STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP RONALD MILLER,

APPELLANT

APPELLATE CASE NO. 2024-000320

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err during the suppression hearing by allowing the State to elicit testimony from an investigator detailing testimonial statements made by a confidential informant, in violation of Appellant's right to confrontation under the Sixth Amendment to the United States Constitution, where the statements by the confidential informant provided the probable cause to extend the stop and search the vehicle?

STATEMENT OF THE CASE

Appellant was indicted during the May 2022 term of the Spartanburg County grand jury for trafficking heroin, possession of a weapon during the commission of or attempt to commit a violent crime, and possession of a weapon by a person convicted of a violent felony. R. 322-323; R. 328-329. The State, represented by James Edward Hunter, called the case to trial on February 27-28, 2024, before the Honorable J. Derham Cole and a jury. R. 1. Appellant was represented by Daniel James MacDonald, IV. R. 1. Appellant was found guilty as indicted. R. 315, ll. 2-17. Judge Cole sentenced Appellant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45 on the trafficking charge and to five years imprisonment on each weapons charge, to be served concurrently to Appellant's life sentence. R. 320, ll. 3-17; R. 324-327; R. 330-331.

STANDARD OF REVIEW

"In criminal cases, this Court only reviews errors of law." State v. Adams, 409 S.C. 641, 646–47, 763 S.E.2d 341, 344 (2014) *citing* State v. Gamble, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013). "[W]hile the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for us to defer to the trial court's overall ruling in every case. Hence, "appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion ... is a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 632-34, 879 S.E.2d 762, 766 (2022). Additionally, whether a statement is testimonial and therefore subject to the confrontation clause is a question of law reviewed de novo. See United States v. Mathis, 932 F.3d 242, 255 (4th Cir. 2019) (noting an alleged confrontation clause issue presents a question of law).

ARGUMENT

The trial court erred during the suppression hearing by allowing the State to elicit testimony from an investigator detailing testimonial statements made by a confidential informant, in violation of Appellant's right to confrontation under the Sixth Amendment to the United States Constitution, where the statements by the confidential informant provided the probable cause to extend the stop and search the vehicle.

Relevant Facts

On March 2, 2021, Deputy Cody Russell with the Spartanburg County Sherriff's Office (SCSO) received a call from Investigator Vassar and Investigator Pennington, members of the SCSO Narcotics Division. The investigators informed him that a black Chevy Tahoe traveling on I-26 westbound needed to be stopped so that they could serve an active arrest warrant for assault and battery third (A&B third) on the passenger, Phillip Miller. Russell was also informed that Appellant might have a gun in the vehicle. He knew it was possibly a drug case because "narcs were contacting me..." R. 15, l. 5-R. 17, l. 16; R. 19, ll. 10-20.

Russell initiated the traffic stop based on the information from investigators that Appellant, who had an active arrest warrant, was in the vehicle and because the vehicle failed to maintain its lane by crossing the yellow line.[1] R. 17, l. 17-R. 18, l. 11. Once Russell confirmed that the passenger was Appellant, he had Appellant step out of the vehicle to be placed in handcuffs. Appellant was searched and $2,080[2] was removed from his person. He was placed in

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1 During his testimony at the suppression hearing, Russell stated he witnessed the vehicle cross the yellow line multiple times. However, in his incident report, admitted as Defense Exhibit 2 for the suppression hearing, he indicated the vehicle only crossed the yellow line one time. R. 17, ll. 19-20; Defense Exhibit 2.

2 No testimony was elicited from the officers that the money recovered from Appellant was the money that was used during the controlled buy.

the back of Russell's patrol car for the duration of the stop. Laura Miller, the driver, was issued a warning citation for improper lane use "before [Russell] left the scene" that day. R. 19, l. 4-R. 22, l. 6; R. 49, ll. 1-3.

Appellant and Laura Miller both denied consent to search the vehicle. R. 20, l. 10-R. 21, l. 5; R. 59, ll. 5-9. At the instruction of Investigator Vassar, Russell called for a canine unit to be dispatched to the scene. R. 26, ll. 17-25. The canine officer indicated that the canine alerted to the vehicle and a search of the Tahoe was conducted. During the search officers recovered a yellow backpack in the trunk of the vehicle that contained a tan powdered substance, a green plant material, and a firearm with an extended magazine. R. 59, l. 10-R. 60, l. 7; R. 222, ll. 1-10. Appellant was taken to jail on the A&B third warrant while Laura Miller was released from the scene as she had a valid driver's license and insurance. Defense Exhibit 2.

