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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Roger M. Young, Sr., Court of General Sessions Judge

Case No. 11-GS-10-5527, 5528, 5531
Appellate Case No. 2014-001051

State of South Carolina, ...Respondent,

v.

Joseph Todd Rowland, ...Appellant.

REPLY BRIEF OF APPELLANT

Mark A. Peper, Esquire
1637 Savannah Highway
Suite 202
Charleston, SC 29407
(843) 225-2520
Attorney for Appellant

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I. The trial court erred in denying Appellant's motion to supress the drug evidence on the ground the search warrant was not supported by probable cause.

The Fourth Amendment guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. Forrester, 343 S.C. at 643, 541 S.E.2d at 840. A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citations omitted). To determine probable cause, the Court looks to the totality of the circumstances test set forth in Illinois v. Gates, 462 U.S. 213 (1983). The totality of the circumstances

test establishes: [t]he task of the issuing magistrate is simply to 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. Id. at 238; see also State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000) (stating that under totality of circumstances test, reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed to issue search warrant). A defendant has the right to challenge misstatements in a search warrant affidavit. See *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57L.Ed.2d 667 (1978); *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501(1975). A defendant is entitled to an evidentiary hearing if the following criteria are met: (1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement. Further, if the foregoing criteria have been met, and the remaining content is insufficient to find probable cause after the allegedly false or reckless material has been set aside, the defendant is entitled to his hearing, under the Fourth and Fourteenth Amendments. *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684, 57 L.Ed.2d at 677. The South Carolina General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S.

Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record . . . ." S.C. Code Ann. § 17-13-140 (1985). Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000). In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). "In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." State v. Thompson, 363 S.C. 192, 200, 609 S.E.2d 556, 560 (Ct. App. 2005).

In the instant case, the reason for the affiant's belief that drugs would be found at 31 Woodleaf Court is included in the affidavit, which provided in part:

> Over the past 6 months, the Charleston Police Department Special Investigations Unit has received numerous complaints of narcotic activity from citizens, in reference to illegal narcotics being sold from 31 Woodleaf Ct. SIU has been conducting an investigation on this residence and Joseph Rowland for more than a year for narcotic activity.
>
> In response, within the past 72 hours, the CPD Special Investigations Unit utilized (sic) established a fixed surveillance location in which Inv., Ratliffe and Inv. Sumner observed Joseph Todd Rowland, a registered resident at this location, conduct a hand to hand narcotics transaction.
>
> At approx. 1440 hrs. Joseph Rowland was observed exiting the residence via the front door and walk up to a vehicle which parked in front of the residence. Joseph Rowland approached the door of the vehicle and conducted a hand to hand

> transaction with a person inside the vehicle (SC CWM-343). Within 1 minute of making contact with the driver of the vehicle Joseph Rowland then walked back into the above residence. The vehicle (SC CWM-343) then immediately left the area. Inv. Ratliffe and Inv. Sumner then corroborate (sic) this by having a CPD patrol unit conduct a traffic stop on the above vehicle (SC CWM-343) and locate an amount of illegal narcotics. The driver of the vehicle then wrote a statement confirming the above mentioned transaction of illegal narcotics. Based on Inv. Ratliffe's experience and the current investigation, there is probable cause to believe that illegal narcotics, and/or the proceeds of, are being stored at *101 A Pamlico Terrace, Charleston, SC 39455*. (with emphasis)

As evidenced in the above, the narcotics officers' decision to request a search warrant was precipitated primarily by the receipt of numerous citizen complaints of narcotic activity at 31 Woodleaf Ct., however, these complainants remained anonymous and there is no mention by any of the citizens of anyone ever actually seeing drugs on the premises. Armed with the complaints, they conducted surveillance of the residence and saw "a blue Honda Accord drive up, drive down the roadway, and park across from Rowland's house, and Joseph Rowland came out from the residence, went over there to the car, into the passenger side, and conducted a hand-to-hand drug transaction". (Transcript p. 47). They "followed the blue car until the marked units could get behind it to conduct a traffic stop...we spoke to the driver, and the driver told us that he just purchased the coke and marijuana from Blow. Blow is an alias of Joseph Rowland." (Transcript p. 49, 59).

