ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Spartanburg County
The Honorable Gary E. Clary, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD BERNARD MOORE,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

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STATEMENT OF THE CASE

The Spartanburg County Grand Jury indicted Appellant at the January 2000 term of court for murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime. (00-GS-42-617 through -619). The State thereafter served notice of its intention to seek the death penalty. The Spartanburg County Grand Jury handed down another armed robbery indictment at the October 2001 term of court. Appellant was represented in the lower court by Michael David Morin, Ralph Keith Kelly and Jennifer Johnson, Esquires. The prosecution was represented by Seventh Circuit Solicitor Harold W. Gowdy, III, and Assistant Solicitors James Donald Willingham, II, and Barry J. Barnette.

The Honorable Gary E. Clary held motions hearings in the case on April 3, September 28, and October 15, 2001. On October 16-22, 2001, Appellant received a capital jury trial pursuant to S.C. Code Ann. § 16-3-20 (Supp. 2002). The jury convicted him of each of the indicted offenses.

Following Appellant's exercise of the twenty-four hour waiting period in § 16-3-20(B), a sentencing proceeding was conducted in front of the same jury. The prosecution relied upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; that Appellant, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Appellant had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1), (3)-(4), (D). Judge

Clary submitted the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7).

The jury found the existence of each of the statutory aggravating circumstances alleged by the prosecution and sentenced Appellant to death. Judge Clary imposed the sentence of death for murder and sentenced Appellant to five years for the weapons charge, ten years for AWIK and thirty years for armed robbery.

A timely Notice of Appeal was served and filed. This appeal follows.

STATEMENT OF FACTS

The present crime further illustrates the evils of crack cocaine and the problems it has caused in our society. Sometime between 8:00 and 10:00 p.m. on September 15, 1999, Appellant went to the residence of George Gibson, on Hillside Drive in Whitney, S.C. [1] He asked Gibson to get him some crack cocaine. Gibson refused because Appellant did not have any money. Gibson also told Appellant that he could not get the crack for Appellant on credit. Appellant, who was unemployed at the time, told Gibson he was going to work and would return the following morning. Then, he left. **R. pp. 1245-48; 1253; 1255; 1371-72.**

Meanwhile, Mr. James Mahoney (the murder victim) was working the third shift at Nikki's Speedy Mart, a restaurant-convenience store located at the corner of Highway 221 and California Avenue in Whitney, South Carolina. He had been employed there for over three years. The owner of Nikki's kept a .32 caliber pistol and a .45 caliber semi-automatic pistol (**State's Exhibit 3**) in the store for protection.[2] Also, Mr. Mahoney carried a .44 caliber handgun (**State's Exhibit 1**) in his waistband for protection. However, his hands were ravaged by arthritis and he was of slight build. (He was between 5' 7" and 5' 9" tall and weighed approximately 145 pounds). Also, none of his co-workers or friends had seen him ever be physically aggressive towards anyone in Nikki's. **R. pp. 1195-96; 1346-57; 1361-63; 1366-70; 1489.**

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[1] Gibson knew Appellant as "Mo." **R. p. 1246.** Also, all locations referred to in this brief are in Spartanburg County unless otherwise specified.

[2] Neither of the weapons were visible to customers: the .45 was kept under a towel by the cash register and the .32 was kept under the counter.

Terry Hadden (the AWIK victim) was a regular customer at Nikki's, who stopped in to eat around 12:15 a.m. on September 16, 1999.[3] After eating and talking to Mr. Mahoney for awhile, he began playing video poker around 1:00 a.m. The store was busy for a short period, but the early morning hours remained relatively uneventful until Appellant walked into the store shortly after 3:00 a.m.[4] Mr. Hadden and Appellant glanced at each other briefly when Appellant first entered. Then, Mr. Hadden turned around and continued playing video poker. Appellant went to a cooler and, apparently, retrieved two cans of beer. See **R. pp. 1193-1205; 1309**.

