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MAY 19 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
Honorable Edward B. Cottingham, Circuit Court Judge  
Appellate Case No. 2011-203769

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THE STATE,

Respondent,

vs.

ALEX LORENZO ROBINSON,

Appellant.

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**RESPONDENT'S PETITION FOR REHEARING**

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On April 23, 2014, this Court issued a published opinion in which it reversed Appellant Alex Lorenzo Robinson's conviction for trafficking in cocaine. State v. Robinson, Op. No. 5224 (S.C. Ct. App. filed April 23, 2014). In the opinion, this Court found that the trial judge committed a clear error in determining that the search warrant affidavit did not contain any false information. Additionally, this Court concluded that the search warrant issued in Robinson's case was invalid because the affiant failed to include any evidence in the supporting affidavit regarding the reliability of a confidential informant working with the Horry County Sheriff's Office. Furthermore, this Court found that suppression of the evidence was warranted after determining that the good faith exception articulated in United States v. Leon, 468 U.S. 897 (1984), was not applicable to Robinson's case. Pursuant to Rule 221(a), SCACR, Respondent ("the State") respectfully submits that this Court misapprehended or overlooked several critical

points – particularly in respect to the applicability of the good faith exception – and petitions this Court for rehearing as a result.

**Absence of Any False Information in the Warrant Affidavit**

In its opinion, this Court found that the trial judge clearly erred in finding that the search warrant affidavit did not contain any false information. In reaching that conclusion, this Court held that Sergeant Donald’s affidavit, at a minimum, implied that the informant personally entered the residence and purchased cocaine, which this Court found was “conclusively demonstrated” to be false in light of Sergeant Donald’s trial testimony regarding the details of the narcotics transactions. However, contrary to this Court’s conclusion, the testimony and evidence presented during trial – when viewed in the proper context – established that Sergeant Donald did not include any false information in the warrant affidavit.

In South Carolina, an affiant seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 (“A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.”); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as “a fair probability that contraband or evidence of a crime will be found”). In deciding whether to issue a search warrant, the issuing judge must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Gates, 462 U.S. at 238. Importantly though, the issuing judge – and a court

subsequently reviewing the issuing judge's decision – must view the warrant affidavit in a common sense and realistic fashion and give consideration to the fact that such affidavits are typically prepared by non-lawyers in the haste of criminal investigations. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).

In the case sub judice, the trial judge properly determined that the warrant affidavit did not contain any false information because none of the statements included in the affidavit were intentionally false or misleading.<sup>1</sup> Critically, contrary to this Court's interpretation of the warrant affidavit, the affidavit did not contain any language indicating – or even implying – that the confidential informant actually entered the targeted residence. Cf. Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 (“Rutledge . . . contends the affidavit improperly implied that the officers recovered the marijuana, seeds, and stalks from the residence itself. . . . Nowhere does the affidavit say it was found in the house.”). Instead, when viewed in the proper context, the information contained in the affidavit only indicated that the confidential informant purchased and obtained drugs from the targeted residence, and that is exactly what actually occurred. Specifically, the testimony and evidence presented during trial established that the confidential information went to the targeted residence accompanied by her contact with the agreed-upon purpose of buying cocaine, gave money to the contact for the cocaine, specifically watched as the contact took the money into the residence, and continued to watch as the contact returned

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<sup>1</sup> Under the Fourth and Fourteenth Amendment of the United States Constitution, a defendant has a right “to challenge misstatements in a search warrant affidavit.” State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court identified the process for raising such a challenge. Pursuant to the process identified in Franks, a defendant is constitutionally entitled to a hearing on the validity of a search warrant affidavit if “the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit” and “if the allegedly false statement is necessary to the finding of probable cause[.]” Id. at 155-156. If such a showing is made, the defendant is entitled to a hearing where he must prove his allegations of falsity or a reckless disregard for the truth by a preponderance of the evidence. Id. at 156. Assuming that the allegations are proven during the hearing and the search warrant affidavit's remaining content is insufficient to establish probable cause, the search warrant is void, and the trial judge should suppress the evidence discovered during the search “to the same extent as if probable cause was lacking on the face of the affidavit.” Id.

