

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

C/A #: 13-CP-36-00321

RECEIVED

DEC 03 2015

SC Court of Appeals

Anthony Derone Richardson,

Appellant,

v.

Jackie Swindler, Chief of Police,
Newberry County Municipal Police,

Respondent.

INITIAL BRIEF OF RESPONDENT

David L. Morrison, Esquire
Kassi B. Sandifer, Esquire
Robert G. Cooper, Esquire
7453 Irmo Drive, Suite B
Columbia, South Carolina 29212
Phone: (803) 661-6285
Fax: (803) 661-6289
E-mail: david@dmorrison-law.com
E-mail: kassi@dmorrison-law.com

Columbia, South Carolina

November 30, 2015

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STATEMENT OF ISSUES ON APPEAL

1. IN THIS CASE BROUGHT PURSUANT TO 42 U.S.C. § 1983 FOR ALLEGED CIVIL RIGHTS VIOLATIONS, DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTIOPN FOR SUMMARY JUDGMENT PURSUANT TO HECK V. HUMPHREY, 512 U.S. 477 (1994)?
2. DID THE TRIAL COURT ERR IN DISMISSING THE APPELLANT'S § 1983 SUIT RATHER THAN GRANTING THE APPELLANT'S REQUEST THAT THE CASE BE STAYED?
3. IF IT DETERMINED THAT THE TRIAL COURT ERRED IN DISMISSING RATHER THAN STAYING THE APPELLANT'S CASE, WAS THE ERROR HARMLESS SINCE THE APPELLANT'S SUBSEQUENT APPEAL OF THE DENIAL OF HIS APPLICATION FOR POST CONVICTION RELIEF HAS SINCE BEEN DENIED BY THE SOUTH CAROLINA SUPREME COURT?

STATEMENT OF THE CASE

The Appellant initiated this action pursuant to 42 U.S.C. § 1983 against Jackie Swindler, former Chief of the City of Newberry Police Department, alleging Chief Swindler violated his constitutional rights provided to him under the Fifth, Sixth and Fourteenth Amendments of the Constitution. The Respondent timely answered. Sometime shortly before or after the Appellant filed his Complaint in civil court, he also filed an Application for Post Conviction Relief arising out of the alleged procedural due process violation and subsequent conviction, which is captioned Anthony Richardson v. State of South Carolina; Case Number: 2013-CP-36-0236. On October 14, 2014, an evidentiary hearing on the Appellant's petition for post conviction relief was heard, during which time the Honorable Frank R. Addy, Jr. Court granted summary judgment in favor of the State of South Carolina. (Transcript of Hearing, pp. 12-13).

The Responded filed a Motion for Summary Judgment on or about May 30, 2014. However, after learning that the Appellant's petition for post conviction relief had been dismissed, the Respondent filed an Amended Motion for Summary Judgment on or about

October 24, 2014, in which the Respondent moved for summary judgment on the additional ground that the Appellant's claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994). The Respondent's Amended Motion for Summary Judgment was heard on November 5, 2014. The Trial Court issued a Form 4 Order the same day granting summary judgment to the Respondent ruling that the Appellant's claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994) and denying the Appellant's request to stay the case. (See Order dated November 5, 2014). This appeal followed.

STATEMENT OF FACTS

On or about October 15, 2008, the Appellant was involved in an incident that occurred at Quick Stop located at 1430 Drayton Street in Newberry, South Carolina. (Deposition of Anthony Richardson, ("Plaintiff's Dep.," pp. 7-8)). As a result of the incident, the owner of the establishment placed the Appellant on a trespass notice, which the Appellant admittedly received. (Plaintiff's Dep., p. 9); (See also, Trespassing Notice). In the notice, the owner of Quick Stop informed the Appellant that he was no longer allowed on the property located at 1430 Drayton Street, Newberry, South Carolina known as Quick Stop. (Plaintiff's Dep., p. 10); (See also, Trespass Notice).