> The next thing I know of anything going on in the store is when I heard Jamie [Mahoney] say, 'What the hell do you think you are doing?' . . . in a loud tone of voice.

R. p. 1205, ll. 9-14. Once Mr. Hadden heard this comment, he swivelled around in his chair and saw Appellant holding both of Mr. Mahoney's hands in one of Appellant's hands. Appellant immediately "come around and come up with a gun and told me not to move." Without giving Mr. Hadden an opportunity to comply with his directions, Appellant fired the .45 caliber semi-automatic (**State's Exhibit 3**), which he had taken from the victim's constructive possession, at him. Mr. Hadden instantly fell to the floor and played dead. He then heard a number of gunshots but did not count how many had been fired. **R. pp. 1204-09; 1215-17; 1288-89; 1424**.

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[3] Mr. Hadden worked the second shift at Wise Snacks Company. **R. pp. 1193-94; 1196**.

[4] Mr. Mahoney had a brief rush of customers around 1:15 a.m. and later he loaned his lug wrench to an African-American customer who had trouble with his tire in the parking lot. However, it does not appear that anyone came into Nikki's between the time that man left and Appellant arrived. **R. pp. 1202-04**.

In the shooting which followed, at least one shot mortally wounded the victim. The pathologist explained that Mr. Mahoney had a gunshot wound which "passed through the lower border of the eighth rib" before going through his liver, through and through his stomach, through and through his diaphragm, through and through his heart and his left lung. It then exited Mr. Mahoney's right chest. Mr. Mahoney also had a gunshot wound to his lower right arm, which broke his right arm. **R. pp. 1491-1502.**

The pathologist opined that it is possible that either there were two gunshot wounds or all of Mr. Mahoney's injuries could have been caused by a single gunshot if his body had been positioned in a manner in which that could have occurred. He died from internal hemorrhaging caused by the wound to his torso and would have died within six to ten minutes after receiving this wound. **R. pp. 1491-1502.** A bullet from Mr. Mahoney's .44 caliber weapon went through Appellant's left arm. **R. pp. 1380-84.**

Mr. Hadden continued to play dead until he heard Appellant say, "Let's get the hell out of here" and exit the store.[5] Mr. Hadden ran out of the building after he heard Appellant's vehicle leave. He then went back into the store, saw that his friend was dead and called 911. **R. pp. 1205-13.**

Appellant took a money bag containing $1,408.00 and immediately drove his pickup truck to Gibson's house. Along the way, he discarded the .45 caliber handgun which had his blood on it. **R. pp. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69;**

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[5] Appellant asserts that he only shot the victim after the victim first shot him through the left arm. However, the record does not indicate whether the victim shot him first, whether they shot at each other simultaneously or whether the victim shot him immediately after having been shot himself. Mr. Hadden clearly testified that he was playing dead after the first shot and Appellant did not testify in either phase of his trial. As with his arguments, his assertion in this regard is mere conjecture and speculation.

1478. When he reached Gibson's, he asked for Gibson to get him some crack. Gibson refused because of the late hour. During their conversation, Appellant told Gibson, "I done something bad, and I got to go turn myself in, and I got money." **R. pp. 1248-49.**

Appellant was obviously bleeding and Gibson asked him what had occurred. Appellant told him that he had been shot, and he asked Gibson to take him to the emergency room. Gibson refused because he did not want to become involved. When Appellant tried to back his truck out of Gibson's driveway, he struck a telephone pole. **R. pp. 1249-50; 1256-57.**

Coincidently, Spartanburg County Deputy Sheriff Bobby Rollins was searching for "a black male, possibly injured, driving a loud vehicle" since this was the description of the suspect he had received. He passed by as Appellant backed into the telephone pole. Therefore, he quickly turned his car around, "threw all of my light in that general area" and exited his vehicle with his weapon drawn. **R. pp. 1234-38.**

