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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Honorable Walton J. McLeod, IV, Circuit Court Judge

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Appellate Case No. 2025-001268

THE STATE, .....RESPONDENT

v.

MARK ANTHONY FESTUS SCHEIBLER,.....APPELLANT.

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**INITIAL BRIEF OF RESPONDENT**

---

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

P. SANDERS LINKER  
Assistant Attorney General

Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-0918

SAMUEL R. HUBBARD, III  
Solicitor, Eleventh Judicial Circuit

205 East Main Street, Suite 309  
Lexington, SC 29072

ATTORNEYS FOR RESPONDENT

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## **APPELLANT'S STATEMENT OF ISSUES ON APPEAL**

### **I.**

Whether the trial court erred by admitting a recorded jail call between appellant and his niece because the calls were obtained in violation of appellant's privacy rights?

### **II.**

Whether the trial court abused its discretion by admitting texts messages extracted from appellant's phone and sent on December 2, 2021, prior to his arrest, where the text messages were not admissible as evidence of flight to demonstrate evidence of appellant's consciousness of guilt because there was no nexus between the alleged evasive conduct and the charged offenses and where the probative value of the text messages was substantially outweighed by the danger of unfair prejudice?

### **III.**

Whether the trial court erred in sentencing appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code § 16-23-490 when the judge sentenced appellant to life in prison for murder?

## **STATEMENT OF THE CASE**

During their June 2025 term, a Lexington County grand jury indicted Appellant Mark Anthony Festus Scheibler for murder and possession of a weapon during the commission of a violent crime. (R. pp. \* (Indictments)). Appellant proceeded to a jury trial before the Honorable Walton J. McLeod, IV from June 16–20, 2025. This trial followed a previous trial where Appellant had been acquitted of arson, but the jury was hung on the remaining charges, thus resulting in a mistrial. (*See* Tr. I, pp. 40–41, 82–84). Appellant was represented by Jean M. Popowski, Esq., Stephen R. Story, Jr., Esq., and Gabriel L. Mangold, Esq. while Deputy Solicitor Suzanne Mayes and Assistant Solicitor Kelly Oppenheimer represented the State. (Tr. I, p. 1). At the end of trial, the jury found Appellant guilty as indicted. (Tr. II, p. 458). Judge McLeod imposed a life sentence as to murder and a concurrent five-year sentence for the weapons possession charge. (Tr. II, p. 468).

This appeal now follows.

## **STATEMENT OF FACTS**

Shortly after sunrise around 7:14 AM on November 27, 2021, neighbors at Mac Circle in Lexington County heard gunfire, shortly followed by a woman screaming outside for help—whereupon they called 911. Some also immediately observed a small, white car speeding away from the scene. (Tr. I, pp. 167–170, 172–174, 178–180, 185–88). One neighbor noted that the tires appeared mismatched. (Tr. I, p. 180, ll. 13–15). Another neighbor who lived across the street from the incident location, Brian Holliman, testified he heard a couple of shots, followed by a couple more, saw a white car speeding away, and then heard a woman outside screaming. Holliman stated he quickly went outside and found the woman in distress and a man, the woman’s boyfriend, lying deceased on his front porch. This man was Jimmy Johnson (Victim), and the girlfriend was Deirdre Smith. Holliman stated he helped move Victim’s body off the front porch because the house (or camper) was on fire and there were “propane tanks under the camper.” Holliman also noted that another vehicle by the burning camper had two of its tires slashed. (Tr. I, pp. 186–194, 202). Holliman stated that it appeared that Victim had been shot multiple times. He noted that the camper belonged to Victim and the vehicle with the slashed tires was on Victim’s property. He also noted that there was a bullet hole in the rear windshield of the vehicle. (Tr. I, pp. 195–201).

Law enforcement arrived on scene at approximately 7:29 AM to render aid, but Victim was already dead from multiple gunshot wounds. Officer Willie James Harris testified that there did not appear to be any signs of a struggle or physical altercation, and no weapon was found near Victim. Harris corroborated Holliman’s testimony that the camper was on fire and Victim’s girlfriend Smith moved the vehicle with the slashed tires away from the burning camper. (Tr. I, pp. 208–213, 217). Another investigator corroborated the apparently intentional damage to the vehicle on the scene, and that there were no weapons on scene. (Tr. I, pp. 282–286). Investigators noted at

the crime scene that blood first appeared by the front of the porch and then led to the front door of the camper in a large pool, where other witnesses stated they found Victim lying dead. Investigators also collected seven fired 9mm cartridge casings—two in the front yard area and five on the front porch. Four casings had an “FC” headstamp while the other three had a “WIN” or Winchester headstamp. All were fired from the same weapon. (Tr. I, pp. 266–275; Tr. II, pp. 357–361). Using trajectory rods or “rodding,” in addition to looking at where the shell casings were found, investigators opined that Victim was first shot from behind somewhere in the front yard and then shot from above near or on the porch firing at a downward angle, meaning the shooter would have been standing above him or shooting at him while he was closer to the ground. Two bullets entered the camper while other fragments were collected around the front porch area past where Victim was lying. (Tr. I, pp. 276–281, 286–291; Tr. II, pp. 368–374).

The forensic pathologist testified that Victim had four “through and through” gunshot wounds and one wound that resulted in a bullet lodged inside of him. The pathologist determined that Victim had been shot once in the back, twice in the left side of his body, once in the right side of his body, and once in the left thigh, with three of those gunshot wounds being equally fatal. The pathologist further opined that Victim’s injuries were consistent with being shot while he was moving and then falling down. (Tr. II, pp. 100–109).

