THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

The Honorable H. Steven DeBerry, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2023-001182

The State, Respondent,

v.

Antonio Denon Brayboy, Appellant.

AMENDED FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On October 27, 2020, Appellant Antonio Denon Brayboy was arrested and charged with murder and possession of a weapon during violent crime, if not also sentenced to life without parole or death. The grand jury for Florence County issued an indictment against Appellant on November 23, 2021, for murder and possession of a weapon during violent crime, if not also sentenced to life without parole or death. (Indictment 2021-GS-21-02508 and 2021-GS-21-02507). Appellant was tried on the murder and possession of a weapon during violent crime, if not also sentenced to life without parole or death.

A trial was held at the Florence County Courthouse in Florence, South Carolina from July 17, 2023 to July 20, 2023, with the Honorable Steven H. DeBerry presiding. Prior to the beginning of the trial, Judge DeBerry held a hearing in regard to Appellant's pretrial motion. Judge DeBerry heard Appellant's Motion to Suppress Cell Phone records pursuant to State v. Gibbs and Carpenter v. United States.

On July 20, 2023, the jury convicted Appellant of murder and possession of a weapon during violent crime, if not also sentenced to life without parole or death in violation of S.C. Code Ann.§ 16-03-10 and S.C. Code Ann.§ 16-23-490. R. Vol. 3, p. 583, lines 3-10. Judge DeBerry sentenced Appellant to fifty (50) years in prison for murder conviction and five (5) years in prison for the possession of a weapon during violent crime, if not also sentenced to life without parole or death conviction to run consecutive R. Vol. 1, pp. 0001-0004, Vol. 3, p. 0604 line 21-p. 0604, line 3.

Appellant timely filed a notice of appeal on October 20, 2021.

ARGUMENTS

I. THE COURT INCORRECTLY RULED APPELLANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN HIS CELL PHONE RECORDS AND THE CSLI, THAT THERE WAS PROBABLY CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT, PARTICULARLY WHERE THE VAGUE ALLEGATIONS DID NOT EVEN STATE WHAT, IF ANY, CRIME APPELLANT ALLEGEDLY COMMITTED.

Standard of Review

The appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law. Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). In Fourt Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure cases, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is a clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citation and internal quotation marks omitted). This deference does not bar the appellate courts from conducting their own record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

Discussion

The Fourth Amendment of the United States Constitution provides that no warrant shall be issued but upon probable cause, supported by oath or affirmation. U.S. Const. amend. IV. S.C. Code Ann.§ 17-13-140 (2014) states that a search warrant may be issued to search for and seize property tending to show that a particular person committed a criminal offense. "[S]earch warrants

may be issued 'only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.'" State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (quoting S.C. Code Ann. § 17-13-140). "Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause." State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678–79 (2000).

In Carpenter v. United States, 138 S.Ct. 2206 (2018), the Supreme Court held that an individual maintains a legitimate expectation of privacy in the records of his physical movements as captured through CSLI. In this case, there was no exigency involved, and under Carpenter, there was no exception to the government not needing a search warrant supported by a probable cause before it acquired the CSLI and phone records from his wireless carrier.

Cell site records hold for many Americans "the privacies of life." Riley v. California, 573 U.S._, __ , 134 S.Ct. 2473, 2494-2495 (2014). That was one major reason the Supreme Court in Carpenter rejected the government's position that CSLI records should be treated under the "third-party doctrine" stemming from the notion that where an individual knowingly shares information with another that he or she has a reduced expectation of privacy. See United States v. Miller, 425 U.S. 435 (1976) (financial records held by a bank); Smith v. Maryland, 442 U.S. 734 (1979). The same cannot be said of CSLI records as is said of bank records because that would be tantamount to holding that because an individual has his or her cell phone turned on that they have knowingly shared all of the details of their present and past whereabouts with law enforcement.

Thus, the issue of a "legitimate expectation of privacy" in Appellant's cell phone records and the CSLI documents have been decided in Appellant's favor for Fourth Amendment purposes. The issue remains whether Judge DeBerry correctly ruled that the affidavit and search warrant process here provided probable cause for the magistrate to determine there was a fair probability

that respondent committed a crime based on information given by individuals the government deemed reliable, and that evidence tending to assist in proving respondent's guilt would be discovered following the issuance of the search warrant.

As seen, the affidavit did not allege Appellant committed any crime. It only stated that it was "reason to believe" that "the subscriber information along with the cell phone records contained vital information to assist with the ongoing investigation." R. Vol. 3, p. 583, lines 3-10. In other words, the police were literally going on a fishing expedition hoping that respondent's cell phone records and CSLI information would provide "vital information to assist with the ongoing investigation." R. Vol. 1, p. 0039, lines 22-24.

Therefore, there can be no assertion that this search warrant affidavit stated there was a fair probability that evidence of a crime would be found in a particular place if the search warrant was issued, since what crime Appellant allegedly committed was not even asserted in the affidavit or warrant. Further, there was also nothing set forth in the affidavit about the identity of the person's records to be searched. During a pretrial motion, counsel read into the record the warrant. Counsel stated:

> So let me read this to you, Judge, so you understand kind of where we're going. This is the search warrant that was presented to the magistrate at the time. On December 29th, 2019, at 1:20 a.m., Florence County Sheriff's Office responded to 2711 Pamlico Highway, Florence County, also known as the Greenwood Athletic Park, located within the jurisdiction of Florence County, concerning a suspicious vehicle complaint. Deputies responded to make contact with the vehicle, one 2003 GMC Yukon, SC tag NPK-425, concerning this incident. Deputies observed a black male individual in the driver's seat, appeared to be sleeping. Upon approach, deputies discovered the male individual was unresponsive and bleeding from the left side of his head are, prompting them to call for EMS. The Florence County Coroner's Office was notified, to respond to the scene. Upon further investigation, it appeared that the male sustained a gunshot wound to his head are. Investigators were able to identify the deceased victim as Rashad Maurice Jones of Mullins, South Carolina. During the court of the investigation, Mr. Jones' personal cell phone made contact with the listed number, 1 (704) 777-8982, several times around the time of his death. Investigators have reason to believe that the subscriber information along with the cell phone records contained vital information to assist with the ongoing investigation.