Appellant approached Deputy Rollins with his hands in the air and "bleeding profusely" from his left arm. The whole time Appellant was complying with Deputy Rollins' instructions to get on the ground, he repeatedly said, "I did it, I did it, I give up, I give up." A search of his truck resulted in the seizure of the stolen money and an open pocketknife. They found Appellant's wallet in the roadway and the bloody shirt Appellant had been wearing near Gibson's residence. **R. pp. 1238-40; 1311-18.** At the hospital, Appellant told the emergency room nurse that he was using alcohol and cocaine. **R. pp. 1377-78.**

The forensic investigator who first responded to the crime scene at Nikki's found the victim lying in the kitchen floor. He was deceased and his right arm was bent at such

a peculiar angle it was clear that it was broken. In addition to finding evidence of the victim's blood, Appellant's blood was found across the back of the victim's clothing and a trail of his blood led out the front door. Also, a meat cleaver, which did not belong to Nikki's Speed Shop (**State's Exhibit 83**), was found at the victim's feet with Appellant's blood on it. **R. pp. 1271-93; 1305-10; 1352-53; 1364-65; 1368; 1421-32**. Additionally, there were six shell casings, two lead bullet cores and two fired bullets which had been fired by the .45 automatic, as well as several fragments which were consistent with having been fired by it.

Appellant mistakenly asserts that his crimes of September 16, 1999, were not "premeditated." However, for a defendant to be guilty of murder, the State must prove only that he acted with malice aforethought at the time of the unlawful killing. There cannot be any serious contention that the prosecution failed to do so in this case and Appellant has not raised any issue on appeal concerning the sufficiency of the State's evidence. Further, a reasonable inference from the presence of the cleaver at the store and the opened pocket knife is that Appellant may have very well been armed before he entered the store. In any event, his crimes were certainly premeditated by the time he fired at Mr. Hadden, who was unarmed and had not spoken to him.

In the penalty phase of Appellant's trial, the State presented victim impact evidence (**R. pp. 1618-24; 1632-35; 1641-47**) as well as photographs and additional testimony from the pathologist who performed the autopsy. **R. pp. 1675-81**. The remainder of the State's evidence was devoted to presenting evidence related to Appellant's character.

The State presented evidence of a 1985 Michigan conviction for unlawful possession of a weapon and a May 15, 1987, Michigan conviction (see **State's Exhibit 49**) for attempted breaking and entering with intent. At the time, Appellant had described the crime by saying that he had pushed open the front door of the Broadway Mark, entered the store and removed two handguns as well as $10.00 in quarters. When later stopped by police, he managed to get away from them. Appellant spoke to David Saad (a parole and probation officer from the Michigan Department of Corrections) and said that his addiction to cocaine and crack cocaine caused him to commit the crime. **R. pp. 1648-57.**

Michelle Crowder testified to a September 1991 incident in South Carolina, in which Appellant robbed her and beat and kicked both her and her boyfriend. Her boyfriend was so badly injured that he had to go to the hospital. **R. pp. 1658-60**. Valerie Wisniewski testified about a September 13, 1991, incident in which Appellant stole money from her at the Rack Room where she was working as a cashier. **R. pp. 1662-64**.

Additionally, the State introduced evidence concerning Appellant's South Carolina convictions. On September 15, 1993, he was convicted of second offense DUS (92-GS-63-59), habitual traffic offender (93-GS-42-1804), DUS third offense (93-GS-42-1805). He was convicted of habitual traffic offender again on August 23, 1994 (94-GS-42-3666). On the same date, he was convicted of common law robbery in connection with the incident at Rack Room Shoes (92-GS-42-2606). On July 13, 1995, he was convicted of driving under suspension (third offense) (95-GS-42-160). On January 18, 1996, he was convicted of driving under suspension (sixth offense) (95-GS-42- 3836) and driving under suspension (fifth offense) (96-GS-42-387). On August 7, 1997, he was

convicted of assault and battery of a high and aggravated nature on Ms. Sonja Harrison.