Smith testified that she and her boyfriend Victim (AKA “JJ”) lived together on the same property in two separate campers. She explained that the night prior, Victim had slept over at her camper until daybreak. She testified that she was woken up by Victim saying that his camper was on fire, having ostensibly seen the fire from security footage. Victim then left for his camper while Smith got herself dressed/refreshed and got their dog back into her camper after it ran out with Victim. During this, Smith stated she heard a couple of pops which she thought was related to an

electrical failure. However, upon approaching Victim's camper, she found him lying down and unresponsive on his porch. (Tr. I, pp. 226–235). After moving him off the porch with Holliman's help, Smith observed blood and what appeared to be gunshot wounds to Victim's lower abdomen. (Tr. I, pp. 235–237, 240). Being unsuccessful in attempting to put out the fire, Smith stated she got in the vehicle with the slashed tires and moved it away from the camper. She did not see the shooter or any vehicle leaving. (Tr. I, pp. 239–241).

Smith testified that a few days prior to the shooting, on November 23, Appellant came to the property and asked for Victim. Smith stated she could hear Appellant asking Victim for a ride into town. Appellant had driven a U-Haul truck close to the property and parked it near a neighbor, Christopher Williams' property. Victim and Appellant then left in Smith's vehicle, the same vehicle that later had its tires slashed. (Tr. I, pp. 244–249). Later, while Appellant and Victim were gone, Smith stated she was doing laundry when she heard doors opening and closing on the U-Haul and could hear male voices, including the neighbor Williams. Smith stated she told Victim what she heard, but never saw Appellant confront Victim about the U-Haul in the days leading up to Victim's death. (Tr. I, pp. 249–251). Finally, Smith confirmed that her vehicle was in working order and did not have a bullet hole or slashed tires until that morning. (Tr. I, pp. 251–253).

The son of the neighbor Christopher Williams, "Van" Williams, testified that he saw the U-Haul near his father's property and met Appellant for the first time while the U-Haul was there. Van stated that Appellant came to him "very flustered" and "very upset" regarding items that were allegedly stolen from inside the U-Haul. Van stated that Appellant indicated to him that these were personal items belonging to his then-deceased girlfriend Ashton Strickland, and that he "knew" Victim stole these items. Van testified he tried to calm Appellant down, but he was still angry and said he was "going to make a crime scene." All this happened "several days" prior to Victim's

death. (Tr. II, pp. 55–64). Appellant’s friend and co-worker, Herbert Crocker, testified that Appellant had texted him on December 2 saying that a sock belonging to his deceased girlfriend had been stolen. (Tr. II, pp. 49–52).

Stacie Fidler testified she had obtained a rental car, a white 2017 Hyundai Elantra, on November 24, 2021. That evening, Fidler stated that her boyfriend Jeffery Davidock was at their apartment with his work friend, Appellant. Fidler noted that when she got home from work, she could overhear Appellant angry about someone that took his deceased girlfriend’s belongings and that he was going to kill said person by going to his house and shooting him when he came out. Like Van Williams, Fidler stated that she had never met Appellant until this point. Fidler confirmed the license plate number and VIN number of the rental car, and that one of the tires had a significant leak. (Tr. II, pp. 198–211). Fidler testified that on Thanksgiving, the 25th, she stayed home and was sick all day. The following morning, the 26th, Fidler said the car was gone, and so was Appellant. Fidler testified that both she and Davidock made numerous attempts to contact Appellant at an -1170 phone number in order to get the vehicle back but were unsuccessful.

On Saturday morning, the 27th, Fidler stated she made another attempt to contact Appellant. After calling and then leaving a text, Appellant messaged her at 9:29 AM saying that she did not want the car back. After attempting to get on the phone with him again, Fidler stated Appellant sent a final text to her at around 11:15 AM saying again that she did not want the car back. (Tr. II, pp. 211–217). She never saw the car again. Fidler conceded that she never told law enforcement that Appellant stole the vehicle, instead she had told them she had left it on the side of the road with a flat tire. She did, however, emphasize that she left an anonymous tip with Crime Stoppers regarding Appellant and the theft of the rental car—which she later confirmed with law enforcement that it was her tip. (Tr. II, pp. 218–220, 226–230, 343–344).

Davidock corroborated Fidler's account, noting that on the 24th, Appellant came to the apartment in a paranoid and agitated state, and was angry at "J.J. [Victim] and Snoop [AKA Christopher Williams]" regarding the alleged theft of his deceased girlfriend's personal belongings. Davidock stated that Appellant directly told him that he was going to go to Victim's place and was going to shoot him. (Tr. II, pp. 232–238). Davidock also confirmed that when they woke up the day after Thanksgiving on Friday the 26th, the rental car was gone. Davidock made multiple attempts to get in contact with Appellant and Appellant only called back on November 27 a minute after Davidock had gotten off the phone with Appellant's sister. In his call, Appellant told Davidock it "would be smart of you to not keep calling [Appellant's] family" and kept telling Davidock that he did not want the car back. Davidock confirmed this phone conversation occurred at 8:37 AM, approximately an hour after the shooting. Finally, Davidock noted that from working with Appellant and being around him, Appellant had access to a 9mm or .45 caliber firearm. (Tr. II, pp. 238–245, 254).

Appellant was eventually arrested on December 2 following an unrelated shooting and a subsequent standoff at a house on Thrush Street in Columbia. Law enforcement recovered a black Samsung cellphone from Appellant's person and a black backpack from inside the residence containing a night vision monocular and loose 9mm ammunition. Some of the loose ammo contained the same "FC" and "WIN" headstamps found on the shell casings at the crime scene. An investigator would also note that there were similar FC casings with nickel primers *and* WIN casings with dark coatings contained in the loose ammo found in the backpack (Tr. II, pp. 10–13, 15–17, 71–83, 362–366). Regarding the cell phone, Investigator Clay Short testified that, after being Mirandized, Appellant consented to the search of the cell phone by signing a written waiver.

(Tr. II, pp. 17–25). The owner of the house at Thrust Street testified that she was not home at the time of Appellant’s arrest and the backpack found therein was not hers. (Tr. II, pp. 89–90, 94–95).