Although the Appellant never received notification that the trespass notice had been withdrawn, he returned to the Quick Stop property on or about December 11, 2012. (Plaintiff's Dep., pp. 11, 33-34). The Appellant was consequently issued a citation for trespass after notice. (Plaintiff's Dep., pp. 21, 33); (See also, City of Newberry Incident Report).

On or about February 2, 2013, the Appellant appeared before Judge Partridge and pled not guilty to the offense of trespass after notice and requested a jury trial. (Plaintiff's Dep., pp. 20-21, 25). The Appellant received a letter to appear at the Public Safety Complex on February

20, 2013 at 2:30 p.m. for jury selection. (Plaintiff's Dep., p. 23); (See also, Letter dated February 7, 2013 from Cella Dodgen to the Plaintiff). The Appellant appeared at the Public Safety Complex and met with Chief Swindler. (Plaintiff's Dep., pp. 26-27). During the meeting, the Appellant signed a form pleading guilty and agreeing to pay the fine of \$250.00 by March 15, 2013. (Plaintiff's Dep., p. 32). The Appellant knew he had a right to a jury trial when he entered into the agreement, but did not assert that right. (Plaintiff's Dep., pp. 35-36). Chief Swindler did not threaten or coerce the Appellant into entering into the agreement. (Plaintiff's Dep., p. 69).

The Appellant did not pay the \$250.00 fine for his trespass after notice offense, and the City of Newberry sent the Appellant a notice advising that his payment was delinquent and that failure to make the payment in ten days would result in the issuance of a bench warrant against him. (Notice of Past Due Payment dated March 22, 2013). The Appellant ultimately paid the fine on May 6, 2013 after learning a bench warrant had been issued against him. (Plaintiff's Dep., p. 62); (See also, Receipt Number 48896).

The Appellant subsequently brought this action claiming that his right to a jury trial was violated when he voluntarily pled guilty. The trial court dismissed that claim upon the reasoning that his conviction has not been overturned and therefore any attack upon the method by which the conviction was obtained would call into question the validity of the conviction itself. Such an attack is barred by Heck v. Humphrey.

ARGUMENT

II. IN THIS CASE BROUGHT PURSUANT TO 42 U.S.C. § 1983 FOR ALLEGED CIVIL RIGHTS VIOLATIONS, THE TRIAL COURT PROPERLY GRANTED THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO HECK V. HUMPHREY, 512 U.S. 477 (1994).

The Appellant filed his Complaint pursuant to 42 U.S.C. § 1983 alleging the Respondent violated his constitutional right to a jury trial. The Trial Court properly granted summary judgment, and this Court should affirm the Trial Court's dismissal of the matter pursuant to Heck v. Humphrey, 512 U.S. 477 (1994). The Appellant does not address the appropriateness of the Trial Court's dismissal of his case pursuant to Heck v. Humphrey. Instead, he maintains that the Trial Court should have granted his Motion for Summary Judgment because genuine issues of material fact regarding the alleged violations of his constitutional rights exist for a jury to determine. (See Initial Brief of Appellant, p. 2). "In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c)." Companion Property & Cas. Ins. Co. v. Airborne Exp., Inc., 631 S.E.2d 915, 916 (S.C.Ct.App. 2006) (citations omitted). The standard of review in evaluating a motion for summary judgment is to "liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Id.* "Summary judgment should be affirmed if there is no issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

In the present case, the Trial Court determined that the Appellant had pled guilty to the underlying criminal charge. (See Order dated November 5, 2014). It also determined that the Appellant had not directly appealed the conviction, but chose instead to file a petition for post

conviction relief, which had been dismissed. (See Order dated November 5, 2014; See also, Transcript of Hearing, pp. 12-14).

In Heck, the United States Supreme Court held that:

[i]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 486-87.

512 U.S. at 486-87. The Supreme Court has established a test to determine the appropriateness of the dismissal of a § 1983 suit seeking damages. When damages in a § 1983 are being sought, the Court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id. However, if the Court determines that, even if successful, the plaintiff's action will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit. Id.