Based on the citizens' complaints, the officer's observations during the surveillance, the statement of the driver of the blue car, as well as his experience, the Officer presented this information to the magistrate with the request that a search warrant be issued for *101-A Pamlico Terrace*. (with emphasis). Further, the Officer provided oral testimony to the magistrate regarding "the background I've had with the Defendant, the different calls I've gone to involving the defendant at that residence and elsewhere, the

numerous complaints that we had received, and the fact that I had spoken with a sibling of his." (Transcript p. 61). The magistrate ultimately signed the warrant for the search of *31 Woodleaf Ct.* (with emphasis).

Following a suppression hearing, the trial court ruled, "the totality of the circumstances is that they had a reason to be observing Mr. Rowland, the defendant's house. They witnessed -- or they – based on tips that he had been drug dealing, et cetera, that's what got them to observe that house. They then witnessed at least one transaction, possibly two, on drugs. One was the bicycle, but, more importantly, the one was the one with the car. They then stopped that person in driving the car who said yes, I bought drugs just a short time before from the defendant. That...is sufficient to rise to the level of probable cause to issue the search warrant." (Transcript p. 74,75). The Court made clear to the parties that this was its final ruling and that probable cause was established to issue the search warrant, thus the Appellant was not required to renew his objection each time the State introduced evidence discovered during the search. (See *State v. Wiles,* 383 S.C. 151, 156-157, 679 S.E.2d 72, 175 (2009).

Applying the facts of the instant case to the law of South Carolina, the Affidavit and the supplemental oral testimony were insufficient to provide the magistrate with a substantial basis for which to find probable cause to issue the search warrant for 31 Woodleaf Ct. While the trial court correctly based the validity of the search warrant on the totality of the circumstances, the Appellant believes it necessary to separately address each piece of evidence presented to the magistrate.

Initially, the officer's belief that drugs would be found on the premises was based on numerous complaints of narcotic activity from citizens, in reference to illegal narcotics

being sold from 31 Woodleaf Ct., however, these citizens remained anonymous and there is no mention of anyone ever seeing drugs on the premises. While such activity might raise suspicions, or be one indicator of possible narcotics transactions, these complaints alone were insufficient to establish probable cause for the issuant of a search warrant. *Bailey v. Superior Court for County of Ventura (People)*, 11 Cal. App. 4th 1107, 15 Cal. Rptr. 2d 17, 19-20 (1992). The complaints were simply the basis for the brief surveillance.

Recently, in *State v. Kinloch*, 410 S.C. 612, 613-614, 767 S.E.2d 153, 153-154 (2014), the South Carolina Supreme Court considered whether the information contained in a search warrant affidavit was sufficient to establish a probable cause basis for the search of a residence. In reversing the trial court and Court of Appeals, the Supreme Court concluded the search warrant affidavit provided the magistrate with a substantial basis for reaching his probable cause determination based on the information contained within it regarding the numerous tips received by the officers and the officers' subsequent observation of "seemingly drug related behavior." Id. At 618, 767 S.E.2d at 156. The "seemingly drug-related behavior" consisted of the following: a man in a red shirt conducting hand-to-hand transactions outside a residence with multiple individuals while a man in a black jacket stood nearby; the man in the red shirt count money after the transactions; the man in the black jacket walk to a nearby gas station later in the day and exchange a plastic bag for money, the contents of which contained heroine; the man in the black jacket counting money as he returned to Kinloch's residence. Id. At 614-615, 767 S.E.2d at 154. The *Kinloch* case above can be distinguished from the case at bar whereby the only "seemingly drug related activity" observed by the officer was a one-time occurrence whereby a blue car pulled up to 31 Woodleaf and the officer observed what

appeared to be a hand-to-hand drug transaction, however, this is merely speculation, as the Officer was "about half a football field away...50 yards". (Transcript p. 54). (See also U.S. v. Zavala, 541 F.3d. 562, 574-75 (5th Cir. 2008) No probable cause to arrest when officers observed defendant in a suspicious transaction but could not identify the items being exchanged). As evidenced by his inability to determine if what he saw was actually a drug transaction, the officer had his subordinates pull the blue car over for an alleged minor traffic violation prior to exiting the neighborhood. Instead of arresting the driver for the marijuana and cocaine found in his car, they released him after receiving a written statement wherein the driver identified the Appellant as the person he purchased the drugs from. (Transcript p. 49, 59). This does not in and of itself, even coupled with what *appeared to be* a hand-to-hand transaction, establish probable cause for the issuance of a search warrant. The driver nor his vehicle was searched prior to going or coming from 31 Woodleaf Ct., and there was no independent verification that this individual was the same person driving the blue car that participated in what appeared to be a hand-to-hand with Blow at 31 Woodleaf Ct.

