d at 715. According to this Court, the jury could have found that Stanko’s conduct showed a total disregard for human life. Id. Therefore, this Court concluded, Stanko “could not

have suffered prejudice from any separate inference that his use of a deadly weapon also give rise to an inference of malice.” Id.

There is no question that evidence was presented in this case that reduced the crime from murder to a lesser crime – specifically, involuntary manslaughter. The state consented to the judge instructing the jury regarding involuntary manslaughter. The testimony of the state’s witnesses established there was a struggle over the gun and that the shooting occurred during the struggle. Appellant’s statement to police provided evidence that Appellant shot the deceased while the two men were struggling over the gun. In light of the evidence in the record tending to reduce, mitigate, and excuse the charge, the judge violated Appellant’s right to due process of law pursuant to the Fifth, Sixth, and Fourteenth Amendments, by shifting the burden of proof to Appellant and diluting the state’s burden to prove each element of a crime beyond a reasonable doubt.

Examining the charges as a whole reveals the judge’s error in charging the jury regarding implied malice from the use of deadly weapon was not harmless beyond a reasonable doubt. Judge Gravely provided the jurors with only part of the jury charge. It is undisputed that the judge printed only the portions of the charge that concerned the offenses. The printed copy of the charge omitted any reference to the burden of proof or the presumption of innocence. However, the printed copy of the charge included the instruction that the jury could imply malice from the use of a deadly weapon.

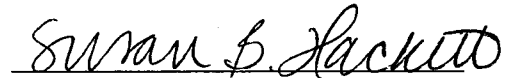
Although trial counsel failed to object to the judge’s conduct in providing the jury with only part of the instructions in written form, the South Carolina Supreme Court has made clear that “[i]t is never appropriate ... to give only part of the charge to the jury.” State v. Covert, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009). While “[a] trial court may, in its discretion, submit its instructions on the law to the jury in writing,” “submission of written instructions to the jury

is not appropriate for every case.” State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007). Provision of written instructions to the jury must “be carefully exercised by the Bench.” Id. at 129, 644 S.E.2d at 697-698.

Here, by giving the jury a very limited portion of the instructions in written form, the judge placed emphasis on those written portions. Those portions included the erroneous charge regarding implied malice. Thus, the jury placed undue emphasis on the implication of malice from the use of a deadly weapon where such an implication should not have been charged to the jury at all.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of June, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARQUAL DEVINE GRIFFIN,

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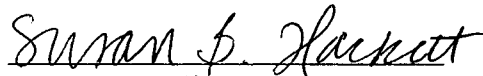
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marqual Devine Griffin states:

1. She is an 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 Perry H. Gravely, which was held on September 11-13, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Anders v. California, 386 U.S. 738, she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Marqual Devine Griffin.

Respectfully Submitted,



Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of June, 2018.

STATE OF SOUTH CAROLINA
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Appeal from Greenville County
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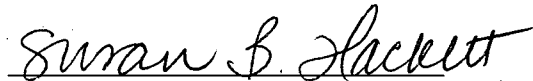
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Entire trial transcript dated September 11-13, 2017 (Volumes 1-3);
- (2) State's Exhibit #23 (DVD – Defendant's Statement);
- (3) Court's Exhibit #3 (jury note)
- (4) Court's Exhibit #6 (jury instructions);
- (5) True-billed indictments; and
- (6) Sentence sheets

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

June 13, 2018


Susan B. Hackett
Appellate Defender

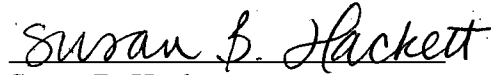
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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."

June 13, 2018.



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent
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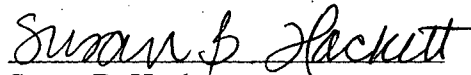
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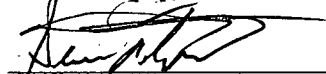
CERTIFICATE OF SERVICE

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 Melody J. Brown, 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 Marqual Devine Griffin, 358328, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of June, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of June, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022