Investigators determined from a cell dump of the Samsung recovered from Appellant that the phone was factory reset three times, once on November 27 at 9:45 AM and again later that day at 9:39 PM, and a third time on December 1 at 11:40 PM. Thus, the only data accessible from the dump itself came from user interactions on December 2 after the last phone reset, the same day Appellant was apprehended by law enforcement in Columbia. (Tr. II, pp. 145, 148–151, 309–311). The State presented multiple texts sent from this phone at trial on December 2: (1) a text to a -7576 number at 10:30 AM indicating that someone had stolen his deceased girlfriend’s socks among other things and that this person had “paid [Appellant] back” after being given two days to return the items; (2) one text to a -9467<sup>1</sup> number at 10:31 AM noting that he was “[b]uying as much time as possible” and thanked the recipient for everything, also asking if they were going to give him a lift later; (3) another text to the -9467 number at 2:51 PM stating “Well, here’s my chance. I’m leaving now, heading to Myrtle Beach. Love y’all. Delete this[;]” (4) a text to an -8222 number at 3:08 PM asking if they were at their house (owner of Thrust Street previously testified this was her number); and (5) a final text to the -9467 number at 3:30 PM stating “They got me. Phone killed me.” Micheal Phipps, the testifying investigator, noted that the first factory reset of the phone occurred at 9:45 AM, roughly three hours after the first 911 call at 7:14 AM on November 27. (Tr. II, pp. 159–164, 316–319; *see also* State’s Exs. 151, 180, 181, 183 (Texts)).

The day following his arrest, Appellant placed a phone call from jail to his niece, wherein he (1) notes that someone got “his ass F\*\*\*ed up” over not giving a sock back, (2) he did not give

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<sup>1</sup> The transcript or the investigator appears to errantly note this first text as going to a -9460 number, but the testimony reflects that this was likely the same -9467 number Appellant was texting to in other texts. There was no other mention of a -9460 number in the record.

an “F” if he gets the death penalty, (3) the same person who got “his ass F\*\*\*ed up” had stolen something and had been given four hours to return the items, and (4) he had “unloaded” on this person after they failed to meet Appellant’s four-hour deadline to give back the items. (Tr. II, pp. 170–178, 189–191, 319–323; State’s Exs. 171–173 (Jail Call)).

Law enforcement eventually found the white Hyundai rental car abandoned in the woods on a remote property in Aiken County just outside of Lexington County after someone on the property found the vehicle and reported it to law enforcement. (Tr. II, pp. 258–263, 324–325). In addition to the cell dump from Appellant’s phone, a review of phone records, including call records and cell tower location data, from Appellant’s -1170 number revealed: (1) Appellant’s phone was around the Mac Circle neighborhood on the evening of November 23 making phone calls; (2) Appellant’s phone was in the area of Fidler and Davidock’s apartment on Harbinson Boulevard on the afternoon of November 24; (3) there was no cell activity or location data from Appellant’s phone around 7:14 AM on November 27, the time of the shooting; (3) Appellant’s phone made a call at 8:37 AM, approximately an hour after the shooting and was hitting a cell tower in Leesville, just off of I-20; (4) at 8:42 AM, Appellant’s phone began using a cell tower on Kyzer Mill Road—an area consistent with the property where the abandoned rental car was later found by law enforcement—and would continue using this tower placing seven calls until 9:39 AM; and (5) the location of the cell towers indicated Appellant was traveling west away from Lexington County and towards Aiken County.<sup>2</sup> (Tr. II, pp. 274–292).

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<sup>2</sup> Recall that the first factory reset occurred at 9:45 AM, approximately five minutes after Appellant got off of the phone. (*See* Tr. II, p. 149).

Finally, the State also presented evidence suggesting that Abby Kirby, Appellant's niece or niece-in-law, helped arrange transportation for Appellant from the scene of the abandoned vehicle and eventually to Columbia. (Tr. II, pp. 326–330).

Appellant did not present any testimony.

## **STANDARD OF REVIEW**

“In criminal cases, the appellate court sits to review errors of law only.” *State v. Johnson*, 413 S.C. 458, 776 S.E.2d 367, 371 (2015). “The admission or exclusion of evidence is a matter within the trial court’s sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a ‘manifest abuse of discretion accompanied by probable prejudice.’” *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 848 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). In the context of Fourth Amendment-based rulings, the appellate court will sustain the trial court’s factual findings if there is any evidence to support them but reviews the trial court’s legal conclusions *de novo*. *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

## **ARGUMENT**

**I. The trial court did not abuse its discretion in admitting a recorded jail call between Appellant and his niece where Appellant could have no legitimate expectation of privacy in his conversations since he was on notice that such calls were subject to monitoring and recording**

Appellant argues that the trial court erred in admitting a recorded jail call between him and his niece because such calls were obtained in violation of Appellant's privacy rights, specifically his right to privacy as protected by Article I, Section 10 of the South Carolina Constitution and more generally his Fourth Amendment rights against unreasonable (i.e. warrantless) searches and seizures. However, in correctly conceding that most courts have expressly rejected such an argument based on the Fourth Amendment's legitimate expectation of privacy framework, Appellant instead relies on *State v. Ellefson*, 266 S.C. 494, 224 S.E.2d 666 (1976), a case that held that the warrantless inspection of a detainee's outgoing *mail* without a legitimate jail purpose was a violation of that detainee's privacy rights. Respondent argues that Appellant's concession regarding the Fourth Amendment's legitimate expectation of privacy framework is dispositive of this issue and *Ellefson* otherwise does not provide relief as it is materially distinguishable and its currentness is questionable.

This Court should affirm.