from the residence with the cocaine. See State v. Thomas, 275 S.C. 274, 276, 269 S.E.2d 768, 769 (1980) (holding that courts should consider a “common-sense reading of the entire affidavit” in determining whether probable cause exists). Thus, by going to the residence, sending money inside for cocaine, and receiving cocaine that was brought out of the residence in exchange for the money, the confidential informant purchased cocaine from the occupants of the residence just as described in the search warrant affidavit, and, significantly, that information fully established a probable cause basis to believe narcotics would be discovered in the targeted residence irrespective of whether the confidential informant ever personally went inside. See United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) (“[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.”); State v. Dupree, 354 S.C. 676, 691, 583 S.E.2d 437, 445 (Ct. App. 2003) (instructing that evidence of a drug transaction supports an inference that more drugs will be found at the same location); see also United States v. Cioni, 649 F.3d 276, 286 (4th Cir. 2011) (“[E]ven if the additional facts cited by Cioni were included in the affidavits, the probable cause calculus would nonetheless have remained unchanged. Under these circumstances, Franks is inapplicable.”); United States v. Colkley, 899 F.2d 297, 298 (4th Cir. 1990) (“We hold that the Johnson affidavit was not tainted by the affiant’s failure to include within it all potentially exculpatory information. Johnson’s incriminating statements were properly admitted because Johnson made no showing that the affiant intended to mislead the magistrate by omitting information, and because the warrant with the omitted information would in any event have been supported by probable cause[.]”).

Notably, although this Court failed to reference or discuss it in its opinion, defense counsel for Robinson readily conceded during trial that Robinson’s argument that the

information included in the warrant affidavit was false was “a matter of the way you look at it.” (R. p. 19). Despite that concession, this Court concluded that the statements in the warrant affidavit could only be interpreted as an implication or direct expression that the informant personally entered the residence and purchased cocaine. Critically though, when the question of whether information in a warrant affidavit is intentionally false or misleading rests on the “matter of the way you look at it,” the inclusion of information that **could** potentially be interpreted in a way to suggest that it is false or misleading is not sufficient to establish that false or misleading information actually was included in the warrant affidavit, particularly when considering that an officer preparing a search warrant affidavit is not required to prepare the affidavit with unerring technical precision or include every detail of an investigation in the affidavit. See Arnold, 319 S.C. at 260, 460 S.E.2d at 405 (“Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion.”); see also Colkley, 899 F.2d at 300 (“An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation.”).

Significantly, the best possible evidence establishing that Sergeant Donald did not knowingly and intentionally include false or misleading information in the warrant affidavit was that he would have had no reason to do so since doing so would not have impacted the probable cause basis for the issuance of the warrant. See Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 398 (1999) (“To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge.”) Just as this Court specifically determined, the inclusion of all of the details about the narcotics

transactions – including those about the involvement of the confidential informant’s contact – would **not** have changed the fact that probable cause existed for a search of the residence assuming that the confidential informant was telling the truth. Under such circumstances, Sergeant Donald’s failure to include every detail of the transactions did not establish that the information he did include in the warrant affidavit was designed to be intentionally false or misleading. As a result, the trial judge correctly found that the warrant affidavit did not contain any false information. See Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 (finding no Franks violation occurred where nothing in the search warrant affidavit demonstrated a reckless disregard for the truth); see also Colkley, 899 F.2d at 301 (“Franks protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the [issuing judge].” (italics in original)). Therefore, this Court’s should grant the State’s petition for rehearing, rehear and reconsider the matter, issue a new opinion holding that the trial judge correctly concluded that the search warrant affidavit did not contain any false information, and ultimately affirm Robinson’s conviction.