R. Vol. 1, p. 0040, line 3-p. 0041, line 6. The warrant does not allege a crime was committed and does not connect the Appellant to any crime, let alone the death of Mr. Rashad Jones. The Court in Gibbs said that a reason that - - "A person has a reasonable expectation of privacy in CSLI because of the nature is especially revealing." R. Vol. 1, p. 0043, lines 13-16. Appellant's activities by and through his phone records, are protected under both State v. Gibbs and Carpenter v. United States. State v. Gibbs, Unpublished Opinion No. 2020-UP-244. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

In State v. Gibbs, the Defendant was charged with murder in Horry County. At a motion to suppress hearing prior to trial, Judge Hyman refused to allow the Defendant's cell phone records to be introduced pursuant to a search warrant obtained by the police. R. Vol. 1, p. 0039, lines 17-24. The warrant in Gibbs, alleged that:

> The phone number to be searched belonged to Javon Gibbs, who has been identified as many -- by being involved with the victim's disappearance based on drug-related incidents before his disappearance. The male denied any allegations that identified that he did not want to provide a DNA sample or take a polygraph to exclude himself. It is my belief that searching the records Javon Gibbs will provide information regarding any contact with the victim and his whereabouts during the date and time of the crime.

R. Vol. 1, p. 0041, line 22-p. 0042, line 6. The appellate court upheld the decision of Judge Hyman and determined the search warrant to be invalid and the South Carolina Supreme Court denied cert. R. Vol. 1, p. 0042, lines 7-9. The State conceded that the Gibbs warrant does not survive yet claims the warrant in this case does survive as sufficient. When in fact, this warrant is substantially more deficient than the warrant in Gibbs. The warrant's affidavit in Gibbs, goes further than the warrant at issue here. The Gibb's warrant alleges that there was a bad act that occurred and that the two men had problems with each other. R. Vol. 1, p. 0042, lines 13-15. Just as in this case, the warrant in Gibbs does not allege Gibbs committed a crime. R. Vol. 1, p. 0044, lines 5-8.

Under Gibbs, "a person has a reasonable expectation of privacy in CSLI because of the nature is especially revealing." State v. Gibbs, Unpublished Opinion No. 2020-UP-244. R. Vol. 1, p. 0043, lines 14-16. The Court goes even further in **Carpenter** and states that "timestamp data provides an intimate window into a person's life, revealing not only his particular movements but, through them, his familial, political, professional, religious, and sexual associations." Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018). R. Vol.1, p. 0043, lines 17-21.

If the Court determined that the search warrant is facially insufficient to establish probably cause, the court can look to oral testimony. Jones, 342 S.C. at 128, 536 S.E.2d at 678–79 ("Oral testimony may also be used in this state to supplement search warrant affidavits [that] are facially insufficient to establish probable cause."). This was a concerted effort to deceive the tribunal. The prosecutor, as an officer of the Court, has a duty to the tribunal to be truthful and forthcoming. Not only did the prosecutor elicit false testimony, but he did so intentionally and with complete disregard to the tribunal and the role of the justice system. The prosecutor knew before he made his arguments to the Court, he intended on portraying false information to the Court. The prosecutor knew when the search warrant was issued and when the records were received. The prosecutor knew the law and knew the representation of supplemented oral testimony for the search warrant was his only hope of not having the phone records suppressed. The prosecutor knew the information regarding Skipthegames was not obtained prior to seeking the search warrant and could not have possibly been provided to Judge Wall to support the procurement of the search warrant for the Appellant's phone records. The prosecutor was untruthful in telling the Court that,

> Furthermore, Judge, at that time, Investigator Edwards believed, based on his training and his experience – considerable experience, that this this crime may be sexual in nature, and that was based on that there was a condom in the car, Vaseline in the car, the victim's pants were unzipped. So he went to an investigator at the sheriff's office who specializes in sex crimes, and they used an application called Spotlight. This is a common tool used by investigators and used by SLED. Basically, it's a search engine for sex-related sites. And

> they typed that 704 number that was on the victim's cell phone records into that Spotlight, and they get an advertisement, about ten days prior to the murder, from that 704 number advertising for sex for sale on SkipTheGames. Investigator Edwards also relayed that information to Judge Wall.

R. Vol. 1, p. 0050, lines 3-19. The investigator may have believed the crime was sexual in nature, however, any insinuation that Investigator Edwards told Judge Wall about the SkipTheGames add in support of the search warrant for the phone records was false. The prosecutor, after portraying the above false information to the Court, then proceeds to elicit false testimony from Investigator Edwards during the pretrial motion to suppress. The prosecutor asked Investigator Edwards "did you ask her to enter that number, that (704) 777-8982 number into her Spotlight database?" in which Investigator Edwards responded "yes." R. Vol. 1, p. 0062, lines 3-5. The prosecutor proceeded to ask Investigator Edwards if he "was able to retrieve an ad associated to that phone number for sex?" R. Vol. 1, p. 0062, lines 6-7. Investigator Edwards affirmed and then affirmed the prosecutor's inquiry that the ad was posted approximately ten days before the murder. R. Vol. 1, p. 0062, lines 9-10. The prosecutor then asked Investigator Edwards, "Based on all that information, did you go to Judge Wall to obtain a search warrant for that telephone number?" R. Vol. 1, p. 0062, lines 11-12. Investigator Edward's response was "Yes sir." R. Vol. 1, p. 0062, lines 13. The prosecutor continued to elicit false testimony from Investigator Edwards on direct examination through the following exchange during the pretrial motion.