At trial, Counsel MacDonald moved to suppress the drugs found during the search of the vehicle on numerous grounds. During the suppression hearing the State called Zachary Brunson, a member of the Richland County Sheriff's Department narcotics investigations unit and Task Force officer with the D.E.A. to the stand. R. 34, l. 17-R. 35, l. 14. Prior to Brunson testifying Counsel MacDonald moved to exclude any testimonial statements made by the confidential informant (CI) who was not present and would not be testifying during the hearing. Counsel MacDonald argued that to allow Brunson to testify to the things he was told by the CI would violate Appellant's right to confrontation. The State conceded that Brunson would be testifying to things that the CI told him, along with things that he had personally observed. Further, the State argued that Counsel MacDonald was "basically objecting to hearsay" and that the hearsay rules did not apply to suppression hearings. Counsel MacDonald clarified that he was objecting to a violation of Appellant's right to confrontation and not to hearsay. The trial court determined

that the State could put up the testimony, Counsel MacDonald could object, and the court would rule on the matter after the testimony was complete. R. 32, l. 3-R. 34, l. 15.

Brunson testified that earlier on March 2, 2021, he assisted in a controlled buy from Appellant utilizing a CI. Brunson reviewed the standard procedures employed in a controlled buy when working with a CI including the pre and post buy search of the CI and the CI's vehicle, and the use of recording devices. He testified that the standard procedures were followed during the controlled buy targeting Appellant, and that the buy was audio and video recorded. The video was not entered into evidence during the suppression hearing. R. 36, l. 1-R. 38, l. 10. The CI was provided with $1,900 for the purchase of narcotics. The meeting occurred at Appellant's aunt's house in Lexington County, South Carolina. Brunson and other members of the task force watched the controlled buy occur from a secure location a few streets away. R. 38, l. 3-R. 41, l. 18. Brunson testified that he was able to overhear Appellant and the CI discussing the buy stating,

> **A** My C.S. gets there, and Miller asked, like, what are -- what are you doing. C.S. says the whole thing. He, Miller, says I ain't got the whole thing. They continue kind of talking about different truck [sic] talk. There's mention of a fent.
>
> **Q** What is fent?
>
> **A** In my experience, fentanyl, the drug.
>
> **Q** And that's through your training and experience as a narcotics officer?
>
> **A** Yes. There's some discussion about weighing the bags. There's some -- Mr. Miller says 16-8, and says he'll get the C.S.I. 12 grams. They continued to engage in some conversation talking about mixing drugs, is what it appears based on my training and experience. Mr. Miller talks about looking at different houses, kind of all over the place. Also, mentioned Anderson and the Upstate of South Carolina. And then there's some discussion, *what appears some discussion, about a weapon and that it can hold 20 rounds*. There's also a point in the conversation where Miller talks about a gun safe.

R. 41, l. 24-R. 42, l. 22 (emphasis added).

After the buy the CI returned $100 of the currency that he had been provided and two bags of a light-colored powdered substance that subsequently tested positive for heroin and fentanyl. R. 44, ll. 3-23. During debriefing the CI informed Brunson that Appellant purportedly had additional narcotics and a gun in a bookbag. Brunson clarified that he did not personally observe a firearm or narcotics in the bookbag on the CI video. R. 47, ll. 16-23. He admitted that the conversation he overheard "*sounded* like a gun was being discussed" but that the conversation with the CI *confirmed* that Appellant had a gun along with additional narcotics in a bookbag. R. 51, l. 12-R. 52, l. 4.

While Brunson was debriefing the CI, other members of the task force observed a black Chevy Tahoe that had arrived at the house during the controlled buy depart the location with what appeared to be Appellant in the passenger seat and a woman driving. The Tahoe was traveling westbound on I-26 from Columbia to Spartanburg, while being followed by the surveillance team. Brunson contacted Investigator Vassar to inform him that Appellant was traveling to Spartanburg with narcotics and a firearm in his vehicle. R. 45, l. 16-R. 47, l. 15. Vassar subsequently contacted Russell to have him conduct a traffic stop of the vehicle because Appellant had an active arrest warrant. Vassar did not inform Russell that Appellant was believed to have narcotics in the vehicle. R. 54, l. 20-R. 56, l. 20.