**A. Relevant Facts**

Before trial, Appellant moved to exclude jail calls made by Appellant while he resided in the Alvin S. Glenn Detention Center, arguing that the recordings were made in violation of Appellant's Fourth Amendment right against unreasonable searches and seizures, as well as the right against unreasonable searches and seizures, and the right to privacy guaranteed by Article I, Section 10 of the South Carolina Constitution. Citing *Ellefson*, Appellant argued that the State

failed to establish that the recordings were made for any legitimate jail purpose and that Appellant’s “waiver” of rights regarding jail calls was weaker than the written waiver the Supreme Court in *Ellefson* found to be non-dispositive. (Tr. I, pp. 120–124). The solicitor responded by focusing the trial court’s attention back to the Fourth Amendment’s reasonable expectation of privacy of framework, noting:

I think the distinction here is, is it reasonable to expect privacy in your jail calls when you’re at a bank of phones in front of other inmates, in front of many other people working the jail, being housed in the jail, and when there is a recording that says your calls are subject to not only being recorded, but to monitoring by law enforcement personnel. *There is absolutely zero reasonable expectation of privacy in your calls made while in the jail, and there’s certainly a waiver by continuing to make phone calls in the jail.* There is certainly a distinction in the Gaskins case and the [Ellefson]<sup>3</sup> case and [Appellant’s] case, in that Gaskins and [Ellefson], they’re talking about mail. We’re talking about jail calls. Jail calls that any other person working the jail, any other inmate in the booking area where he made this call, could overhear what he was saying. *There is no reasonable expectation of privacy in the statements he made to his niece. Not his attorney. His niece.*

And to the extent that Mr. Story is saying that we listen to calls made to an attorney, those are absolutely not monitored at all. They’re blocked. Every attorney has to submit their phone numbers to the jail so that those calls are not recorded and they are blocked. They’re not monitored whatsoever. *There’s absolutely no reasonable expectation of privacy, and the Fourth Amendment would not protect his phone calls. There’s also an implicit waiver, if there even were a reasonable expectation of privacy. He continues to make his calls.*

(Tr. I, p. 124, ln. 9—Tr. I, p. 125, ln. 11) (emphasis added).

Appellant replied by continuing to argue that the safety considerations present in the Gaskins case (death row bombing case) were not present here. The trial court denied the motion. (Tr. I, p. 125, ll. 13–23). During trial, the State moved Exhibits 171–173 into evidence. The trial court admitted the exhibits subject to Appellant’s prior objections. (Tr. II, p. 190). While State’s Exhibits 172 and 173 contained snippets of the phone call itself wherein Appellant arguably

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<sup>3</sup> The transcript repeatedly notes counsel referring to the case as “Ellison,” but it is clear from context that both parties are referring to *Ellefson*, as Appellant does so now on appeal.

confesses to the murder to the effect of stating that he “unloaded” on someone that had failed to return his stolen items within a specified timeframe, State’s Exhibit 171 was a recording of the message that plays at the start of every jail call that warns the inmate that “all phone calls are subject to monitoring and recording.”

## **B. Discussion**

In order for a defendant to assert that the admitted evidence would be in violation of the Fourth Amendment as a warrantless search, “[t]hey must show that they have a legitimate expectation of privacy in the place searched.” *State v. Cardwell*, 414 S.C. 416, 425, 778 S.E.2d 483, 488 (Ct. App. 2015), *aff’d as modified*, 425 S.C. 595, 824 S.E.2d 451 (2019) (quoting *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004)). “A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable.” *Cardwell*, 414 S.C. at 425–26, 778 S.E.2d at 488 (citation omitted). “‘The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure’ by demonstrating he had an expectation of privacy in the area illegally searched.” *State v. Robinson*, 410 S.C. 519, 528, 765 S.E.2d 564, 569 (2014) (quoting *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978)). As discussed below, because Appellant fails to demonstrate a legitimate expectation of privacy, his claim must fail—without having to consider the next steps of Fourth Amendment analysis.

Even assuming Appellant maintained a subjective expectation of privacy in the contents of his jail calls, Appellant’s claim that he has an expectation of privacy that society would recognize as reasonable—when he is on notice that his jail calls are subject to monitoring and recording—is at odds not only with common sense but also established Fourth

Amendment precedent. First, current state law does not construe the Fourth Amendment so broadly. In support of his argument, Appellant cites *State v. Ellefson*, 266 S.C. 494, 224 S.E.2d 666 (1976).

There, our Supreme Court held that the photocopying of incriminating handwritten letters of a pre-trial detainee by a detective not working for “any legitimate jail purpose” was a violation of that detainee’s constitutional rights. *Id.* at 498–503, 224 S.E.2d at 668–71. The Court noted that “jail security” did not provide a wholesale justification for the search/reading of the letters and that the detective’s own testimony that he was reading the letters to gather incriminating evidence refuted “the idea that the search was for any legitimate jail purpose.” *Id.* at 499–500, 224 S.E.2d at 669. The Court also rejected the State’s argument that the defendant had consented to the reading of his mail in this manner when all detainees were required to sign a card allowing searches of prison mail as a part of the booking/reception process. *Id.* at 502–03, 224 S.E.2d at 670. The Court discussed precedent governing jail searches (including the First Amendment) and cited the basic Fourth Amendment principle that warrantless searches are generally unlawful, but it did not discuss the issue in the reasonable expectation of privacy framework. *Id.* at 499–502, 224 S.E.2d at 669–70.

As the solicitor correctly noted, letters are simply different than jail calls. Writing a letter, putting it into an envelope, and sealing it is different than entering the jail’s phone bank surrounded by other inmates, placing a phone call that can be overheard by said inmates or correctional staff, being directly warned that your conversation is subject to monitoring/recording, and then proceeding with the call despite said warning and the possibility of being overheard. Additionally, *Ellefson* does not address the modern expectation of privacy framework that now governs Fourth Amendment claims. Instead, it discusses the

issue in terms of general constitutional principles, often relying on old and abrogated caselaw—likely making it out of date with modern standards governing motions to suppress.<sup>4</sup> Both the trial court and the solicitor correctly identified that this issue was governed by the legitimate expectation of privacy framework under the Fourth Amendment, not *Ellefson*. Again, even assuming Appellant maintained a subjective expectation of privacy (which is questionable based on the recorded notice), society would not recognize this expectation as reasonable because of the clear notice given before proceeding with the call.

