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March 5, 2013

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Joseph G. Cobb

Dear Ms. Kitchings:

At Appellant Joseph G. Cobb's oral argument on March 5, 2013, the topic was broached of whether the jury instruction on attempted second degree criminal sexual conduct with a minor in Mr. Cobb's case was a lesser-included offense of second degree criminal sexual conduct with a minor. I was under the impression that it was not based upon the test announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932), as well as the law regarding lesser related offenses, and I represented the same to the Court.

However, it has come to my attention this afternoon that, under South Carolina case law, the attempt charge could indeed be permissible as a lesser-included of the underlying offense:

In a prosecution for rape, or for attempt or assault with intent to rape, accused may be convicted of the offense charged or of any lesser offense embraced therein, and, where the evidence, or any reasonable view thereof, warrants it, it is proper in (to?) instruct the jury that they may convict of a lesser offense included in the charge, such as attempt, or assault with intent to rape, or aggravated assault, or simple assault, and a failure or refusal to do so is error, at least where a request is made; and an instruction affirmatively excluding lesser included offenses from the consideration of the jury is likewise erroneous.

State v. Shea, 226 S.C. 501, 506, 85 S.E.2d 858, 859-60 (1955); see also State v. Hiott, 276 S.C. 72, 80, 276 S.E.2d 163, 167 (1981).

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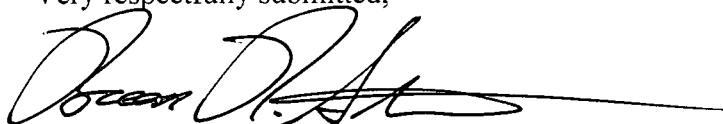
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Therefore, pursuant to my duty of candor toward the tribunal, I respectfully request to make the Court aware of this, and apologize for any inconvenience my initial answer to the Court may have caused.

Very respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

Breen R. Stevens
Appellate Defender

cc: Christina J. Catoe, Esq.