STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

PRETRIAL FROM RICHLAND COUNTY

Court of General Sessions

Indictment No. 2014-GS-40-03853
and 2016-GS-40-00587

State of South Carolina,

Respondent,

vs.

Perez Antwan Brooks,

Petitioner.

STATE'S RETURN TO PETITIONER'S MOTION TO SUPPRESS AND STATE'S MOTION TO DENY PETITIONER'S MOTION TO SUPPRESS

The undersigned counsel for the State of South Carolina respectfully moves this Court to deny the Petitioner's Motion to Suppress, which challenges statements made by Petitioner during the course of recorded phone conversations while Petitioner was incarcerated at the Alvin S. Glenn and Sumter-Lee County detention centers. The State also requests that this Court deny the request for written discovery and a hearing pursuant to South Carolina Code section 17-30-110 (Supp. 2012).

As noted in the facts presented by Petitioner is his pretrial Motion to Suppress, the Petitioner's statements were made during a series of recorded phone conversations at two separate detention facilities. The recording of these jail phone calls is governed by South

Carolina Code section 17-30-10, et seq. (Supp. 2012) (hereinafter the "S.C. Homeland Security Act" or the "Act"), which controls the interception and disclosure of telephone communications.

FACTS

On May 2, 2014, the Petitioner, Perez Brooks, was arrested and charged with Felony DUI resulting in Death based upon a collision that occurred on the interstate in Richland County. Petitioner was subsequently indicted for an additional charge of Reckless Homicide in January 2016. Petitioner was later re-arrested in Sumter County and charged with Assault and Battery of a High and Aggravated Nature. As a result of the sum of these charges, Petitioner was detained and held first at the Alvin S. Glenn Detention Center and then at the Sumter-Lee Detention Center. During this time period, Petitioner made numerous phone calls to third parties that were monitored and recorded subsequent to written and/or audio advisements that warned Petitioner and third parties of the monitoring and recording of telephone calls from the respective detention centers. Indeed, Petitioner willingly conceded that the telephone calls from the facilities included a warning to all parties of the communication(s) that the telephone call would be subject to monitoring and recording. In addition, the telephone systems at Alvin S. Glenn Detention Center include an additional warning in print—on the face of the phone unit itself—which states the following: "ALL CALLS SUBJECT TO RECORDING AND MONITORING." See State Exhibit A.

To date, the State has turned over to Petitioner a series of phone recordings from both the Alvin S. Glenn and Sumter-Lee Detention Centers—portions of which may or may not be used at trial in Richland County General Sessions Court.

ANALYSIS

The South Carolina Wiretap Statute was passed as part of the Homeland Security Act in 2002. See S.C. Code Ann. §§ 17-30-10 et seq; South Carolina Homeland Security Act, 2002 Act No. 339. This Act is modeled after the Omnibus Crime Control Act and Safe Streets Act of 1968 (hereinafter the "Federal Act"), and like a vast majority of similar state statutes, the relative provisions of these Acts remain substantially similar in their purpose and effect. Moreover, because there are not many South Carolina cases that have addressed similar issues in the recording of jail phone calls, the Court has previously referred to the federal courts when interpreting similar provisions under the South Carolina Act. See generally, e.g., State v. Whitner, 399 S.C. 547, 553 (2012) (explaining that South Carolina's Wiretap Act "parallels the Federal Act passed by Congress in 1968, which similarly permits lawful interception where one party to the communication consents"); State v. Guerrero-Flores, 402 S.C. 530, 534 (Ct. App. 2013) (finding "that federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting the provisions of the Homeland Security Act"); Jackson v. State, 127 So.3d 447, 469 (Fla. 2013) (explaining that the comparable Florida statutes were "essentially identical" to the South Carolina statutes and "there is no reasonable expectation of privacy . . . in a telephone communication from jail during which warnings are issued").

I. RECORDING TELEPHONIC COMMUNICATIONS FROM DETENTION CENTERS DOES NOT VIOLATE THE SOUTH CAROLINA HOMELAND SECURITY ACT

Both the South Carolina Act and the Federal Act generally prohibit the unauthorized interception of "any wire, oral, or electronic communication." Compare S.C. Code Ann. § 17-30-20 with 18 U.S.C. § 2511(1)(a). However, both the state and federal wiretap statutes also permit law enforcement to obtain judicial orders that authorize the interception of

electronic/telephonic communications. Compare S.C. Code Ann. § 17-30-70 with 18 U.S.C.2516(2), 2518. Nevertheless, a judicial order is not always necessary. Like the Federal Act, the South Carolina Act provides for a "law-enforcement exception" that permits detention facilities to monitor and record inmates' telephone conversations if the recording is done within the ordinary course of their duties or business. See, e.g., United States v. Hammond, 286 F.3d 189 (4th Cir. 2002) (explaining that although the federal wiretapping provisions apply to prisons, the law-enforcement exception exempted the detention facility administered by the Bureau of Prisons from the prohibition on the interception of telephone calls).