Having applied the fact that tips alone don't give rise to probable cause, and by the Officer's own admission that he only saw "what appeared to be" a drug transaction, "from about 50 yards away", the only basis the Court used in denying the motion to suppress was the information that was provided by the driver of the blue car. There was no information provided to the magistrate as to whether the driver of the blue car was telling the truth as to whether the drugs in his possession were specifically purchased from the Appellant or the specific residence of 31 Woodleaf Ct., and further, no information provided to the magistrate regarding the driver of the blue car's reliability. It is reasonable to believe the

driver of the car would say whatever necessary to prevent himself from being arrested. In making a probable cause determination, the task of the issuing magistrate is simply to 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. (*State v. Herri*ng, 387 S.C. 201, 212, 692 S.E. 2d 490, 496 (2009) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

Recently, in *State v. Robinson*, 408 S.C. 268, 758 S.E.2d 725 (S.C. App., 2014) the South Carolina Court of Appeals considered whether the information contained in a search warrant affidavit was sufficient to establish a probable cause basis for the search of a residence. In that case, the only information in the affidavit about the events and circumstances surrounding the drug transaction came from the informant, thus his reliability and basis for knowledge should be considered by a magistrate. Because the officer who sought the search warrant failed to provide the issuing judge information about the informant's reliability, the Court found this failure left no substantial basis to determine the existence of probable cause. In the case at bar, the occupant of the blue car was the only person to provide information to the issuing judge regarding whether Appellant was actually involved in a hand-to-hand transaction, as the officer himself was so far away that he could only see what appeared to be one, thus the officer was required to demonstrate the informant's reliability to the issuing judge.

Finally, the Appellant asserts that the search warrant was invalid on its face due to the property to be searched listed as 101-A Pamlico Terrace, as opposed to 31 Woodleaf

Court. Contrary to the trial court's ruling that "it's clear that the reference to the 101A Hamilton (sic) Terrace address was a scrivener's error...The correct address, 31 Woodleaf, is referenced several times in here, and that was obviously just a scrivener's error" , (Transcript, p. 74), the Appellant believes it to be more and asserts that the language in the Affidavit to secure the search warrant regarding the property location must be set aside, thus making the remaining content insufficient to establish probable cause, and therefore, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. (*Franks v. Deleware*, 438 U.S. 154 (1978)). The Appellant also asserts that this is grounds to reverse pursuant to *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

II. The trial court erred by denying Appellant's motion for directed verdict when the evidence presented by the State did not suffice to create a jury issue as to constructive possession of the drugs.

A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001). In deciding whether the circuit court erred in denying a motion for a directed verdict, the appellate court must view the evidence in the light most favorable to the State. *State v. Hudson*, 277 S.C. 200, 201, 284 S.E. 2d 773, 774 (1981). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the court must find the case was properly submitted to the jury. *State v. Curtis*, 356 S.C. 622, 591, S.E. 2d 600 (2004).

Conviction of drug possession requires proof of possession, either actual or constructive, coupled with knowledge of its presence. *State v. Hudson, supra.* In order to prove constructive possession, the "State must show a defendant had dominion and control,

or the right to exercise dominion and control over the [illegal substance]." *State v. Heath*, 370 S.C. 326, 329, 635 S.E. 2d 18, 19 (2006) (citing *State v. Halyard*, 274 S.C. 397, 400, 264 S.E. 2d 841, 842 (1980)). The State may establish constructive possession by either circumstantial or direct evidence. *Id.* Finally, the defendant's knowledge and possession may be inferred if the substance was found on premises under his control. *State v. Adams*, 291, S.C. 132, 135, 352 S.E. 2d 483, 486 (1987). Whether the evidence is sufficient to withstand a directed verdict motion when the State relies upon circumstantial evidence of constructive possession is a fact intensive determination.