The Appellant's civil lawsuit necessarily implies the invalidity of his conviction. As the Respondent argued at the hearing, the Appellant challenged the very process by which his conviction was obtained. (Transcript of Hearing, pp. 6-7). Specifically, the Appellant claimed

that the violation of his constitutional right to a jury trial led to his conviction. A judgment in favor of the Appellant in the civil case would be tantamount to a finding that the Appellant was deprived of a right to a jury trial, and consequently, that the conviction was invalid. Accordingly, the dismissal of the Appellant's claim was appropriate pursuant to Heck v. Humphrey unless he could show that the conviction or sentence had already been invalidated. 512 U.S. at 487.

At the hearing, the Appellant was not able to provide any evidence that the conviction had been reversed on direct appeal, expunged by executive order or declared invalid by a state tribunal authorized to make such determination. The Appellant admitted that he had not filed a direct appeal of the conviction of trespass after notice. (Transcript of Hearing, p. 12). The time to file a direct appeal has long since expired. Furthermore, at the time of the hearing, the Appellant's Application for Post Conviction Relief had been dismissed at the evidentiary hearing by the Honorable Frank R. Addy, Jr., who was presiding over the Respondent's Motion for Summary Judgment. The Appellant acknowledged that Judge Addy had dismissed his Application for Post Conviction Relief at the evidentiary hearing on October 14, 2014. (Transcript of Hearing, p. 12). Despite his contentions that he had appealed that dismissal, the Appellant provided no supporting documentation. The Trial Judge consequently dismissed the Appellant's Complaint without prejudice. The dismissal of the Appellant's § 1983 suit under Heck v. Humphrey was proper as a matter of law because a judgment in favor of the Appellant's § 1983 suit would necessarily imply the invalidity of his conviction, and the Appellant was not able to demonstrate that the conviction had been invalidated. Accordingly, this Court should affirm the Trial Court's dismissal of the matter pursuant to Heck v. Humphrey, 512 U.S. 477 (1994).

II. THE TRIAL COURT PROPERLY DISMISSED THE APPELLANT'S § 1983 RATHER THAN GRANTING THE APPELLANT'S REQUEST THAT THE CASE BE STAYED.

The Appellant maintains that the Trial Court erred in denying his request to stay this matter pending the outcome of his Application for Post Conviction Relief pursuant to Younger v. Harris, 401 U.S. 37 (1971). (Appellant's Initial Brief, p. 1). The holding in Younger "mandates that a federal court abstain from exercising jurisdiction and interfering in a state criminal proceeding if (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides adequate opportunity to raise constitutional challenges." Nivens v. Gilchrist, 444 F.3d 237, 241 (4th Cir. 2006).

The Trial Court determined that "[n]o evidence was presented that an appeal was pending per Younger v. Harris nor has a notice of intent been filed." (Order dated November 5, 2014). At the hearing, the Appellant maintained that an appeal was pending. (Transcript of Hearing, p. 13). However, the Appellant did not produce a filed notice of intent to appeal or other supporting documentation, and therefore, the Appellant could not show that there was an ongoing state judicial proceeding. Accordingly, the Trial Court properly denied the Appellant's request that the case be stayed.

Moreover, the Trial Court properly dismissed this matter under Heck v. Humphrey, 512 U.S. 477 (1994). Heck bars a prisoner's claim for damages under 42 U.S.C. § 1983 where the success of the action would implicitly question the validity of the conviction or duration of the sentence, unless the prisoner can demonstrate that the conviction or sentence has been successfully challenged. A Court may exercise its discretion to dismiss a § 1983 suit under Heck or to stay the matter until a favorable termination has either been obtained or is no longer

available. See generally, Wallace v. Kato, 549 U.S. 384, 393-94 (2007). The Trial Court exercised its discretion to dismiss the case and did so without prejudice to allow the Appellant an opportunity to bring his action again if the dismissal of his Application for PCR was subsequently reversed and he was granted a new PCR, which proved successful, making his claims under 42 U.S.C. § 1983 cognizable under Heck. (Transcript of Hearing, pp. 13-14).