Counsel MacDonald argued that allowing Brunson to testify as to what the CI told him was a violation of Appellant's rights under the Confrontation Clause. He continued that statements from a CI to police used in criminal investigations are testimonial and that the Confrontation Clause applied to pre-trial hearings, especially suppression hearings, because it was a critical stage of the case that was often outcome determinative of the trial itself. He argued that the State was relying heavily on the statements of the CI to Brunson to establish probable

cause to search the vehicle and not having the CI there for cross-examination was a violation for Appellant's constitutionally protected rights. R. 73, l. 12-R. 75, l. 16.

The State argued that probable cause to stop and search the vehicle existed the moment the undercover buy occurred in Lexington County.[3] The State specifically argued that "at the time that Investigator Brunson called Investigator Vassar, relayed that information of the buy, as well as the fact that he [Appellant] has a gun, that cash was used...would have been probable cause at the time of the stop to stop the car and search it." R. 98, ll. 1-15. Regarding the Confrontation Clause, the State agreed it had elicited testimony about what the CI told Brunson but stated that even if you took out that information, the State still had probable cause to search the vehicle. The State continued,

> I believe this state in pretrial hearings, the rules of evidence, specifically hearsay, the confrontation clause for pretrial, obviously at trial is going to be a lot different. I cannot talk about what the informant told him. That is hearsay. He's not going to be able to confront him on that. However, for the purposes of pretrial suppression motion, I believe it was valid and that the testimony today from all of the officers and the video that's shown today leads to probable cause for the stop, probable cause for the search and that the search was – and stop were valid.

R. 104, l. 23-R. 105, l. 9.

The Court denied the suppression motion and found the testimony of Brunson regarding the CI's statements was proper ruling,

> All right. Regarding the motion to suppress, in this particular case, as I understand it, the state is contending that the stop and the search and the seizure and the arrest of the defendant was based upon three theories. One is a valid traffic stop and a search incident, and an arrest thereto; secondly, an arrest by the defendant on a valid warrant after determining he was in the vehicle and therefore stopped; and, thirdly, a stop, a search and a seizure based upon the existence of probable cause.

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[3] Throughout the pre-trial hearing and the trial, the parties incorrectly refer to the location of the controlled buy as Richland County when it occurred in Lexington County. R. 98, ll. 1-2.

In the criminal-law context probable cause refers to the existence of facts and circumstances founded upon reasonably trustworthy information that would cause a reasonably objective person to believe that the defendant has committed or is committing a crime. And that information may be derived from hearsay if it is shown that that hearsay is reasonably trustworthy. And for the purpose of establishing to the satisfaction of the Court, probable cause to search or to arrest the person from whom the evidence is received need not testify so long as it is shown that the information is reasonably reliable and the officer testifying reasonably relied upon that information.

In this case I do find there was a valid traffic stop, but I'm understanding that that's the state's weakest position, or at least that's not the position they're asserting strongest. But I do find based upon the testimony there was a valid traffic stop.

The defendant contends that the purpose of the stop was exceeded, and the law provides that once the purpose of a stop has been fulfilled the continued detention of a vehicle and its occupants amounts to a second detention. Any second detention would have to be based upon probable cause, or at least reasonable suspicion; and therefore once the underlying basis for the traffic stop has concluded, in this case, according to Deputy Russell, it was based upon a lane violation. It does not however automatically follow that any further detention is unconstitutional. Lengthening the detention is acceptable where the officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring.

In this case I find exactly that fact. The evidence supports the fact that the officer, or at least the common knowledge of the officers involved in this particular case, had objectively reasonable and articulable suspicion that the defendant was involved in illegal activity, had been involved in illegal activity and was continuing to be involved in illegal activity.

So, probable cause is based upon reasonably trustworthy information shared between law enforcement agencies that the defendant has freshly committed a crime and is continuing to commit a crime by the unlawful drug possession and unlawful gun possession, as well as in this case the possession of evidence of a crime, being the money provided by law enforcement to a confidential source used to purchase drugs from the defendant in an officer-supervised transaction.

The information received from the confidential source as it relates to the defendant's possession of drugs has been established as reliable for the purposes of probable cause as it results from a controlled drug purchase orchestrated and supervised by an officer who has testified in this case. The information relating to the defendant's unlawful possession of a firearm results from recorded statements made by the defendant himself during the drug transaction that reasonably

> establishes his possession of a firearm and the officer's knowledge that the defendant is prohibited from possessing a firearm due to his criminal history. And the information relating to the defendant's possession of evidence of a crime, being the purchase money used in the controlled drug purchase, results from the officer's providing of that purchase money to the confidential source to purchase drugs from the defendant.
>
> And therefore the stop and the search and the seizure and the arrest of the defendant is constitutionally valid and sound, and therefore the motion to suppress is denied.