R. pp. 1665-70.

ARGUMENT

I.

The trial judge did not abuse his discretion by ruling that Appellant could not argue "my very life is at stake" in his guilt phase closing argument because Appellant's argument was not relevant to the question of his guilt or innocence, which was the only question before the guilt phase jury.

Appellant's first contention is that the trial judge erroneously ruled that he could not argue "my life is in jeopardy here a second time" or "the State is seeking the death penalty, which means my very life is at stake" in his guilt phase closing argument. The State submits that the trial judge did not abuse his discretion because Appellant's argument was irrelevant to the question of whether or not he was guilty of the crimes for which he was charged. Moreover, the jury was well aware that if he was convicted then a sentencing hearing would be held to determine whether he would be sentenced to either life imprisonment or the death penalty.

Appellant began his closing guilt phase argument to the jury by saying, "I am very nervous. All I can do is tell you that I am not guilty of murder." The trial judge sustained the State's objection that Appellant was testifying instead of making an argument." **R. p. 1571, ll. 12-17.**

The trial judge instructed Appellant to limit himself to the evidence which had been presented at trial and explained that Appellant could not testify. Appellant responded by indicating that he heard the trial judge but was uncertain as to whether he

could comply with the judge's instructions.[6] The trial judge told Appellant he would stop Appellant if he did not limit his argument as the trial judge had explained. **R. p. 1571, ll. 18-25**. Appellant then proceeded to point out that the State's theory that he had pawned items to buy crack cocaine was wrong because he had been employed at the time two of the items were purchased. **R. p. 1572, ll. 2-11**.

At this juncture, Appellant made the portion of his argument which the trial judge limited, as follows:

> I am shaking up here because I don't know what to say. All I know is my life is in jeopardy here a second time.
>
> MR. GOWDY: Your Honor, that is improper argument at this stage. I would object.
>
> THE COURT: Sustain the objection.
>
> Yes, sir. You are to limit yourself to the testimony in evidence and they are to determine the guilt or innocence, sir.
>
> THE DEFENDANT: The state is seeking the death penalty on me, which means my very life is at stake.
>
> MR. GOWDY: Your Honor, that's --
>
> THE COURT: Sir, one moment. We are in the guilt phase. They are simply determining the guilt or innocence of the crimes charged at this point in time. That's all they

[6] Appellant had earlier been belligerent in his request to have his trial attorneys removed and substitute counsel appointed. His belligerence was so bad that he repeatedly threatened to file a grievance against the trial judge, as he apparently had done with respect to his trial counsel. See **R. pp. 91-130**. The State submits a reasonable inference from the earlier conduct was that Appellant may well have understood precisely what the judge instructed him and had the ability to comply with the judge's instructions but voluntarily chose not to do so.

are doing in this stage of the trial. So, please limit it to that.

THE DEFENDANT: Your Honor, I am having trouble.

THE COURT: Yes, sir.

THE DEFENDANT: Please bear with me.

See what I am trying to do, put my hand in my pocket. I have no feeling in this hand.

MR. GOWDY: Objection, Your Honor. That is not in evidence.

THE COURT: I am going to let you talk to your lawyer just one moment, please, Mr. Moore.

R. p. 1572, l. 13 - p. 1573, l. 13.

In camera, the trial judge explained to Appellant that he had the right to make a closing argument to the jury but again emphasized that he had "to do it within the confines of the testimony and evidence that has been presented. You cannot go beyond that. . . . [S]ince you elected not to take the stand, you cannot testify. . . ." He further explained that Appellant could comment on the facts and what the evidence had revealed in the case. However, he could not mention punishment because "we are not about that right now." If there were any violations of what the judge explained to him, the trial judge explained that he would stop Appellant's argument. See **R. p. 1573, l. 5 - p. 1575, l. 8**. After the jury returned to the courtroom, **R. p. 1575, ll. 10-11**, Appellant completed his closing argument. **R. p. 1575, ll. 15-24**.