In his Initial Brief, the Appellant argues “[b]ecause the Appellant denied the trial court abused its discretion and committed reversible error,” but states no ground upon which to base his argument. (Appellant’s Initial Brief, p. 3, ¶ 13). However, the Appellant maintains throughout his Initial Brief that the Trial Court should have stayed his case. Because the decision of whether to stay or dismiss a case pursuant to Heck is within the discretion of the Court, the “decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” Sundown Operating Co. v. Intedge Industries, Inc., 681 S.E.2d 885, 888 (S.C. 2009). “An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” Id.

During the hearing, the Respondent argued that the Appellant’s claim pursuant to 42 U.S.C. § 1983 was not cognizable under Heck v. Humphrey because a judgment in his favor in the civil case would necessarily imply the invalidity of his conviction, and he could not show that his conviction had been invalidated. (Transcript of Hearing p., 6). The Respondent further pointed out that the Appellant never filed a direct appeal, and his Application for PCR had been dismissed. (Transcript of Hearing, p. 6). The Appellant admitted that he had not filed a direct appeal and that his Application for PCR had been dismissed. However, he maintained that he had appealed the dismissal of the Application of his Post Conviction Relief although he was

unable to provide any supporting documentation. (Transcript of Hearing, pp. 13-14). Accordingly, the Trial Court granted summary judgment finding no possible way that the § 1983 suit could go forward under Heck v. Humphrey and dismissing the action without prejudice. (Transcript of Hearing, p. 13); (Order dated November 5, 2014).

The Trial Court's discretion to dismiss the § 1983 suit without prejudice pursuant to Heck was appropriate. See Ballenger v. Owens, 352 F.3d 842 (4th Cir. 2003). In Ballenger, after finding that the District Court correctly concluded the plaintiff's claim was not cognizable under Heck, the Fourth Circuit Court of Appeals determined that the District Court had appropriately dismissed Bellinger's § 1983 suit without prejudice because his post-conviction proceedings were still pending. In the present case, the Appellant's Application for Post Conviction Relief had been dismissed at the evidentiary hearing by the same judge who was presiding over the hearing on the Respondent's Motion for Summary Judgment, and there was no evidence at that time that he had filed an intent to appeal that determination. Accordingly, the Trial Court did not abuse his discretion in dismissing with prejudice the Appellant's § 1983 case. This Court should affirm the Trial Court's decision not to stay the Appellant's case under the circumstances.

III. IF IT IS DETERMINED THAT THE TRIAL COURT ERRED IN DISMISSING RATHER THAN STAYING THE APPELLANT'S CASE, THE ERROR WAS HARMLESS SINCE THE APPELLANT'S SUBSEQUENT APPEAL OF HIS APPLICATION FOR POST CONVICTION RELIEF HAS SINCE BEEN DENIED BY THE SOUTH CAROLINA SUPREME COURT.

If it is determined that the Trial Court committed error in dismissing rather than staying the Appellant's §1983 action, any alleged error is harmless. "Whether an error is harmless depends on the circumstances of the particular case. Judy v. Judy, 582 S.E.2d 836, 842 (S.C.Ct.App. 2009). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id.

(citing State v. Mitchell, 584 S.E.2d 893, 897 (S.C. 2003)). Further, error is harmless where it could not reasonably affected the result of the trial. Id.

At the time of the hearing on the Respondent's Motion for Summary Judgment, the Appellant had not filed an intent to appeal the dismissal of his Application for Post Conviction Relief. Apparently, however, he subsequently filed an appeal because on June 10, 2015, the Clerk of the Supreme Court of South Carolina issued an Order of Remittitur dismissing the appeal due to the Appellant's failure to abide by Rules 243(b) and 207 of the South Carolina Appellate Court Rules. The Order is captioned Anthony D. Richardson, Petitioner, v. State of South Carolina, Respondent. Appellate Case Number: 2014-002395; Lower Case Number: 2013CP3600236. Because the foregoing Order was issued on June 10, 2014, it was not in evidence before the Trial Court when the Respondent's Motion for Summary Judgment was argued.