R. 108, l. 4-R. 111, l. 19. Counsel MacDonald asked the trial court if it had addressed his Confrontation Clause argument to which the court responded "Well, I addressed that by staying [sic] that hearsay testimony, so long as it's proven to be reliable and trustworthy, is admissible in a probable cause hearing...So, that addresses the confrontation clause issue." R. 111, ll. 20-R. 112, l. 3.

Discussion

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. Amend. VI. The Confrontation Clause, as applied to the states through the Fourteenth Amendment, *guarantees* criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987); Pointer v. Texas, 380 U.S. 400 (1967) (emphasis added). The Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Crawford v. Washington, 541 U.S. 36, 51 (2004). "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id.

In Crawford, *supra*, the United States Supreme Court abrogated the "adequate indicia of reliability" test promulgated in Ohio v. Roberts, 448 U.S. 56 (1980), and held that testimonial out-

of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. "[I]nterrogations[4] by law enforcement officers fall squarely within [the] class" of testimonial hearsay the Confrontation Clause forbade. Id. at 53. "[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." Michigan v. Bryant, 562 U.S. 344, 358 (2011).

This right to confront and cross-examine witnesses "is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Stokes, 381 S.C. 390, 399, 673 S.E.2d 434, 438 (2009) citing State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). Both the United States Supreme Court and our state Supreme Court have indicated that statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006); see also State v. Stokes, 381 S.C. at 401, 673 S.E.2d at 439 (2009). Several courts[5] have held that a defendant's right to confront the witnesses against him is implicated during a suppression hearing. As the Texas Court of Appeals held in Curry v. State, 228 S.W.3d 292, 297 (Tex. App. 2007),

> ...[A] suppression hearing is a critical phase of a criminal proceeding. The aims and interests involved in a suppression hearing are just as pressing as those in the actual trial. See United States v. Stewart, 93 F.3d 189, 193 n. 1 (5th Cir.1996). In

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4 Notably, the United States Supreme Court clarified that the term "interrogations" as used in its opinion was intended to be read colloquially rather than in a technical legal sense. Crawford at 53, n. 4.

5 See United States v. Clark, 475 F.2d 240, 246 (2d Cir.1973); United States v. Lopez, 328 F.Supp. 1077, 1088 (E.D.N.Y.1971); Granville v. Graziano, 139 Ohio Misc.2d 29, 858 N.E.2d 879, 883 (Ohio Mun.2006); State v. Sigerson, 282 So.2d 649, 651 (Fla.App.1973); United States v. Mejia, 69 F.3d 309 (9th Cir.1995); See Also 6 Wayne R. LaFave, Search and Seizure: a Treatise on the Fourth Amendment § 11.2(d) (4th ed.2007).

> drug possession cases like the one before us, the outcome of the suppression hearing often determines the outcome of the trial itself. To deny a defendant the protections afforded by the Confrontation Clause at this critical stage of the proceeding essentially denies him his only opportunity to ensure that the evidence presented against him is reliable.

Importantly, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, 'the right ... to be confronted with the witnesses against him,' is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established as the time of the founding." Crawford at 54. As the United States Supreme Court also noted in Crawford, South Carolina has long held the right to confrontation as sacrosanct. In State v. Campbell, our Supreme Court wrote,

> The primary principle upon which so strict a rule of law rests, is this-no court can take the life of a man, but by the conviction of the accused, effected in the due course of law...*And one of the indispensable conditions of such due course of law is, that prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.* The defendant's cross-examination expresses well the searching process and practical test furnished and intended by this rule of law; in order to correct any misconception of facts, to elicit truth, and justify the severe retribution awarded in cases of clear guilt.

30 S.C.L. 124, 125 (S.C. App. L. 1844). Appellant asserts that a suppression hearing is a critical stage of a criminal prosecution, particularly in a case based upon a warrantless search, and that during such a critical stage he should be guaranteed the right to confront his accusers and subject them to cross-examination under the Sixth Amendment to the United States Constitution.