**Sufficiency of the Information in the Warrant Affidavit to Establish Reliability**

In its opinion, this Court concluded that the trial judge erred in issuing the search warrant because the search warrant affidavit allegedly contained no information whatsoever in regard to the reliability of the confidential informant who provided the information about the targeted residence to the officers. In reaching that conclusion, this Court determined that “[t]he only information in the affidavit about the events and circumstances at Robinson’s residence . . . came from the informant” but that there was no information about the informant’s reliability. However, contrary to this Court’s conclusion, the information contained in the warrant affidavit

was sufficient to establish that the informant was reliable and that there was a probable cause basis for a search of the targeted residence.

Before issuing a search warrant, an issuing judge is required to make a “a practical, common-sense decision” that there is a fair probability that contraband or evidence of a crime will be found in a particular place based on all of the circumstances set forth in the warrant affidavit. Gates, 462 U.S. at 268. In making such a decision in a case where an affiant relied upon information supplied by a confidential informant, the informant’s veracity, reliability, and basis of knowledge are highly relevant towards a determination the value of the informant’s information. Id. However, those elements related to the informant are **not** “entirely separate and independent requirements to be rigidly exacted in every case” and, instead, “should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is ‘probable cause’ to believe that contraband or evidence is located in a particular place.” Id. at 230.

In the case at bar, the trial judge properly determined that the warrant affidavit established a probable cause basis to believe drugs would be located in the targeted residence because there was sufficient information included in the search warrant affidavit to establish that the confidential informant who participated in the controlled narcotics buys from the residence was reliable. Specifically, the confidential informant’s reliability was established in the warrant affidavit through the inclusion of the information regarding the informant’s successful narcotics purchases from the targeted residence on multiple occasions. See Dupree, 354 S.C. at 691, 593 S.E.2d at 445 (“The controlled buy was evidence of the credibility and trustworthiness of the informant.”). Critically, the statements in the affidavit indicated that the informant was working for the Horry County Police Department, successfully purchased what was purported to be

cocaine from the residence in a recent and continuous manner, and that the purchased cocaine was confirmed to be cocaine through field-testing.<sup>2</sup> Cf. State v. Viard, 276 S.C. 147, 150-151, 276 S.E.2d 531, 532 (1981) (“Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause.”). Thus, the information in the warrant affidavit made it clear to the issuing judge that the confidential informant had participated in successful control drug buys from the targeted residence and that officers of the Horry County Sheriff’s Office working with the informant corroborated the information provided by her by working with her and field-testing the cocaine that she purchased from the targeted residence. See Gates, 462 U.S. at 241 (“Our decisions applying the totality-of-the-circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant’s tip by independent police work.”). As a result, the affiant sufficiently established the confidential informant’s reliability in the warrant affidavit, and there was probable cause to believe more cocaine would be found in a search of the residence. See id. at 233 (“[A] deficiency in [veracity or basis of knowledge] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.”); see also Bellamy, 336 S.C. at 145, 519 S.E.2d at 349 (finding that a search warrant sufficiently established the confidential informant’s reliability where, “[a]lthough the affidavit is weak on the element of the reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and

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<sup>2</sup> The inclusion of that information in the warrant affidavit rendered the affidavit in Robinson’s case far different from the affidavit in State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990), which contained no information of any kind from which the issuing judge could determine if the confidential informant was reliable. Critically, in Johnson, the warrant affidavit merely stated that a confidential informant had seen a quantity of cocaine in Johnson’s home within the past seventy-two hours. Id. at 245, 395 S.E.2d at 168.

partial corroboration”); see, e.g., Viard, 276 S.C. at 149-150, 276 S.E.2d at 532 (“Affidavits must be judged on the facts presented and not on the precise wording used.”). Therefore, this Court’s should grant the State’s petition for rehearing, rehear and reconsider the matter, issue a new opinion holding that the trial judge correctly concluded that the search warrant affidavit contained sufficient information to establish the reliability of the information provided by the confidential informant and a probable cause basis for the search of the targeted residence, and ultimately affirm Robinson’s conviction.