The Respondent requests that this Court take appellate judicial notice of the South Carolina Supreme Court's Order dismissing the Appellant's appeal of the dismissal of his Application for Post Conviction Relief. Although appellate courts are generally reluctant to take judicial notice of "adjudicative facts even when those facts may be absolutely reliable," the appellate court may take original judicial notice of adjudicate facts at the appellate level of matters which are indisputable. Masters v. Rodgers Development Group, S.C., Inc., 321 S.E.2d 194, 197 (S.C.Ct. App. 1984). Original judicial notice of adjudicative facts at the appellate level is limited to matters which are indisputable because "notice of facts for the first on appeal may deny the adverse party the opportunity to contest the matters noticed and may violate the general principal that appellate review should be limited to the record." Id. Further, appellate courts,

limited to the record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. Id.

In Masters, the Court of Appeals was asked to take judicial notice of recitals in a deed. The Court refused reasoning that recitals in a deed do not constitute indisputable matter because whether the defendant paid valuable consideration was not common or general knowledge. Id. The Court also found that the recitals in the deed would not be conclusive of whether the defendant was a purchaser of value of the property, and taking judicial notice of the recital in the deed would obligate the Court to give the plaintiff the opportunity to contradict it. Id.

The present case is distinguishable from Masters. In the present case, the South Carolina Supreme Court's Order dated June 10, 2015 is indisputable. The Appellant cannot contest the existence of the Order. Further, he cannot contest the contents of the Order. The Order exists, and its content dismissing the Appellant's appeal speaks for itself. Accordingly, taking judicial notice of the Order will not deprive the Appellant of a right to contest it. Additionally, this Court has the opportunity to be as sensitive to the appropriateness of judicial notice as the trial court. The Supreme Court's Order dismissing the Appellant's matter ends the Appellant's appeal of the underlying PCR matter, and his conviction in the underlying criminal matter stands. As such, there is no circumstance under which the Appellant can show that his conviction has been overturned. Furthermore, if this Court determines that the Trial Court should have stayed the present action instead of dismissing it and reverses the Trial Court's ruling, the end result will be the same. The action will ultimately conclude in the dismissal of the Appellant's action pursuant to Heck v. Humphrey because the Appellant will not be able to show that his conviction has been invalidated. In this way, if the Trial Court committed error in dismissing the case, the error was

harmless because it will not affect the ultimate outcome of the matter, and therefore, there is no prejudice to the Appellant.

Furthermore, the Appellant has not been prejudiced by the Trial Court's decision to dismiss the case pursuant to Heck v. Humphrey without prejudice. Moreover, it is doubtful that the Appellant's appeal of the dismissal was the appropriate course of action. Under Heck v. Humphrey, a claim for damages bearing a relationship to a conviction that has not been invalidated is not cognizable. Heck, 512 U.S. 477, 486-87. If, as in this case, the Court determines that a judgment in favor of the plaintiff in a § 1983 suit would necessarily imply the invalidity of the conviction, the § 1983 claim for damages is still not recognizable until the conviction has been invalidated. The conclusion was based on the principal that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." Wallace, 549 U.S. 384, 392. Instead, "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983." Id. Accordingly, under Heck, the rule for a deferred accrual of the appropriate statute of limitation is called into play when there is a conviction or sentence that has not been invalidated." Id.