In the matter *sub judice*, Appellant's right to confront his accuser was violated. First, the statements at issue are testimonial and subject to the Confrontation Clause based on the test set forth in Crawford, *supra*. The statements were made by a witness (the CI) to a government actor (Brunson) during a formal debriefing of the CI to obtain further evidence that would later be used against Appellant in a criminal prosecution. Any admission of those statements or use of those

statements to reach a ruling, without producing the CI to testify to the statements and the basis of his knowledge, was violative of Appellant's Sixth Amendment right to confrontation.

Second, the ruling by the trial court that the statements were admissible as reliable and trustworthy hearsay was an error of law. The ruling harkened back to the Ohio v. Rogers, *supra*, test that the Court specifically abrogated in Crawford, *supra*. The trial court ruled that there was not a violation of Appellant's rights under the Confrontation Clause because "hearsay testimony, so long as it's proven to be reliable and trustworthy, is admissible in a probable cause hearing." Respectfully, the rules of evidence do not supersede the Constitution. The trial court wholly failed to consider whether the statements were testimonial for the purposes of confrontation. Instead the court seemed to focus on the admissibility of the statements, which was not the basis of Counsel MacDonald's objection.

Importantly, the State conceded that the CI's statements were hearsay that could not be elicited in front of the jury because that would violate Appellant's right to confrontation. It would be counterintuitive to find that statements which would be subject to Confrontation Clause before a jury are not subject to the Confrontation Clause simply because the testimony is heard during a suppression hearing. Indeed, a finding that the guarantees of the Confrontation Clause do not extend to a suppression hearing which is a critical portion of a criminal prosecution would undermined the purpose of the Confrontation Clause in "promot[ing] reliability in criminal trials and insur[ing] that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Stokes, 381 S.C. 390, 399, 673 S.E.2d 434, 438 (2009). The words of the Texas Court of Appeal bear repeating that "[t]o deny a defendant the protections afforded by the Confrontation Clause at this critical stage of the proceeding essentially denies him his only

opportunity to ensure that the evidence presented against him is reliable." Curry v. State, 228 S.W.3d at 297.

Finally, Appellant was harmed by the unchallenged testimony of the CI as that information was the only probable cause basis for extending the stop, calling the canine, and searching the vehicle. The Stated argued that even if the court were to not consider the CI's statements because they violated the Confrontation Clause that law enforcement still had enough probable cause to extend the stop and search the car. The record does not support that assertion. There was no evidence that Appellant had a gun or narcotics in the vehicle *other than the unconfronted statements of the CI.* While the arrest warrant likely gave rise to sufficient probable cause to conduct the stop, once Russell finished writing the warning citation, there would not have been a justification for extending the stop, calling for a canine handler, and searching the vehicle.

Without the testimony about the CI's statements, there was no evidence that Appellant was continuing to commit a crime or engaged in criminal activity. The evidence that the State could rely on, absent the CI's statements, would have been that Brunson overheard a conversation that appeared to be about a weapon that Appellant had with him during the controlled buy *at the house.* That conversation would not give rise to probable cause or even reasonable suspicion to extend the stop and search of the car. Nothing presented to the trial court indicated that the officers had a reasonable suspicion of continued criminal activity once Appellant left the house and rode with his wife to Spartanburg. Further, there was no evidence that Appellant had committed a crime as there was never testimony elicited that the money recovered from Appellant was the same money provided to the CI for the controlled buy. Without the unconfronted statements of the CI, the State had no grounds upon which to extend the traffic stop and search the car.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests that this Court find that the Sixth Amendment Confrontation Clause protections extend to suppression hearings and find that Appellant's rights were violated by the admission of the testimony at issue in this matter.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2025.

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May 19 2025
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

May 19, 2025.

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STATE OF SOUTH CAROLINA

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THE STATE,

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PHILLIP RONALD MILLER,

APPELLANT

APPELLATE CASE NO. 2024-000320

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 19th day of May, 2025.

Jessica M. Saxon
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Leverett, Scott

From: Leverett, Scott
Sent: Monday, May 19, 2025 4:05 PM
To: Josh Edwards
Cc: Susan Spencer; Saxon, Jessica
Subject: 2024-000320 - State v. Philip Ronald Miller - Final Brief of Appellant
Attachments: 2024-000320 - State v. Philip Ronald Miller - Final Brief of Appellant.pdf

Dear Mr. Edwards,

Attached please find the Final Brief of Appellant in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Jessica Saxon
Appellate Defense