### **Applicability of the Good Faith Exception**

In its opinion, this Court held that the trial judge should have suppressed the evidence discovered during the search because the good faith exception articulated by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984), was allegedly not applicable to Robinson’s case due to the fact that the warrant affidavit allegedly lacked any basis for determining if the information included in it was reliable. However, contrary to this Court’s determination, the good faith exception was applicable under the facts and circumstances of Robinson’s case because the warrant affidavit was not “ ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[,]’ ” which was the proper standard identified by the Supreme Court in Leon for determining if the good faith exception was applicable. Id. at 924 (citation omitted).

Turning to the Supreme Court’s decision in Leon, officers in that case received information from an informant of **unknown** reliability about drug activity occurring at a particular residence and initiated a narcotics investigation as a result. Id. at 901. During their investigation, they observed cars registered to individuals with criminal records come to and leave from the residence and saw individuals enter the residence and leave a short time later with

small paper sacks. Id. They also located a small quantity of marijuana at an airport in the belongings of two individuals connected to the targeted residence when those individuals returned from a trip to Miami. Id. at 902. Thereafter, a narcotics investigator prepared a search warrant affidavit recounting those details, obtained a search warrant, searched a variety of locations connected to Leon and his accomplices, and discovered large quantities of cocaine and other evidence. Id. Subsequently, during trial, Leon and his accomplices sought the suppression of the evidence discovered during the searches, and the district court judge granted the suppression motion after finding that the warrant affidavit contained insufficient information to establish probable cause. Id. at 903. Following that ruling, the State appealed, and the Ninth Circuit Court of Appeals affirmed the district court judge's decision. Id. at 904-905. The State then filed a petition for a writ of certiorari in the Supreme Court, and the Supreme Court granted that petition to address the issue of whether the exclusionary rule should be applied to evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." Id. at 900.

After considering the issue, the Supreme Court determined that the exclusionary rule should only "rarely" be applied to cases where officers reasonably relied upon subsequently-invalidated search warrants. Id. at 926. Specifically, the Supreme Court concluded that suppression of the evidence based on a subsequently-invalidated search warrant was only appropriate in four limited situations: (1) where the affiant misled the issuing judge by including false or misleading information in the warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the warrant affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]" and (4) when a warrant was so facially deficient in some technical respect that

the officer executing the search warrant could not reasonably have presumed it to be valid. Id. at 923 (citation omitted). Thereafter, the Supreme Court reversed the district court judge's decision in Leon's case despite the fact that the warrant affidavit had been found not to contain sufficient information to establish probable cause after concluding that "the officers' reliance on the magistrate's determination of probable cause was objection reasonable" under the circumstances. Id. at 926.

Just as in Leon, the good faith exception was applicable in Robinson's case even assuming that the trial judge erred in finding that the search warrant affidavit was sufficient to establish a probable cause basis for the search. That is true because the warrant affidavit prepared in Robinson's case was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[,]" which is what is necessary for an officer's reliance on a search warrant to be objectively unreasonable. Id. at 924. Specifically, the information in Sergeant Donald's warrant affidavit was not "bare bones." Instead, the warrant affidavit contained statements establishing the grounds for why the officer believed drugs would be located at the targeted residence, statements regarding the ongoing and continuous nature of the drug activity occurring at the targeted residence, and at least some information regarding the reliability of the confidential informant through the statements about the informant's work with the Horry County Sheriff's Office in conducting the successful narcotics buys that yielded the cocaine. Cf. id. at 926 (finding that an officer's reliance on a search warrant was not objectively unreasonable despite the fact that the warrant affidavit did not contain sufficient information to establish probable cause where the warrant was supported by more than a "bare bones" affidavit). As a result, the officer's reliance on the search warrant was not objectively unreasonable, the officer acted in good faith in executing the search warrant, and

the trial judge properly declined to suppress the evidence discovered during the search of the targeted residence. See id. at 922 (“[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion.”).