> Q Was Judge Wall -- did she require you to provide more information?
>
> A Yes, sir. Each encounter, I went to the office with my case file. Every new detail, document she was made aware of and also was shown -- you know, was shown to her during the investigation.
>
> Q So she was made aware of the Spotlight information?
>
> A Yes, sir.
>
> Q And the Spotlight information was related to that 704 number?
>
> A Yes, sir.

Q And all of that was provided and then a search warrant was granted; is that correct?

A Yes, sir.

R. Vol. 1, p. 0062, lines 1-11, 17-19. It is an impossibility for Investigator Edwards to have informed Judge Wall, at the time he sought the search warrant and got it signed from her, as he testified, that he showed her the SkipTheGames ad because he did not find out about the SkipTheGames ad until 3 days after seeking and obtaining the search warrant.

During cross-examination, Investigator Edwards was asked when the search warrant was issued. R. Vol. 1, p. 0066, lines 24-25. Investigator Edwards advised the court "January 13th." R. Vol. 1, p. 0067, line 1. However, under oath, Investigator Edward's read into the record his report dated January 16, 2020, in which his report stated "I, Investigator Edwards, along with Investigator Clark, reviewed Antonio Brayboy's cell phone and discovered Mr. Brayboy was also on SkipTheGames web site during the same time frame as the male victim, Rashad Maurice Jones. Investigator Clark discovered Mr. Brayboy had an ad posted on SkipTheGames and provided the information to this investigator." R. Vol. 1, p. 0072, lines 11-17.

On January 13, 2020, Investigator Edwards obtained the search warrant for Appellant's phones records. On January 16, 2020, Investigator Edwards received the phone records for Appellant, at which time, the investigator reviewed Appellants records and "discovered Mr. Brayboy was also on the "Skip the Games" website during the same time frame as the male victim." During the pretrial motion to suppress the phone records, the investigator took the stand and claimed otherwise, the investigator along with the state, claimed that the Appellant's connection to Skip the Games was discovered prior to obtaining the search warrant for the phone records and relayed to the magistrate judge to support the affidavit for the phone records. A clear misrepresentation portrayed to the Court and later to Jury. The State, therefore, attempted to bolster the information provided to the magistrate by attempting to claim that the investigator was aware of additional contact between the victim and the Appellant.

"A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found . . . ." State v. Kinloch, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). Nevertheless, our supreme court held that the affidavits must set forth facts as to why police believe the defendant was the individual to commit the charged crime. State v. Baccus, 367 S.C. at 51, 625 S.E.2d at 221. The Court has said that "the duty of the reviewing court, which is this Court in this case, is to ensure that the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. The passing upon the validity of a warrant and reviewing court may consider only information brought to the magistrate's attention." R. Vol. 1, p. 0043, line 22-p. 0044, line 4. State v. Owen, 275 S.C. 586, 588, 274 S.E.2d 510, 511 (1981), abrogated on other grounds by Gates, 462 U.S. at 238. Even further, the Court has said, "the affidavit must set forth facts as to why the police believe the defendant was the individual to commit the crime, not simply that a crime was even committed." R. Vol. 1, p. 0044, lines 12-17. At the pretrial motion to suppress the Appellant's phone records, counsel presented a clear comparison to this matter and the matter of State v. Gibbs, affirmed by this Court and Cert. denied by the South Carolina Supreme Court. When compared, the warrant in this matter is substantially more deficient than the warrant in the Gibbs case. The warrant in this matter specifically states:

> On December 29th, 2019, at 1:30 a.m., Florence County Sheriff's Office responded to 2711 Pamplico Highway, Florence County, also known as the Greenwood Athletic Park, located within the jurisdiction of Florence County, concerning a suspicious vehicle complaint. Deputies responded to make contact with the vehicle, one 2003 GMC Yukon, SC tag NPK-425, concerning this incident. Deputies observed a black male individual in the driver's seat, appeared to be sleeping. Upon approach, deputies discovered the male individual was unresponsive and bleeding from the left side of his head area, prompting them to call for EMS. The Florence County Coroner's Office was notified, along with investigators with the sheriff's office, to respond to the scene. Upon further investigation, it appeared that the male sustained a gunshot wound to his head area. Investigators were able to identify the deceased victim as Rashad Maurice Jones of Mullins, South Carolina. During the

> course of the investigation, Mr. Jones' personal cell phone made contact with the listed number, 1 (704) 777-8982, several times around the time of his death. Investigators have reason to believe that the subscriber information along with the cell phone records contained vital information to assist with the ongoing investigation.

R. Vol. 1, p. 0040, line 5-p. 0041, line 6. The warrant in Gibbs states:

> The phone number to be searched belonged to Javon Gibbs, who has been identified as many --by being involved with the victim's disappearance based on drug-related incidents before his disappearance. The male denied any allegations that identified that he did not want to provide a DNA sample or take a polygraph to exclude himself. It is my belief that searching the records Javon Gibbs will provide information regarding any contact with the victim and his whereabouts during the date and time of the crime.

R. Vol. 1, p. 0041, line 22-p. 0042, line 6.

In Gibbs, this Court stated, "the affidavit fails to even set forth the crime police believed transpired." State v. Gibbs. As such, the affidavit necessarily fails to set forth why police believed Gibbs committed any crime. State v. Baccus, 367 S.C. at 52, 625 S.E.2d at 222. ("This affidavit fails to set forth any facts as to why police believed [the defendant] committed the crime. . . . Given the totality of the circumstances, we conclude the issuing magistrate did not have a substantial basis to find probable cause for a search of [the defendant]'s residence . . . ."). While the affidavit states vaguely why police believed Gibbs was involved with Victim's disappearance, it fails to mention what crime Gibbs is believed to have committed. See id. Plainly stated, police failed to allege a crime for which probable cause for the warrant was needed. See § 17-13-140 (stating, in part, a search warrant may be issued to search for and seize property "tending to show that a particular person committed a criminal offense"). Furthermore, the affidavit merely expressed a belief that Gibbs's phone records would provide information regarding any contact the Victim may have had with Gibbs and Gibbs's whereabouts the night of Victim's disappearance.