In *State v. Heath, supra*, the Court discussed the "right to exercise dominion and control" element of constructive possession. In *Heath*, the defendant lived with his mother in her home. Police arrived at the residence to search the home for cocaine. *Id.* at 328, 635, S.E. 2d at 18. The defendant and his brother were standing outside of the house, and defendant remained there throughout the search. *Id.* at 328, 635 S.E. 2d at 18-19. In the house, police found a small crack rock, scales, and numerous plastic baggies. *Id.* In addition, a police dog found 43.48 grams of crack in a car washing mitt in the recycling bin at the rear of the house, and there was evidence that the defendant had been washing the car before the police arrived. *Id* at 330, 635 S.E. 2d at 19. The appeal centered on whether there was evidence that defendant was in constructive possession of the crack cocaine found in the mitt. *Id* at 330, 635 S.E. 2d at 19. The Court found there was no direct or circumstantial evidence linking defendant to the crack cocaine, and therefore, examined whether there was evidence that the defendant had dominion and control over the property where the crack was found. *Id.* The Court held that "although the defendant lived where the crack was found, the premises were owned by his mother, and as a result,

the defendant only had a right to access the area where the crack was found and not a right to exercise dominion and control over the area. *Id.* Accordingly, the Court held that the court erred in not granting defendant's motion for a directed verdict.

In *U.S. v. Watkins*, 519 F.2d 294, 171 U.S.App.D.C. 158 (C.A.D.C., 1975), the Court reversed Appellant's convictions having found the District Court erred in denying Appellant's motion for directed verdict at trial. Upon gaining admittance to the apartment, the officers found appellant Watkins sitting on a bed in the bedroom, Bragg standing near the commode in the bathroom, and another individual identified as Alfred McKenny sitting on a couch in the living room. During the search of the apartment which ensued, the officers observed books, in which appellant's name appeared, in a hall closet, as well as articles of women's clothing in the bedroom. Moreover, the officers stated that they seized the following items in the bedroom of the apartment: four tinfoil packages containing cocaine from the top drawer, and drug-related paraphernalia containing traces of heroin from the bottom drawer of a bedside dresser table; $1,480 in cash and a plastic bag containing heroin located between the mattress and box spring of the bed on which appellant was sitting; $733 in cash in a clothing bag in the closet; and three receipts indicating appellant had paid the rent on the apartment for April and June 1973 and that she had paid for utility service in June 1972. The officers also testified that they seized two napkins containing marijuana seeds from the top of the refrigerator in the kitchen of the apartment. The only admissible evidence offered by the Government which in any way linked appellant to Apartment 303 or the narcotics found therein, was appellant's presence in a room where the cocaine and heroin, although concealed from plain view, were found, and several books in which appellant's name appeared in a hall closet. The Court

determined that the Government's case did not show facts that would permit a reasonable juror to reach a conclusion of guilt beyond a reasonable doubt as to whether appellant Watkins constructively possessed the drugs and thus found that the district court erred in denying appellant's motion for judgment of acquittal. (*Id* at 298).

In determining whether to grant a motion for a directed verdict on constructive possession, in addition to presence, the Court must look for the following evidence: testimony tying the defendant to the contraband (*State v. Tabory*, 260 S.C. 355, 196 S.E. 2d 111 (1973)); *State v. Brownlee*, 318 S.C. 34, 455 S.E. 2d 704 (Ct. App. 1995)); evidence of control or shared control of the premises (*Hudson, supra*); and evidence of a special relationship between the owner of the premises from which a right to control may be inferred (*State v. Brown*, 267 S.C. 311, 227 S.E. 2d 674 (1976)).

In the instant case, similar to the holding in *Heath and Watkins, supra*, there is no evidence of Appellant's control of the drugs founds in the bedroom of the house owned by his Father, nor any evidence that he possessed or had the right to control or shared control of the premises wherein the drugs were found. In fact, no evidence was submitted showing that the Appellant had ever even been inside the residence, and when the search warrant was served at the residence, the Appellant was standing outside the residence. (Transcript, p. 47, 52). However, his brother, the children, their mother, and his mother and father were in the residence. (Transcript p. 68). The testifying witness was unable to say whether the Appellant slept at the residence or not (Transcript p. 53). Upon serving the search warrant, the Officer walked out in the front yard and arrested the Appellant. (Transcript p. 69). Of extreme importance is where the quantity of cocaine was located; not outside the house where the Appellant was located, but inside the residence, specifically, in a brown, tan in

color Gucci handbag with a strap on it hanging from behind a door of a bedroom that contained a bed with no sheets on it. (Transcript p. 142-144). Further, the testimony clearly indicated that the Appellant did not own the house, it is not possible that the Appellant had a right to control the house where the drugs were found. The State's case is void of any testimony tying the Appellant to the drugs found in a woman's purse in a house owned by his Father, nor any evidence of control or shared control of the premises.