Notably, most federal appellate courts that have addressed this specific scenario have failed to adopt such an expansive view of the Fourth Amendment. *See United States v. Novak*, 531 F.3d 99, 101–04 (1st Cir. 2008) (holding that a “telephone call can be monitored and recorded without violating the Fourth Amendment so long as one participant in the call consents to the monitoring.”); *United States v. Friedman*, 300 F.3d 111, 123 (2d Cir. 2002) (holding that pre-trial detainee has no reasonable expectation of privacy in contents of jail calls when they receive notice of monitoring/recording); *United States v. Sababu*, 891 F.2d 1308, 1328–30 (7th Cir. 1989) (no reasonable expectation of privacy for person calling federal inmate); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (holding that any subjective expectation of privacy in such calls is objectively unreasonable); *United States v. Gangi*, 57 F. App’x 809, 814–15 (10th Cir. 2003) (same).

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<sup>4</sup> For example, one modern case has specifically recognized the standalone nature of *Ellefson* compared to the majority of jurisdictions. *See Busby v. Dretke*, 359 F.3d 708, 716, n. 5 & 6 (5th Cir. 2004). With regards to the outdated authority on which *Ellefson* relies on in its analysis, compare *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (invalidating indiscriminate censorship of prison mail on First Amendment grounds and holding that censorship justified only upon satisfaction of two-prong test) with *Thornburgh v. Abbott*, 490 U.S. 401, 407–414 (1989) (rejecting a strict application of *Martinez* and holding that regulations regarding censorship of outgoing prison mail are subject to reasonableness standard).

Finally, many states that have considered this issue have also decided similarly. *See State v. Brantley*, 914 S.E.2d 807, 809–10 (Ga. 2025); *People v. Diaz*, 122 N.E.3d 61, 64–66 (N.Y. 2019); *Jackson v. State*, 263 So.3d 1003, 1010–11 (Miss. Ct. App. 2018); *Com. v. Rosa*, 9 N.E.3d 832, 841 (Mass. 2014); *State v. Gilliland*, 276 P.3d 165, 177–78 (Kan. 2012); *State v. Guess*, 104 So.3d 41, 50–51 (La. Ct. App. 2012); *State v. Johnson*, 229 P.3d 523, 530 (N.M. 2010); *State v. Avery*, 211 P.3d 1154, 1157–59 (Alaska Ct. App. 2009); *Lemond v. State*, 878 N.E.2d 384, 392 (Ind. Ct. App. 2007); *People v. Windham*, 51 Cal. Rptr. 3d 884, 890–891 (Cal. 2006); *People v. Lee*, 93 P.3d 544, 548 (Colo. App. 2003); *State v. Fox*, 493 N.W.2d 829, 831–32 (Iowa 1992); *People v. DeGeer*, 363 N.W.2d 37, 37–38 (Mich. Ct. App. 1985).

Appellant appears to concede the weakness of his Fourth Amendment argument by asking this Court to “find that appellant had, *at least*, a diminished but reasonable expectation of privacy in the jail call at issue *based on the heightened protection of privacy found in the South Carolina Constitution and the holding in Ellefson*.” (Brief of Appellant at 12) (emphasis added). However, because the Fourth Amendment governs this issue, not *Ellefson*, this Court should decline this request. To the extent *Ellefson* even established a heightened privacy protection pursuant to the South Carolina Constitution, it should not be relied on here because the facts of this case are materially distinguishable; and the foundation of *Ellefson*’s analysis and holding has been weakened by developments in the caselaw since 1976.<sup>5</sup> Moreover, Appellant’s argument regarding access to the outside world and having “no viable alternatives” to using the jail phone is similarly weak where the record clearly reflects that calls made to attorneys are protected from

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<sup>5</sup> Notably, in addition to the points made *supra* in note 4, the two state cases that have discussed *Ellefson*’s holding on the jail/prison mail issue, *State v. Gaskins*, 284 S.C. 105, 116, 326 S.E.2d 132, 139 (1985) and *State v. Matthews*, 296 S.C. 379, 389, 373 S.E.2d 587, 593 (1988), have distinguished the case and declined to apply its holding or reasoning to prohibit evidence. No state case has addressed or re-visited this issue since.

recording/disclosure, and nothing is (or was) stopping Appellant from calling his attorneys or using the mail. Whether a warrantless search of such theoretical mailings would be lawful—what was actually at issue in *Ellefson*—however, is not an issue here on appeal. Accordingly, because Appellant cannot show a legitimate expectation of privacy in the contents of his recorded jail calls, his claim must fail.

This Court should affirm.

**II. The trial court did not abuse its discretion by admitting text messages extracted from Appellant's phone that were sent on December 2, 2021 immediately prior to his arrest in Columbia where such messages were admissible as evidence of flight and Appellant's guilty conscience**

Appellant argues the trial court abused its discretion in admitting text messages from Appellant's phone made prior to his arrest on the basis that the messages were inadmissible as evidence of flight or consciousness of guilt. Specifically, Appellant argues that the State failed to establish a sufficient nexus between the alleged evasive/guilty conduct and the charged offenses. Appellant also argues that the messages were inadmissible under Rule 403. Respondent contends that the trial court appropriately found that the State established a sufficient nexus between Appellant's guilty texts and the murder at issue here, in addition to appropriately applying the Rule 403 balancing test. Appellant can show no abuse of discretion. Moreover, the texts at issue here were merely cumulative to other significant evidence of Appellant's guilt, meaning any error in admitting them would be harmless beyond a reasonable doubt.