The affidavit in this case is more derelict than the affidavit in Gibbs. In this affidavit, just like the Gibb's affidavit, the investigator did not set forth a crime the police believe the Appellant committed. Likewise, the affidavit fails to set forth why they believe the Appellant committed any crime. In Gibbs, the warrant at least gave a vague description of why the police believed Gibbs was involved in the victim's disappearance. Further, Gibbs was identified in the search warrant itself. Like in Gibbs, the Court stated that the affidavit "merely expressed a belief that Gibb's phone records would provide information regarding any contact the victim may have had with Gibbs and Gibbs's whereabouts the night of the victim's disappearance. The affidavit for the Appellant's phone records was even more vague. The Affidavit stated, "Investigators have reason to believe that the subscriber information along with the cell phone records contained vital information to assist with the ongoing investigation." Although the information Investigator Edwards testified to was false, even if taken true, that in itself does not mean a crime was committed by the Defendant. It would then be equally parallel to the issue in Gibbs. There is still absolutely no crime alleged or involvement of the Appellant allege in the death of Rashad Jones.

Based upon the above, the Cellebrite information should have been quashed along with everything derived from said cell phone records. Including but not limited to the identification of the Appellant. Under Wong Sun v. United States, the Court said not only the derivative evidence, but the identification as well must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). R. Vol. 1, p. 0043, lines 2-3.

II. THE COURT INCORRECTLY RULED IN ALLOWING EVIDENCE OF SKIPTHEGAMES AND SPOTLIGHT TO BE SUBMITTED TO THE JURY WITHOUT PROPER AUTHENTICATION.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367

S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. Id.; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005).

Discussion

During a motion on matter of law appellant objected to the introduction of evidence by two law enforcement individuals. The prosecution intended to introduce agent jade Roy and Angel Clark to lay the foundation for two separate websites and or search engines spotlight and SkipTheGames. Appellate objected on the grounds that these records were not authenticated and could not be authenticated by agent Jade Roy nor Angel Clark. Further Appellant objection to the introduction of this evidence pursuant to State v. Jones relating to the reliability of the evidence. One of Appellant's issues with this is,

> they sent the actual number to SkipTheGames directly. SkipTheGames sends a message back to them saying, 'Look, we don't have any sort of account for that particular number. This is what we do have." And then they give a list of numbers that are not connected to him at all, that they have not connected at all to him, and then now they want to offer that evidence into the record, not having a custodian from SkipTheGames, not having a custodian from Spotlight, and having someone from SLED to come in to say, "Hey, we did this search and now we want to offer all this evidence."

R. Vol. 2, p. 0255, lines 15-21. This is a violation of State v. Jones and State v. Council. Even though South Carolina has not adopted Daubert it is a violation under Daubert as well. The trial court erred in allowing them to testify and allowing the introduction of this evidence by and through them because if State does not offer them in as experts, they're still getting up, trying to testify about something they have no knowledge of. R. Vol. 2, p. 0256, lines 7-9. In this case the trial court allowed SLED to come in and testify on the record about SkipTheGames and about spotlight without anyone coming in and saying "We're the custodian, we can authenticate that this account belongs to this individual. This email is associated with this individual." R. Vol. 2, p.

0257, lines 5-8. The State wanted to and was allowed to offer evidence of an ad as well as the use of Spotlight, without producing anybody from Spotlight. R. Vol. 2, p. 0258, line 15. They're not coming in to testify. No one also from SkipTheGames is coming to certify that these accounts, one, exist. As a matter of fact, what SkipTheGames said is, "Look, we don't know. We have free -- this is free. There's no billing information, so we don't know who this is. It could be anybody." R. Vol. 2, p. 0258, lines 16, 21.

As previously done in pretrial motions the prosecutor again makes misrepresentations to the court. The prosecutor tells the court "it is a rigorous process. You have got to apply for it. You have to have someone who endorses you. You have to go through training in order to be able to certify -- and you also have to certify that you're a law enforcement officer and that sort of thing before you can get access to Spotlight. R. Vol. 2, p. 0259, lines 3-7. Under direct examination during Agent Jade Roy's proffer, he stated, "it is a search tool that law enforcement -- we have to be vetted. We have to certify that we're currently certified as law enforcement officers in any state or federal organization." R. Vol. 2, p. 0266, lines 17-20. Also under that direct examination, the prosecutor asked,

> Q Okay. And do you have to go through a certain amount of training through Spotlight?
>
> A In order to have access to it?
>
> Q Yes, sir.
>
> A Not in particular, no, sir.

R. Vol. 2, p. 0267, lines 9-14. This is a complete contradiction of the prosecutor's previous representation to the court that they have to "go through training in order to be able to certify." However, during the proffer of Agent Jade Roy, on cross examination, Agent Roy was further questioned about the training and experience necessary.

Q Now, let me ask you again:
Spotlight -- you just testified under oath that there is no special training that goes into whether or not you go on there and put a number in there; right?

A Correct.

Q All right. All that's required is that you're law enforcement; right?

A (Witness nodding.)

Q And then you have to certify that you're law enforcement?

A Yes, sir.

Q And then you get to go and then you get to look up this stuff; correct.

A Yes, sir.