"A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. The Court must review the argument in the context of the entire record."

Also, the defendant must show any alleged error deprived him of a fair trial. State v. Johnson, 306 S.C. 119, 131, 410 S.E.2d 547, 554-55 (1991), citing State v. Bell, 302 S.C. 18, 393 S.E.2d 367 (1990); see also State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997). Here, there is no abuse of discretion.

The purpose of the **sentencing phase** in a capital trial pursuant to § 16-3-20(B) is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). To this end, the trial judge may permit the introduction of additional evidence in extenuation, mitigation or aggravation of punishment, which ordinarily would have been inadmissible in the guilt phase. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); State v. Shaw, 273 S.C. 194, 200, 255 S.E.2d 799, 802 (1979); § 16-3-20 (B). However, the **guilt phase** of a capital trial is like that of a non-capital trial. The jury's function in the guilt phase is simply to determine whether or not the defendant is guilty of the offenses for which he is indicted. Cf. Kornahrens.

Thus, the argument which Appellant proposed to make was not relevant to the issues before the jury in the guilt phase of his trial. Rather, his argument was more appropriately addressed to the issues in the sentencing phase. Nor has S.C. Code Ann. § 16-3-28 (Supp. 2002) expanded a defendant's right to use his unsworn closing argument in the guilt phase to address matters which are more appropriately addressed in the sentencing phase. See State v. Davis, 306 S.C. 246, 251, 411 S.E.2d 220, 222 (1991) ("Of course, the trial judge may prohibit a defendant from answering unsworn testimony in his statement to a jury. . ."); cf. State v. Huiett, 271 S.C. 205, 207, 246 S.E.2d 862, 864 (1978) ("[o]rdinarily the jury is not concerned with the punishment fixed by law" where

the issue of punishment is not properly before it). Therefore, § 16-3-28 does not give a defendant the right to make arguments which are otherwise inappropriate in the guilt phase. Id.

Finally, to the extent Appellant asserts that his concern was that the jury understand that he faced the death penalty if the jury convicted him of murder in the guilt phase, his concern was satisfied by (1) the trial judge's inquiry during the course of qualifying the jury *venire* (**R. p. 207, l. 25 - p. 208, l. 19**), (2) the *voir dire* of each petit juror who served on the jury (**R. pp. 276-89; 294-309; 344-59; 388-401; 494-506; 510-20; 539-50; 565-78; 748-61; 764-78; 788-801; 849051; 1765**) and (3) the trial judge's opening remarks to the petit jury. **R. p. 1178, l. 9 - p. 1179, l. 7.**[7] Clearly, the jury was well aware that if they found Appellant guilty of murder, there would be a separate phase of the trial in which they would determine whether or not he should be sentenced to either life imprisonment or the death penalty. As a result, even though Appellant's proposed argument was improper, the substance of what he wished to communicate had already been brought to the jury's attention and he cannot show any prejudice resulting from the trial judge's ruling.

[7] However, they were properly charged that in the guilt phase they were "not to consider punishment or sentence . . . . You are only to determine the innocence or guilt of the defendant based upon the evidence that will be introduced in the trial of the case." **R. p. 1179, ll. 3-7.**

II.

Appellant's complaints about the trial judge's conduct of the on-the-record waiver of Appellant's right to make a closing argument in the sentencing phase is not properly before the Court because there was no objection at trial.