This Court should affirm.

**A. Relevant Facts**

In a pre-trial motion, the State argued for the admission of *res gestae* evidence, specifically regarding the fire set to Victim's camper. At the end of the motion, however, the State also moved for admission of evidence of flight as consciousness of guilt, specifically evidence showing that Appellant's phone was not interacting with cell towers at the time of Victim's murder, but was then active roughly an hour after the murder and then was sending texts while in a standoff with law enforcement in Richland County on December 2, notably the "phone got me" text. The State argued that the text was probative evidence of Appellant's knowledge and state of mind regarding law enforcement's ability to trace cell phone locations, and further proof of Appellant's state of

mind and intent to deactivate his cell phone during the timeframe of Victim's murder in Lexington County. All this evidence together, the State argued, made a complete chain of inferences showing Appellant deactivated his phone prior to committing the crime and after committing the crime while continuing to avoid apprehension until December 2. (R. pp. \*).

After arguing the issues relating to the evidence of the fire, Appellant also raised an objection pre-trial to the use of the texts, including the "phone got me" text, arguing that the State failed to establish a nexus between the texts and the Lexington County murder where Appellant was at large awaiting arrest for an unrelated Richland County shooting at the time he sent those texts. Appellant contended that law enforcement would not have had probable cause to make an arrest regarding Victim's murder, the Lexington County charges, and that there was no actual flight since Appellant eventually surrendered to Richland County law enforcement and gave a confession relating to those charges. Thus, without the nexus, Appellant argued that the evidence would be irrelevant and otherwise inadmissible under Rule 403. (Tr. I, pp. 86–89).

The solicitor responded by first laying out the importance of the phone being factory reset three times, which laid the groundwork for the relevance and probative value of the texts, including the "phone got me" text:

It's working fine before the murder. It's working fine after the murder. But the phone is not connecting to a network at the time that the murder occurs. That's relevant and probative to the State's case because, again, it's evidence of premeditation or planning, which all relates to malice.

Beyond that, Your Honor, he is going to factory reset that phone three times after the murder, including a factory reset that occurs within three hours of the murder of [Victim]. Again, relevant information to the Defendant's state of mind and knowledge that that phone can be traced. And so, when he is surrounded by law enforcement on December 2nd and states, "The phone. They got me. The phone killed me." That's a relevant admission by the Defendant that he knows, in fact that his phone can be traced. *Going back to the ultimate jury question, did he, in fact, deactivate his phone during the time frame of the murder, or did the battery just*

*die? Well, it's relevant and probative that he knows full well the phone can be traced.*

(Tr. I, p. 90, ll. 3–21) (emphasis added).<sup>6</sup> Next, the solicitor laid out the nexus between Appellant's texts and the murder:

And so, Your Honor, the evidence of flight as to this crime, there is a strong nexus, and it is very detailed, and I will lay out for the record where we are with this phone after the shooting of his girlfriend in Richland County, November 19th. *When his girlfriend was shot on November 19th, he was using a completely different phone. Not this phone.* A completely different phone that he used to communicate with people. . . . That phone, Your Honor, completely disappeared. I don't know that that phone was ever recovered by law enforcement, but it was a completely different phone and a different phone number.

*This phone was activated for the first time after the shooting of his girlfriend.* And this phone that he was caught with, and is referencing, "phone got me", is the phone that he would have been in possession of. Would have ultimately been deactivated during the time frame of the murder. It's the same phone that, within an hour and a half of the murder, he's going to call that witness, Jeffery Davidock on. So, it's a completely different phone.

Then, as I stated, we know that this phone was factory reset three times after the murder, including three hours after [Victim] was shot. We know that he fled the scene of this crime. And when I say "fled the scene", Your Honor, he leaves in that vehicle. He's ultimately going to abandon that vehicle. He's going to tell witnesses. "You don't want that car back", showing he has knowledge that that vehicle can be found and connected to the murder of [Victim]. *Same reason he's factory resetting his phone.*

He does not call 9-1-1. He also gets rid of the gun that's used in the crime, just as he got rid of the vehicle and hid the vehicle that was used in this crime. And then, Your Honor, he flees Lexington County and returns back, not only to the county where he shot his girlfriend, . . . but to an area, give or take, is probably 200 yards from the crime scene where she was shot. He goes and stays at a residence on Thrush Street in very, very close proximity to the originally location where he shot the girlfriend.

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<sup>6</sup> The solicitor also made reference to how the factory reset and subsequent "phone got me" text was addressed at the first trial, noting that the State did not intend to offer the text until the defense suggested through cross-examination regarding the factory reset that it was done so that Appellant could sell the phone, the point being that the text would have corroborated the State's theory at that point in the first trial and thus rebutted Appellant's suggestion. (See Tr. I, p. 89, ll. 9–25; Tr. II, p. 133, ll. 3–23).

And so, . . . he's fleeing this crime . . . when he returns back to Richland County. He's fleeing this crime when he gets rid of the car, and he's fleeing this crime, *or concealing this crime, when he wipes that phone and then ultimately this phone number is going to be traced. And he says, "They got me. Phone killed me."* And the testimony that we offered in the last trial is that he's then detained. The jury never heard . . . he's got another charge, ultimately, that he's going to be arrested on too. But he's detained also on *this* charge, because those authorities knew he was wanted as a suspect in this case. . . .

So there is a very strong nexus . . . between this phone, that communication, and ultimately him being detained on December 2 and stating, "My phone got me." At the same time that he's sending *that* text . . . he's also texting multiple other people saying that he wants or needs a ride. He is thanking someone by the name of Abby Kirby, who, as evidence will show in this case, . . . lives in very close proximity to where that vehicle is ditched and abandoned. And he's communicating with them, thanking them for their help, obviously showing his intent to flee and his state of mind.