R. Vol. 2, p. 0272, lines 12-25.

Agent Jade Roy testified, that state law enforcement does not have custody of the records at SkipTheGames and does not work in conjunction to maintain their records, nor to delete or open accounts. R. Vol. 2, p. 0290, lines 12-25. Further the agent testified that he had no real knowledge of the inner workings of SkipTheGames. R. Vol. 2, p. 0274, lines 21-24. His testimony was quite similar as it referred to Spotlight. He testified SLED does not maintain Spotlights records that spotlight is a "third-party website" and essentially is a "collection of information from other websites." R. Vol. 2, p. 0275, lines 1-8. He testified that SLED does not have access to how they maintain their records and does not know the ratio of error that spotlight and SkipTheGames works with. Further he was not aware of how the information is pulled together from these nine websites that spotlight uses nor was he aware of the errors or potential problems that spotlight could have

or any potential hacks that could have existed as SLED is not privy to that information. R. Vol. 2, p. 0275, line 11-p. 0276, line 1.

When the trial judge questions the agent during his proffer, the prosecutor was quick to step in and attempt to explain away any potential issues the judge may see with allowing this evidence in. The prosecutor states "this is one-half of the equation judge, the other half of the equation is Angel Clark." R. Vol. 2, p. 0276, lines 21-23. However, when Angel Clark is asked during cross examination if this was her "first time using Spotlight" she testifies "yes, I have used it quite a good bit after that, but yes, I created an account on January 10, 2020. R. Vol. 2, p. 0414, lines 8-11.

The trial court failed to understand the importance that these are third-party websites. They are not "owned by SLED. SLED didn't' go in and create the web site. They don't work for spotlight." R. Vol. 2, p. 0260, lines 11-13. This objection was not about the "weight of the evidence or the credibility of it" it is about the authenticity of the evidence. R. Vol. 2, p. 0261, lines 6-7. Rule 901 makes clear that testimony must come from a "witness with knowledge." R. Vol. 2, p. 0261, line 15. The trial court put unreliable evidence in front of the jury by allowing unauthenticated evidence to be presented to the jury. No one came "in and testify about how the records are kept at the actual Spotlight, how they actually get those things to your screen once you put the number in. Spotlight is not a public domain that anyone can use to search information. R. Vol. 2, p. 276, lines 5-6.

During the motion, Appellant tells the court,

> MR. WILSON: Judge, it can be 403, okay. It can be relevant. I'm not saying it's not relevant. That is not my argument. They still –
>
> THE COURT: You're saying it's not reliable.

MR. WILSON: I'm saying that the evidence is not reliable because, again, you've got nobody from SkipTheGames who is asserting that he had an account with SkipTheGames. That's the first problem. The second –

THE COURT: Well, the SkipTheGames part, I have a lot of problem with.

MR. WILSON: Yes, sir.

THE COURT: I mean, all of that's completely hearsay to start with.

MR. WILSON: It is. I agree with that.

R. Vol. 2, p. 0280, lines 8-22. However, the Court then improperly puts the burden on the Appellant to authenticate the records and show their reliability. A clear error of law.

THE COURT: And so, you know, I don't have any problem, you know, if you needed to come in or if you wanted to come in, you know, with an agent saying SkipTheGames didn't confirm this, you know, but I mean –

MR. WILSON: Judge –

THE COURT: -- to get into the inner workings of SkipTheGames, I don't think anybody's -- you know, like you say, if they want to come here and call them as a witness or the State wants to call them as a witness and get into the inner workings of SkipTheGames, but...

MR. WILSON: Judge, but that's -- Judge, we don't have any obligation under the law to assist them with their case. The obligation –

THE COURT: I understand.

MR. WILSON: So that's their evidence. They're offering it. They're offering it for the truth of the matter.

R. Vol. 2, p. 0280, line 23-p. 0281, line 14. The trial court erred in allowing this evidence to be introduced without being authenticated and erred in placing the burden of authenticating this

evidence upon Appellant which is clearly shown in allowing the testimony and evidence to be submitted to the jury.

Nothing in the record indicates true and actual knowledge by either SLED agents whether or not an account actually existed for that phone number or if the ad was in fact deleted at the time SkipTheGames performed a search and submitted their email response to SLED. This is because no record custodian was required by the trial court to authenticate the information being provided to the jury in complete violation of state law.

Incompetent evidence cannot be submitted to a jury. The prejudice this place on the accused is so heavy that it is inexcusable error of law. Because of this, the Appellant's conviction should be revered and remanded for a judgment of acquittal.

III. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AS THERE WAS NO CORROBORATING EVIDENCE PRESENTED AND FURTHER INADMISSIBLE EVIDENCE WAS PUT IN FRONT OF THE JURY.

Standard of Review

In considering a motion for directed verdict in a criminal case, all evidence is viewed in the light most favorable to the State. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). The trial court is "concerned with the existence or non-existence of evidence, not its weight." State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). Thus, if the State presents direct or substantial circumstantial evidence reasonably tending to prove guilt, or from which guilt can be logically deduced, the directed verdict motion is properly denied. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001); McHoney, 344 S.C. at 97, 544

S.E.2d at 36.

It is well-settled law that a conviction cannot be had on the extra judicial confessions of a defendant unless they are corroborated by proof aliunde of the corpus delicti. State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996). See also State v. Brown, 103 S.C. 437, 442, 88 S.E. 21, 22 (1916) ("Before a defendant can be required to go into his defense, it is necessary that there shall be some proof of. the corpus delicti").

Discussion

The legal definition of "confession" is "restricted to acknowledgment of guilt and does not apply to mere statement[s] of fact from which guilt may be inferred." State v. Cunningham, 275 S.C. 189, 192, 268 S.E.2d 289, 291 (1980) (quoting State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947)). See also 29A Am. Jur. 2d Evidence § 709 (1994) (although every confession is an admission, not every admission is a confession).

An accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required. The need for corroboration extends beyond complete and conscious admission of guilt — a strict confession. Facts admitted that are immaterial as to guilt or innocence need no discussion. But statements of the accused out of court that show essential elements of the crime . . . stand differently. Such admissions have the same possibilities for error as confessions. They, too, must be corroborated. Opper v. United States, 348 U.S. 84, 90, 75 S. Ct. 158, 163, 99 L.Ed. 101, 107 (1954) (internal citations omitted). See also State v. Trexler, 342 S.E.2d 878, 880 (N.C. 1986) ("[R]egardless of whether defendant's statements constitute an actual confession or only amount to an admission, our long established rule of corpus delicti requires that there be corroborative evidence, independent of the statements, before defendant may be found guilty of the crime"); 29A

Am. Jur. 2d at § 753; E.H. Schopler, Annotation, Corroboration of Extrajudicial Confession or Admission, 45 A.L.R.2d 1316, 1323 (1956). In Opper v. United States, the Supreme Court considered "the extent of the corroboration of admissions necessary as a matter of law for a judgment of conviction, concluding:

[T]he corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt. State v. Osborne, 348 U.S. at 93, 75 S. Ct. at 164, 99 L.Ed. at 108-09.

We clarify the law in this State that, consistently with Opper and its progeny, the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra judicial statements and, together with such statements, permits a reasonable belief that the crime occurred. Cf. Williams, 321 S.C. at 385 n. 2, 468 S.E.2d at 658 n. 2 (emphasizing that "[p]roof of corpus delicti is not a prerequisite to the admission of an extra-judicial confession of a defendant.").

"We are not here to determine the sufficiency of the evidence to justify the jury's verdict . . . but we are concerned only with the question as to the sufficiency of that evidence to require the trial Judge to submit the issue . . . to the jury." State v. Blocker, 205 S.C. 303, 307, 31 S.E.2d 908, 910 (1944) (quoting State v. Edwards, 173 S.C. at 165, 175 S.E. at 278).

> In State v. Welch, they had a bullet they found in my guy's house they wanted to allege the bullet itself meant that my guy had a gun. And my argument to the judge, I said "look just because my guy allegedly had a bullet in his house if he had a baseball glove and the murder was done with a baseball bat can you use a baseball glove to say that he committed the murder?" And the judge said no. It was Judge John. The reason is because, again that evidence is so dangerously prejudicial, unless you have something that is competent, something that corroborates it. Anything. If there was circumstantial evidence that corroborated that he even possessed the weapon at some point in time or was there with the weapon, I could see allowing it in, but because she's coming in saying, "I never saw him with it, I can't describe it" –

R. Vol. 1, p. 0104, line 17-p. 0105, line 9.

Appellants concern with miss Cooper's testimony is the uncorroborated nature of the alleged extra judicial confession. Appellants grounds for the motion for directed verdict were based upon the trial courts error in submitting the appellants phone records into evidence and failing to suppress them and submitting to the jury uncorroborated, unreliable evidence. Further, the State fails to prove any malice as the only malice comes from completely uncorroborated testimony.

That evidence is so tenuous and circumstantial, the courts have said in numerous cases that that sort of case should never go to a jury. It is wrong. It's unconstitutional. Because he has a right not to be exposed to a jury verdict that could be wrong. That is the issue here.

The other issue is malice. If you're talking about malice aforethought, the only malice that is in the record is from a witness who says that he told her he didn't like gay people. And there's nothing in the record to suggest that Mr. Rashad Jones is a homosexual. R. Vol. 3, p. 0496, lines 1-7. As a matter of fact, everything the detective found out was that he likes women. R. Vol. 3, p. 0496, lines 7-9. When Investigator Edwards was asked to read his case notes during an interview with the deceased's co-worker, the testimony was,

> Mr. Thomas then stated Mr. Jones, during the week of Christmas, met with a new girl in the Florence area. Mr. Thomas advised this investigator Mr. Jones would

> hang out at Greenwood Athletic Park with females in behind the ball field. Mr. Thomas stated Mr. Jones only dealt with black females between their 20s and 30s. Mr. Jones [sic] advised investigator Mr. Jones would pay females for oral sex between 20 or $30 each encounter. Mr. Jones [sic] then went on to say Mr. Jones would never provide the name of the female he was dealing with. Mr. Jones [sic] went on to say he attempted several times to obtain the name, but Mr. Jones would not give any additional details because he would attempt to identify her on social media. Mr. Jones stated he, then, would drop the young girl off at home after they finished hanging out.

R. Vol. 2, p. 0471, line 12-p. 0472, line 1. Further testimony revealed the deceased "frequented this area at Greenwood Park to have sex with girls." R. Vol. 2, p. 0472, lines 9-12. Further, the deceased had a child.

The witness never tells Investigator Edwards during her initial interview that the Appellant had any issue with gay people. The record is completely void of any support of corroborating evidence that the Appellant had any issue with homosexuals or any malice in his heart towards homosexuals.

The testimony provided at trial by Ms. Asia Cooper included new information and excluded previously provided information. Ms. Cooper testified that "he said he went to go grab the money, but the money had blood all over it." R. Vol. 2, p. 0431, line 21-22. During cross examination, she testifies that he burned it. R. Vol. 2, p. 0445, lines 10-12. On direct, she brings up a "hoodie." However, this information was never disclosed to Investigator Edwards.

> Q All right. During your conversations with the families, during the time that you have talked to them -- withdraw that, Judge.
> Let me ask you this question: Back in 2020 when you spoke with Asia Cooper, did she tell you anything in her record about a hoodie?
>
> A No, sir, not that I can recall. Let me check my notes, but I don't believe so.
>
> Q Please check your notes.

A (Reviewing document.) No, sir. I don't see anything about a hoodie.

Q Nothing about a hoodie.