In addition to the fact that the Appellant's claim is not cognizable until his conviction is invalidated, the Trial Court dismissed the Appellant's case without prejudice. Critically, "a dismissal of a case without prejudice means that the plaintiff can reassert the same cause(s) of action by curing the defect that led to the dismissal. By contrast, dismissals with prejudice are intended to bar relitigation of the same claim." McComas v. Ross, 626 S.E.2d 902, 909-910 (S.C. Ct. App. 2006). Accordingly, the Appellant could have waited to appeal the Trial Court's dismissal until his conviction had been invalidated. However, given the Supreme Court's

dismissal of the Appellant's appeal, no such invalidation of his conviction will be forthcoming. The Trial Court's dismissal has not prejudiced the Appellant because had the Trial Court stayed the Appellant's case, he still would not have had a cognizable § 1983 claim under Heck v. Humphrey until he could show that his conviction had been invalidated. Accordingly, this Court should affirm the Trial Court's decision to dismiss the Appellant's case.

CONCLUSION

The Trial Court properly granted summary judgment. The Trial Court properly dismissed the Appellant's § 1983 claim pursuant to Heck v. Humphrey, 512 U.S. 477 (1994). Furthermore, the Trial Court properly dismissed the Appellant's § 1983 suit rather than granting the Appellant's request that it be stayed because the Appellant presented no evidence that an appeal was pending or that a notice of intent to appeal had been filed. The decision to dismiss the case was also within the Court's discretion under Heck v. Humphrey, and the Trial Court did not abuse that discretion. If, the Trial Court erred in dismissing the Appellant's case, the error was harmless since the Appellant's subsequent appeal of the denial of his Application for Post Conviction Relief has since been denied by the South Carolina Supreme Court.

For these reasons, the Respondent requests that this Court affirm the grant of summary judgment from the lower court.

(Signature Block on Following Page)

Respectfully submitted,

MORRISON LAW FIRM, LLC

By: Kassi B. Sandifer

David L. Morrison, Esquire

Kassi B. Sandifer, Esquire

Robert G. Cooper, Esquire

7453 Irmo Drive, Suite B

Columbia, South Carolina 29212

Phone: (803) 661-6285

Fax: (803) 661-6289

E-mail: david@dmorrison-law.com

E-mail: kassi@dmorrison-law.com

ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina

November 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2014-002532
Case No. 2013-CP-36-00321

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SC Court of Appeals

Anthony Derone Richardson,

Appellant,

v.

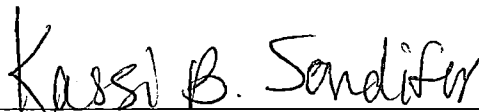
Jackie Swindler, Chief of Police,
Newberry County Municipal Police,

Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Morrison Law Firm, LLC, attorney for the Respondent does hereby certify that service of the **Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record** in the above-captioned action was made upon the Appellate by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 30th day of November, 2015 addressed as follows:

Anthony D. Richardson
Post Office Box 221
Newberry, South Carolina 29108


Kassi B. Sandifer

Columbia, South Carolina

Morrison Law Firm, LLC
7453 Irmo Drive, Suite B
Columbia, South Carolina 29212
Phone: (803) 661-6285
Fax: (803) 661-6289
E-mail: David@dmorrison-law.com
E-mail: Kassi@dmorrison-law.com

David L. Morrison*
Kassi B. Sandifer
Robert G. Cooper**

*Licensed in SC & NC
*Certified Mediator
**Of Counsel

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

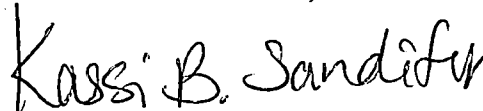
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Municipal Police
Appellate Case #: 2014-002532
C/A #: 13-CP-36-00321
Our file: 210.0411

Dear Clerk Kitchings:

Enclosed is the original and one copy of the Initial Brief of the Respondent and our Designation of matter to be included in the Record on Appeal in this matter. Please return a clocked-in copy to me in the self-addressed stamped envelope enclosed for your convenience. By copy of this letter, I am serving counsel for the Appellants with a copy of same.

Very truly yours,

MORRISON LAW FIRM, LLC



Kassi B. Sandifer

KBS/cmm

Enclosure

cc: Anthony D. Richardson

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MORRISON LAW FIRM, LLC
7453 Irmo Drive, Suite B
Columbia, South Carolina 29212

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211