[H]ere the evidence of flight is directly connected to the murder of [Victim], from the time he fled the crime scene onwards. From the time he fled the crime scene, ditched that car, factory reset his phone, and then gets apprehended and said, "My phone killed me." It's all relevant and probative . . . to his state of mind and his knowledge of what law enforcement can and cannot trace, and his wanton ability, capabilities in this case, to conceal and destroy evidence. And he did conceal and destroy the gun. That's never been recovered. He did conceal that car until two weeks ago. And he did conceal and destroy evidence on that phone. We only have evidence for the very date that he was detained, which was December 2. *Although we know he was using that phone for a long period of time.* In fact, he's going to send a text to someone saying, "Delete this." *All relevant, Your Honor, to show his intent to conceal and destroy evidence relating to the murder of* [Victim].

(Tr. I, p. 90, ln. 22—Tr. I, p. 94, ln. 5) (emphasis added).

Appellant replied again arguing there was no flight in this case, distinguishing from cases where the defendant had actually fled on foot from law enforcement (held to be flight) or where the defendant was proverbially "ducking and dodging" law enforcement's attempt to interview him (held to be not flight).<sup>7</sup> The solicitor maintained that Appellant was in flight from the moment of the shooting where he fled the scene and was not there when law enforcement arrived, and he

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<sup>7</sup> Those cases were *State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005) and *State v. Middleton*, 441 S.C. 55, 893 S.E.2d 279 (2023), respectively.

did not call 911. The trial court declined to grant Appellant's motion to suppress, instead noting it would address the issue again as it came up during trial. (Tr. I, pp. 94–96).

During trial but outside of the presence of the jury, the State reiterated its position on the admissibility of the texts, noting that the -1170 number at issue in the case was the same phone recovered from Appellant that was only activated *after* the unrelated Richland County shooting and was the same phone factory reset three times and from which Appellant made the incriminating “phone killed me” text. The solicitor noted that based on phone records from Verizon, Appellant had made multiple communications to friends and family between the murder and December 2 that were not recovered from the phone because of the factory resets. The solicitor thus argued that, while flight may pertain to one of the proposed text messages, other texts concern concealment and destruction of evidence which is an independent basis to admit the evidence as consciousness of guilt. For example, the solicitor cited the text from Appellant to his niece indicating that he was leaving for Myrtle Beach with the added instruction to “Delete this,” later admitted as State's Exhibit 181. The solicitor explained that a text like this would be relevant and probative to further explain the factory resets. (Tr. II, pp. 119–124).

The “phone killed me” or “phone got me” text on the other hand, the solicitor argued, was *directly* relevant and probative to consciousness of guilt based on the factory resets, cell records showing Appellant's movements away from the crime scene, the non-activation of Appellant's phone during the timeframe of the murder, and the fact the case was mostly built on circumstantial evidence. The solicitor also argued that based on the evidence regarding the abandoned rental car, having been abandoned in close proximity to where Appellant's niece Abby Kirby lived, and Appellant's eventual movements to Thrush Street in Columbia, the texts explain how Appellant was getting rides and assistance from other people to physically distance himself from the crime.

Thus, the solicitor surmised that the texts at issue here, State's Exhibits 180, 181, and 183 were admissible as consciousness of guilt, guilty knowledge, and concealment/destruction of evidence. (Tr. II, pp. 124–128).

Appellant maintained that the texts did not indicate anything specifically about the murder or Lexington County and that they were otherwise taken out of context from the cell phone. He contended that the State was merely speculating that the texts indicated some sort of flight from Lexington County. Thus, he argued it was irrelevant and inadmissible under Rule 402 or otherwise inadmissible under Rule 403. (Tr. II, pp. 129–132).

Eventually, after further back and forth argument, the trial court ruled as follows:

I'm overruling the objections. Obviously, if something comes up in testimony between now and then, we'll cross that bridge. But I intend to admit them over objection. I think they're relevant. I don't think they will confuse the jury. They may be prejudicial. I don't find they are unfairly prejudicial. I don't find they are substantially prejudicial in light of Rule 403.

I think you can certainly address it on cross, *but I think there's certainly an argument that . . . based off the time the text messages were sent, I think they can provide clarity to the jury instead of confusion.* But again, I haven't heard all the questions. So as of now, I intend to admit them subject to objection.

(Tr. II, p. 135, ll. 1–13) (emphasis added).

Thereafter, the State moved State's Exhibits 180, 181, and 183 into evidence which were admitted subject to Appellant's prior objections. (Tr. II, pp. 149–153).

## **B. Discussion**

"As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). For an act of a defendant to be relevant as evidence of guilty conduct or a guilty conscience, there must be a nexus between the conduct and the offense charged. *State v. Cartwright*, 425 S.C. 81, 92, 819 S.E.2d 756, 762 (2018); *State v. Martin*, 403 S.C. 19, 28, 742

S.E.2d 42, 47 (Ct. App. 2013). Flight from prosecution is admissible as evidence of guilt. *State v. Middleton*, 441 S.C. 55, 62, 893 S.E.2d 279, 283 (2023); *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) (“Flight evidence is relevant when there is a nexus between the flight and the offense charged.”) (citations omitted). “The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities.” *Pagan*, 369 S.C. at 209, 631 S.E.2d at 266.

Here, as the solicitor correctly surmised, the texts at issue here were independently admissible as evidence of flight, consciousness of guilt, and guilty conduct in the form of instructing the deletion of inculpatory evidence. Moreover, the detailed evidentiary proffer made by the solicitor more than satisfied the nexus requirement. Importantly, the phone at issue here, the -1170 number could not be conflated with use in the Richland County shooting since Appellant did not start using the phone until after that unrelated incident. Instead, the record clearly shows that all the relevant activity regarding that phone was only related to the Lexington County murder at issue here with three factory resets, incriminating phone calls and texts made to witnesses like Fidler and Davidock which were independently corroborated by said witnesses despite the factory resets, the phone’s non-activation during the period immediately around the murder, and location data associated with Appellant’s phone records indicating Appellant fleeing the scene of the crime towards the area where law enforcement would eventually recover the abandoned rental vehicle—the same vehicle Appellant clearly stole based on the aforementioned witness testimony.