R. Vol. 2, p. 0474, line 21-p. 0475, line 4.

Q So, during your recorded conversation at 10:36 into the conversation, you don't recall asking her, "Okay, so he didn't say anything about touching him or anything?"
"Mm-mmm."
"Okay. What did he tell you happened after that?"
At 10:36, she says, "He said he took his phone out, turned flashlight on to look for a bullet, and then, also, he said he took his phone, he broke it, and threw it in the water."
She never told you that during that recorded conversation?

A Not -- no, sir, not about breaking a phone or throwing it in the water, no.

Q So you're saying you didn't put it in your notes?

A No, sir. I just said he collected the male victim's older model Apple iPhone. I have that noted in here but not about breaking it or throwing it in the water.

R. Vol. 2, p. 0475, line 19-p. 0476, line 5. On cross examination, Appellants asked Ms. Cooper,

Q Well, did you tell Detective Edwards that he deleted you from his Snapchat?

A He did.

Q He deleted you?

A Right.

Q All right. Why would he delete you from his Snapchat if he was so enthralled and wanted you so bad?

R. Vol. 2, p. 0442, lines 8-14. Ms. Cooper could provide no answer to this inquiry. Yet, claimed that Appellant was constantly calling her. When Investigator Edwards was questions about this, he

seemed to believe there was something off about Ms. Cooper's information. In fact, he said he "couldn't make heads or tails of it." R. Vol. 2, p. 0477, line 19.

Now, putting the gun in his hand, no one, in December, says he had a .45 and shot this man in the head, other than her, who didn't even know him at the time. And then I asked her on the stand: Can you describe the gun? No. Have you ever seen him with a gun? No. What did he always carry? He always carried a .38 caliber weapon. R. Vol. 3, p. 0496, lines 16-22.

> Q Okay. All right. Now, this .45 weapon that the State is asking you about –
>
> A Mm-hmm.
>
> Q -- tell this jury if you ever laid eyes on him ever having a .45 caliber weapon.
>
> A I have never laid eyes on him having it, but he's told me he has it. He had another gun, but he told me about the .45.
>
> Q Okay. All right. Did you ever see him with a .45?
>
> A I haven't.

R. Vol. 2, p. 0442, line 19-p. 0443, line 3.

> Q This is all new stuff. You didn't tell Detective Edwards that he was wearing a hoodie or anything like that beforehand. How would you even know that?
>
> A He told me.
>
> Q He told you that?
>
> A Yes, sir.
>
> Q So why is it, then, when Detective Edwards questioned you more contemporaneously, more closely to the time when you said he told you, that you didn't tell him that? But the prosecutor, who has that information now, you can tell the jury that?

A Right.

R. Vol. 2, p. 0448, lines 14-25.

The witness could not remember a large portion of the information she provided to investigators yet was able to provide new information during her testimony at trial. She did not recall telling the investigator she researched the case before talking to the investigators, yet she told the investigator she looked it up. She did not recall telling him about that boyfriend at the time did not like the Defendant, she did not recall how she claimed the phone was disposed of.

The "corroboration rule" requires that extra-judicial confessions of a defendant be corroborated by proof aliunde of the corpus delicti. State v. Osborne, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999). "The [rule] is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred." Id. at 180, 516 S.E.2d at 205.

Q And so, when you went to get your search warrant from Judge Wall -- who signed this search warrant; right?

A Yes, sir.

Q -- you had no idea who this man was, did you?

A That's correct.

Q Did you have any information at the time that he had done anything wrong or illegal?

A No, we had no information.

Q Another question for you: Is it illegal to make a phone call to somebody?
A No, sir, it's not.

Q Is it illegal for anyone in this room, whether it be me, Solicitor White, to call someone late at night?

A No, sir.

Q But y'all still went and got his phone records; right?

A Yes, sir.

R. Vol. 2, p. 0481, line 21-p. 0482, line 12. "[G]enerally speaking, the term 'corpus delicti' means, when applied to any particular offense, that the specific crime has actually been committed." State v. Teal, 225 S.C. 472, 474, 82 S.E.2d 787, 788 (1954) (citations omitted). When asked about this, there was no corpus delicti.

Q Okay. All right. Now, in the warrant itself, which is, I think, already been offered as an exhibit, I want you to tell the Court what crime you allege, one, occurred and, two, how you connected Mr. Brayboy in this particular warrant to the judge, how you thought that he was the person that committed the crime, the corpus delecti, which is the most important thing in our justice system when it comes down to the nexus of how we present warrants to magistrates to get cell phone records.

A Yes, sir.

Q Tell me what -- tell the Court what information you had at the time that connected him to the murder of Mr. Rashad Jones.

A Basically, once I got the search warrant for Mr. Jones's phone –

Q That's right.

A -- we got the information back, we went through it, and that was one of the last numbers that he had contact with, the (704) 777-8982.

R. Vol. 1, p. 0068, lines 6-24. There is no corpus delicti in this response from Investigator Edwards, because they did not have any. The State still does not have any. There is no evidence in the record that Appellant committed any crime or had any malice.

Ms. Cooper alleged that the Appellant said he got into the vehicle, however, SLED was sent DNA swabs from both the vehicle and the condom located outside the vehicle. SLED agent Catherine Leisy testified,

> Q For the swab inside the passenger door, how many people contributed to the mixture?
>
> A From the door handle?
>
> Q Yes, ma'am.
>
> A From the swabs from the door handle, we interpret the profile as being a mixture from three individuals.
>
> Q And, on No. 2, the swabs from the bottle of water, who contributed to that mixture?
>
> A That DNA profile was interpreted to be a mixture from two individuals.
>
> Q And from the swabs from the passenger's door panel, how many people contributed to that mixture?
>
> A Again, that was determined to be a profile originating from two individuals.
>
> Q The swabs from the passenger seat and the headrest where somebody's head would be, how many people contributed to that mixture?
>
> A The DNA profile developed from the passenger seat headrest was interpreted as a mixture originating from four individuals.
>
> Q And the swabs from the passenger seat cushion, how many individuals contributed to that mixture?
>
> A That particular profile was determined to be single-source, again, meaning that it was DNA from one individual.
>
> Q From one individual?
>
> A Yes, sir.