Finally, there was no evidence presented of a special relationship between the owner of the premises from which a right to control may be inferred. The Appellant was not on the premises when the search warrant was executed, nor was there any evidence that placed him inside the house where the drugs were located, thus the fact that he was seen in the front yard of the house is not sufficient circumstantial evidence from which to infer Appellant's right to control the inside of the house. Even assuming a special relationship existed between the Appellant and home owner, that fact alone in and of itself does not suffice to withstand a motion for directed verdict. Further, mere presence, even before the incident leading to the discovery of the contraband, will not support the denial of a directed verdict. (*State v. Dantzler*, Op. No. 14-MO-020 (S.C. Ct. App. Filed June 18, 2014) (*citing Heath, supra*).

The Appellant did not testify at his trial, and no evidence was presented proving the he had actual or constructive knowledge of drugs being inside his Father's residence. Even assuming an inference could be made that he knew or should have known there were drugs in the house, the State would still fall short of its burden. Mere proximity or accessibility to contraband will not support a conclusion that an individual had knowing

dominion and control over it. (*United States v. Williams*, 952 F.2d 418, 420 (C.C. Cir. 1991) (quoting *United States v. Foster*, 783, F. 2d 1087, 1089 (D.C. Cir. 1986)).

CONCLUSION

For the foregoing reasons, the Court should reverse the conviction of the appellant and remand for a new trial.

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In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
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The Honorable Roger M. Young, Sr.
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Appellate Case No. 2014-001051

State of South Carolina, ... Respondent,

v.

Joseph Todd Rowland, ... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served counsel for the Repondent, with a copy of the *Reply Brief of Appellant* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Stephanie Linder, Assistant Solicitor
Ninth Circuit Solicitor's Office
O.T. Wallace Building
101 Meeting Street
Charleston, SC 29401

SC Attorney General's Office
Mark R. Farthing
P.O. Box 11549
Columbia, SC 29211
THE PEPER LAW FIRM, PA

By: _____

July 15, 2015

Mark A. Peper
SC Bar No. 72624
E-Mail: mark@peperlawfirm.com
1637 Savannah Highway Suite 202
Charleston, SC 29407
843-225-2520

Attorney for Appellant Joseph Todd Rowland

MARK A. PEPER, ESQ.
MARK@PEPERLAWFIRM.COM

THE PEPER LAW FIRM, PA
1637 SAVANNAH HWY., STE. 202
CHARLESTON, SC 29407
843.225.2520 (O)
843.225.2554 (F)

WWW.PEPERLAWFIRM.COM

July 14, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: State of South Carolina v. Joseph Todd Rowland – Appellate Case No. 2014-001051
2011-GS-10-5527 / 2011-GS-10-5528 / 2011-GS-10-5531

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Reply Brief of the Appellant, along with a Proof of Service. If you would be kind enough to return a clocked copy, I would be most appreciative.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact my office.

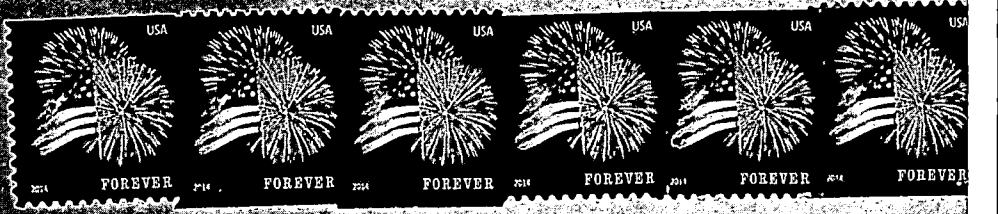
With best regards, I am

Sincerely,

Mark Peper, Esq.

Enclosures as stated.

Cc: Stephanie Linder, Assistant Solicitor, Ninth Circuit (via US Mail)
Mark R. Farthing, Office of Attorney General (via US Mail)



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CHARLESTON, SC 29407

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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