In reaching a contrary conclusion, this Court found that the good faith exception was not applicable after concluding that the warrant affidavit did not contain a substantial basis for determining the existence of probable cause and that the warrant affidavit was so lacking in indicia of probable cause as to render official belief in its existence unreasonable. To the extent that this Court’s decision was based on a finding of an absence of a substantial basis for finding probable cause, that is **not** the appropriate standard for determining if the good faith exception is applicable and, instead, is the standard for determining whether a warrant affidavit establishes probable cause. United States v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002); see also Gates, 462 U.S. at 239 (“An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause[.]”). Critically, in United States v. Bynum, the Fourth Circuit Court of Appeals explained:

“Substantial basis” provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, **the exception would be devoid of substance**. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer’s affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” This is a less demanding showing than the “substantial basis” threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (citations omitted and emphasis added). Accordingly, this Court applied an incorrect standard in determining if the good faith exception was applicable to Robinson’s case. See State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (“Johnson should not be read as prohibiting the applicable of the good-faith exception every time an

affidavit fails to satisfy the technical requirements of Gates. Suppression is appropriate in only a few situations, including when an affidavit is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” (citation omitted)). Moreover, to the extent that this Court found the warrant affidavit to be so lack in indicia of probable cause, this Court’s finding was incorrect in light of the information in the affidavit regarding the confidential informant’s work with the Horry County Sheriff’s Office, the confidential informant’s successful purchases of cocaine from the targeted residence on multiple occasions, and the results of the field-testing of the purchased cocaine. Compare Viard, 276 S.C. at 150-151, 276 S.E.2d at 532 (“Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause.”); with Johnson, 302 S.C. at 245, 395 S.E.2d at 168 (finding that a search warrant affidavit did not contain a substantial basis for determining the existence of probable cause where it merely stated “that a confidential informant had seen a quantity of cocaine in Johnson's home within the past seventy-two (72) hours”). For those reasons, this Court should grant the State’s petition for rehearing, rehear and reconsider the matter, issue a new opinion holding that the good faith exception was applicable to Robinson’s case, and ultimately affirm Robinson’s conviction. See Leon, 468 U.S. at 918-921 (“[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. . . . Penalizing the officer for the [issuing judge]’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”); see, e.g., United States v. Anderson, 851 F.2d 727, 729-730 (4th Cir. 1988)

(finding the good-faith exception applied even though the search warrant affidavit did not contain any information regarding the date of the crime or the date that Anderson offered to sell a weapon to the informants).

**Conclusion**

Based on the foregoing reasons coupled with the arguments raised in the Final Brief of Respondent and during oral argument, the State respectfully requests that the panel reconsider and rehear this matter, vacate its previous opinion, and affirm Robinson's conviction and sentence after finding that the trial judge correctly concluded that no false information was included in the warrant affidavit, that the trial judge correctly determined the search warrant affidavit contained sufficient information to establish the reliability of the information provided by the confidential informant and a probable cause basis for the search of the targeted residence, and that the good faith exception was applicable to Robinson's case.

Respectfully submitted,

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Attorney General

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By  \_\_\_\_\_  
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STATE OF SOUTH CAROLINA  
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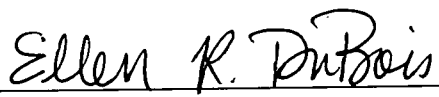
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I, Ellen R. DuBois, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

Dayne C. Phillips, Esquire  
407 ½ West Main Street  
Lexington, SC 29072

I further certify that all parties required by Rule to be served have been served.  
This 19th day of May, 2014.

  
ELLEN R. DuBOIS  
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ALAN WILSON  
ATTORNEY GENERAL

May 19, 2014

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
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RE: State v. Alex Lorenzo Robinson – Appellate Case No. 2011-203769

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing  
Assistant Attorney General  
Bar Number 76901

MRF/  
Enclosures

cc: Carmen V. Ganjehnsani, Esquire  
Dayne C. Phillips, Esquire  
Victim Services

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