Q But not Mr. Brayboy?

A Correct

R. Vol. 1, p. 0235, line 2-p. 0236, line 5. The agent was questioned, "The swab from the exterior of the condom that were submitted, how many were in that mixture?" R. Vol. 1, p. 0236, lines 20-21. "For the non-sperm fracture from the swabs, from the exterior, the DNA profile was interpreted as a mixture originating from two individuals." R. Vol. 1, p. 0236, lines 22-24. However, the agent testified that "they were both excluded," meaning Appellant's DNA was not present. R. Vol. 1, p. 0237, line 1. When the investigator was asked about the condom wrapper he confirmed, "condom wrapper – because you investigated this case -- that was outside, and the condom, y'all didn't find Mr. Brayboy's DNA on that hair follicle, did you?" R. Vol. 2, p. 0488, 8-11. SLED tested multiple samples. These samples cave from a condom, inside and out, hair, water bottle, the seat cushion, head rest, door and other areas of the vehicle. None of the DNA was the Appellants. Therefore, the record is void of any evidence that the Appellant was ever in the vehicle.

According to testimony of Dr. Batalis there was stippling and soot present meaning "the barrel of the gun would have been within a foot of the body." R. Vol. 2, p. 0426, lines 8-9. Therefore, whoever shot the deceased, would have to had been inside the vehicle. Appellant asked,

Q At the crime scene, did you find anything -- an ID, Mr. Brayboy's cell phone, anything that might give you probable cause to arrest Mr. Brayboy or think that he might be possibly involved in the crime?

A No, sir.

R. Vol. 1, p. 0073, lines 13-17. The State and the investigators did not have any corpus delicti, malice or anything to corroborate the testimony of Asia Cooper. There is no testimony that the Appellant had a .45 caliber weapon. No one can testify that the Appellant was in the vehicle, which

the killer was. The state collected DNA from the vehicle, however, of the four different profiles, none belonged to the Appellant. Appellants DNA was not inside the vehicle nor was it on the condoms. In fact, "Mr. Brayboy was excluded as a contributor to all of the DNA profiles that were developed." R. Vol. 1, p. 0223, line 25-p. 0224, line 1. No gun itself was presented at trial. The State did not find the Appellant in possession of a .45 caliber weapon. The State did not find Appellant in possession of a hoodie. Nor was their blood found in any way connected to Appellant. There was no evidence the deceased was homosexual, nor was there any evidence other that Asia Cooper's statement, that the Appellant had any malice or ill will towards homosexuals. No phone was ever located, whether broke or otherwise. R. Vol. 1, p. 0074, lines 4-6. The State presented no evidence to corroborate Ms. Coopers testimony.

The state failed to corroborate malice or prove the defendant robbed Mr. Jones or that Mr. Jones was gay. Asia Cooper claimed the Appellant "went to grab the money, but the money had blood all over it." R. Vol. 2, p. 0431, lines 21-22. However, she claimed "so he disposed of the money." R. Vol. 2, p. 0431, lines 22-23. The State tried to allege that Appellant robbed Mr. Jones. But when asked, "when he pulls out $180 on the 27th, Investigator Edwards says he does not know how Mr. Jones spent his money. R. Vol. 2, p. 0472, line 22-p. 0473, line 2. Investigator Edwards testified he did not find any burnt money in the park or money floating from his car in the crime scene. R. Vol. 2, p. 0473, lines 7-12. Further, $40 was discovered in Mr. Jones' wallet by the deputy coroner. R. Vol. 2, p. 0458, lines 2-4. In Fact, none of Mr. Jones "money or the blood was found on" Appellant. R. Vol. 3, p. 0497, lines 11-12. Therefore, the state cannot corroborate any allegation that the Appellant robbed Mr. Jones. It is further noteworthy; the Appellant was not charged with robbery.

Therefore, the State failed the corroboration rule and therefore the matter should not have been presented to the jury.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand for a ruling of acquittal.

Respectfully submitted,
May 9, 2025

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM FLORENCE COUNTY
Court of General Sessions

The Honorable H. Steven DeBerry, Circuit Court Judge

Appellate Case No. 2023-001182

The State, Respondent,

v.

Antonio Denon Brayboy, Appellant.

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Amended Final Brief as filed with this Court on May 9, 2025 complies with Rule 211(b), SCACR.

May 9, 2025

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PROOF OF SERVICE

I certify that I have served the Respondent's Amended Final Brief upon the below listed by sending a copy of the same by electronic mail, on today's date addressed as follows:

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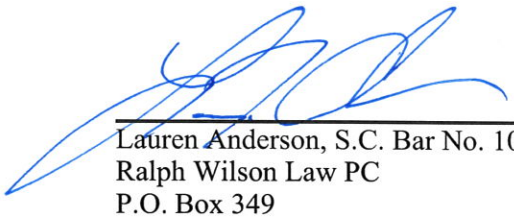

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May 9, 2025

VIA EMAIL ONLY

The Honorable Jenny A. Kitchings
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RE: The State v. Antonio D. Brayboy
Appellate Case No. 2023-001182

Dear Madame Clerk:

Please find enclosed and for filing the Respondent's Amended Final Brief; Certificate of Compliance; and Proof of Service in connection with the above-referenced matter, a bound copy to follow by USPS First Class Mail.

Sincerely,

Lauren K. Anderson, Esq.

Enclosures

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