Over the State's arguments that the Court should not make such a requirement, in State v. Orr, 304 S.C. 185, 187-88, 403 S.E.2d 623, 624-25 (1991), this Court held that a trial judge must obtain an on-the-record waiver of a defendant's right to personally address the jury in both phases of the trial. Since that time, there have been a number of cases in which defendants have complained either about the trial judge's failure to conduct an on-the-record waiver or the manner in which he conducted it. See, e.g., State v. Charping, 333 S.C. 124, 133, 508 S.E.2d 851, 856 (1998) (rejecting argument that trial judge's conducting of on-the-record waiver before the State's closing argument rendered waiver involuntary); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (holding that where on-the-record waiver is not made, issue should be addressed in PCR to determine whether or not the defendant's waiver of rights was, in fact, voluntary). See also Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001).

Now, Appellant claims that the trial judge "erroneously and arbitrarily limited" his closing argument "'to the evidence that has been presented' which necessarily excludes an expression of remorse on plea for mercy." **Initial Brief of Appellant at 13**. The State submits that this argument is procedurally barred because Appellant did not object to the on-the-record waiver as conducted by the trial judge. Alternatively, the State submits that it is without merit because the trial judge did not err in the manner in which he conducted the on-the-record waiver.

As he had in the guilt phase, the trial judge obtained an on-the-record waiver of Appellant's right to testify in the penalty phase. **R. p. 1686, l. 1 - p. 1687, l. 6.** Following a charge conference, the trial judge obtained an on-the-record waiver of Appellant's right to personally address the penalty phase jury. The waiver colloquy was as follows:

> Of course, Mr. Moore, would you stand, please, sir?
>
> (Whereupon the defendant stood).
>
> THE COURT: As is the case in the sentencing phase, as well as the guilt phase that we have already been through, you certainly have the right, along with your attorney, to have a closing argument **regarding the sentence imposed**.
>
> Now, once again, this is your right, Mr. Moore, to address the jury; and once again, **the statement that you would make to the jury would have to be confined to the evidence that has been presented and to the issues concerning the sentence imposed**.
>
> Do you understand that you have this right, sir?
>
> THE DEFENDANT: Yes, sir, I do.
>
> THE COURT: And what is your decision?
>
> THE DEFENDANT: I shall not speak, Your Honor.
>
> THE COURT: You will not speak to the jury?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: But you understand that that is your right?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right, sir. Thank you very much, Mr. Moore.

R. p. 1713, l. 6 - 1714, l. 1 (emphasis added).

Thus, it is clear that Appellant did not object to the manner in which the trial judge conducted the penalty phase on-the-record waiver. As a result, the current argument is procedurally barred. State v. Byram, 326 S.C. 107, 112-13, 485 S.E.2d 360, 362-363 (1997); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). Further, Appellant did not make any proffer, whatsoever, concerning what argument he intended to make but felt that the trial judge's admonition prevented him from making. Under these circumstances, he deprived the trial judge of the opportunity to rule on the propriety of any supposed argument he wished to make and there is nothing for this Court to review. State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979). Indeed, all we have is speculation concerning what he may have argued had he attempted to do so. In light of the on-the-record waiver, however, the State submits that any argument is procedurally barred. Id. See also Bailey.

Even assuming *arguendo* that the matter was not procedurally barred, it is clear that the trial judge did not abuse his discretion in the manner in which he conducted the on-the-record waiver. See Orr, supra; Charping, supra. Appellant's assertion that the trial judge told him that any argument "would have to be confined to the evidence that has been presented" (see **R. p. 1713, ll. 14-15**) ignores the remaining portion of the trial judge's explanation "and to the issues concerning the sentence imposed." **R. p. 1713, ll. 15-16**. Clearly, the admonition that a closing argument would have to be confined to the evidence presented at trial and to issues concerning the appropriate sentence was proper. See Kornahrens, supra; Shaw, supra. In fact, he could not have given a more accurate description of what the defendant could argue to the penalty phase jury since the jury, at

that point, was determining the appropriate sentence to be imposed. Id. As a result, Appellant's argument is without merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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September 15, 2003.
WES

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Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent by depositing two (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Esquire, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Suite 305, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 15th day of September, 2003.

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CERTIFICATE OF COUNSEL

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

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