Taking it one exhibit at a time, the nexus was clearly established. First, the “phone killed me” text, State’s Exhibit 183, had a clear nexus to Victim’s murder as this specific phone left a highly incriminating trail of evidence in the wake of Appellant’s destructive and violent acts, despite his attempts to conceal inculpatory evidence. Appellant acknowledging that the trail left

by the phone “killed” him is about as guilty as guilty can be. Next, the text noting that it was his chance to leave for Myrtle Beach with the added instruction at the end to “delete” the text, State’s Exhibit 181, was equally admissible as evidence of flight since Appellant was aware of the inculpatory trail left by his phone and the fact that law enforcement were already bearing down on him for the Richland County shooting; *and* as evidence of a guilty conscience from Appellant’s instruction to delete inculpatory evidence. Finally, the text noting that Appellant was “buying as much time as possible” and asking for a “lift,” State’s Exhibit 180 was further evidence of Appellant’s flight and otherwise admissible to provide further relevant context to Appellant’s actions taken after the murder and further context to the other admissible texts. Appellant can show no abuse of discretion in the trial court’s decision finding these texts relevant.

Alternatively, Appellant argues that even if the texts were relevant (and thus generally admissible per Rule 401), the trial court should have excluded them under Rule 403. “Although relevant, evidence may be excluded if *its probative value is substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE (emphasis added). “The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.” *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). “Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.” *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

In this case, the trial court properly found that these texts were not unfairly prejudicial and were not substantially prejudicial in light of Rule 403. As explained above, these texts were highly probative to further explain Appellant’s conduct between the shooting and his eventual arrest in

Columbia and to explain his guilty state of mind regarding his failed attempts to cover his tracks. Whatever prejudicial effect these texts may have had would simply be minimal in comparison to their probative value. Appellant can show no abuse of discretion in the trial court's balancing under the rule. Finally, even if the court erred in admitting these texts, such error would be harmless beyond a reasonable doubt given the other significant and competent evidence to Appellant's guilt. Error is harmless when it could not have reasonably affected the result of the trial. *State v. Simmons*, 423 S.C. 552, 566, 816 S.E.2d 566, 573–74 (2018) (quoting *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011)).

In this case, there were multiple eyewitnesses who attested to Appellant being furious at Victim alleging that Victim stole the property of his deceased girlfriend out of a U-Haul he parked next to Victim's property on November 24. Specifically, after ranting and raving to Van Williams that he was going to "make a crime scene" in reference to Victim, Appellant went to Fidler and Davidock's apartment and directly told Davidock that he was going to go to Victim's property, wait for him to come outside, and then shoot him—with Fidler overhearing the same. Friday morning, approximately 24 hours before the shooting, Fidler and Davidock both wake up to find their white rental car missing. Both made repeated attempts to get in contact with Appellant, imploring him to return the car. Meanwhile, on Saturday morning, eyewitnesses at Mac Circle heard gunshots and saw a white car fleeing the scene. Appellant texted and told over the phone both Davidock and Fidler within a few hours of the murder that they "don't want the car back." Their accounts were further corroborated by cell records from Appellant's phone showing that he called and texted them. Appellant's phone was factory reset during the midst of all this, and his phone was conveniently off during the timeframe immediately surrounding the murder.

Further analysis of cell tower location data shows Appellant's phone leaving Lexington County west along I-20 towards Aiken County within about an hour of the murder where law enforcement would later find the abandoned white rental car—and conveniently where Appellant's niece happened to live nearby. When law enforcement eventually arrested Appellant at Thrush Street, they found a backpack inside with loose ammunition consistent with the same casings found at the crime scene and a night vision monocular, a device that specifically allows a user to better see in the dark—perhaps a device that allowed Appellant to better facilitate a staged fire to Victim's camper before sunrise in order to stalk and shoot Victim dead as he left his girlfriend's camper. This evidence is substantial, not merely suspicious.

Accordingly, any error in admitting the texts in this case must be harmless because the non-objected to or non-appealed evidence just described was more than sufficient on its own to convict Appellant of Victim's murder. Therefore, this Court should affirm.

**III. The State agrees that the trial court erred in sentencing Appellant to an additional five-year sentence under S.C. Code Ann. § 16-23-490**

Appellant argues that the trial court erred by imposing a five-year sentence under S.C. Code Ann. § 16-23-490 when Appellant was also sentenced to life imprisonment for murder. The State agrees. Under Section (A) of the statute, the “five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.”

There was no objection to the sentence, and the trial court had no opportunity to consider its error. (*See* Tr. II, p. 468). Under standard preservation rules, this would normally bar an issue from appellate review. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). However, in *State v. Plumer*, 439 S.C. 346, 887 S.E.2d 134 (2023), our Supreme Court considered whether an objection was required to reach such an issue and reasoned that an objection was not required to address an illegal sentence. Our Supreme Court determined that an “appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial[.]” *Id.* at 351, 887 S.E.2d at 137. This is so “even if there is no real threat of incarceration beyond the limits of a legal sentence,” which had been a condition precedent in prior cases to reach an unpreserved sentencing issue. *Id.* Consequently, the manner of treatment to effect correction of the sentence is in this Court’s discretion.

## **CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

P. SANDERS LINKER  
Assistant Attorney General

SAMUEL R. HUBBARD, III  
Solicitor, Eleventh Judicial Circuit

BY: s/ P. Sanders Linker  
P. Sanders Linker  
S.C. Bar No. 107688

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-0918

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina  
August 26, 2026