To understand the origins of the law-enforcement exception, it is first important to note that the S.C. Homeland Security Act defines "intercept" to be the "aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." S.C. Code Ann. § 17-3-15(3) (2002); see also, 18 U.S.C. §2510(4). Moreover, it is important to note that section 17-30-15 specifically excludes "any telephone or telegraph instrument, equipment, or facility, or any component thereof . . . being used by . . . an investigative or law enforcement officer in the ordinary course of his duties" from the definition of "electronic, mechanical, or other device." S.C. Code Ann. § 17-3-15(4)(a)(1)(ii) (2002). Thus, the interception of electronic/telephonic communications is not unlawful even without a judicial order if the interception satisfies the "law-enforcement exception" to the S.C. Homeland Security Act. Ultimately, this "law-enforcement exception" has been consistently upheld in the federal courts, and has been found to include prison officials, prison employees, private contractors, etc. See also, e.g., United States v. Van Poyck, 77 F.3d 285 (9th Cir. 1996) (concluding that the law enforcement exception applied to a detention center's policy of audiotaping all inmates' outbound telephone calls and the interception was done in the ordinary

course of business); United States v. Rivera, 292 F. Supp. 2d 838 (E.D. VA 2003) (explaining, amongt other things, that a prison official is considered an "investigative or law enforcement officer," obviating the need for a judicially authorized intercept, and that a private contractor such as Verizon may be used to monitor and record jail telephone calls in accordance with the law enforcement exception); United States v. Friedman, 300 F.3d 111 (2nd Cir. 2002); and United States v. Frink, 328 Fed. Appx. 183 (4th Cir. 2009).

In addition to the law enforcement exception, the courts have also found that consent operates as a second exception to the prohibition on the interception of wire and other electronic communications. Like the Federal Act, the S.C. Homeland Security Act provides that "[i]t is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception." S.C. Code Ann. § 17-30-30(B) (2002).

The courts have found that consent is a very broad term, defined as an "agreement, approval, or permission as to some act or purpose" and that "[t]he law recognized different kinds of consent, including express, implied, informed, voluntary, and parental." Whitner, 399 S.C. at 555 (citing Black's Law Dictionary 346 (9th Ed. 2009)). In addition, the federal courts have repeatedly found that "[t]he legislative history [of the Federal Act] shows that Congress intended the consent requirement to be construed broadly." United States v. Amen, 831 F.2d 373, 378 (2nd Cir. 1987). Furthermore, "consent may be express or implied in fact from 'surrounding circumstances indicating that the defendant knowingly agreed to the surveillance.'" Rivera, 292 F.Supp.2d at 844. In many cases, an inmate's consent to a recording has been implied if he was given a meaningful notice that a call was subject to monitoring or recording and still decided to

make a phone call. See generally, e.g., Van Poyck, 77 F.3d at 292 (9th Cir. 1996) (explaining that when signs have been posted above jail telephones and warn of the monitoring and recording, consent may be implied in fact from the "surrounding circumstances indicating that the defendant knowingly agreed to the surveillance."); Amen, 831 F.2d at 378-79 (2d Cir. 1987) (same reasoning applied); United State v. Workman, 80 F.3d 688, 693 (2d Cir. 1996) (a sign, written in both Spanish and English, was placed near the telephones and warned that calls were monitored and recorded); and Hammond, 286 F.3d at 191 (4th Cir. 2002) (placing notices on audio recordings as well as near the jail telephones gives rise to a finding of consent).

In this case, Petitioner clearly received notice of the telephone recordings because there are placards posted on the actual telephones. In addition, Petitioner further conceded that an audio recording plays prior to every telephone call and warns both the inmate as well as the third party caller that the call is subject to monitoring and recording.

The Petitioner further asserts that for purposes of the Fourth Amendment, his implied consent was not voluntary. However, Petitioner seemingly confuses the nature of his consent with the scope of his privacy interests in a detention facility. Indeed, the Petitioner overlooks the generally well-understood principle that an inmate who is confined to a detention facility has no reasonable expectation of privacy in his telephone calls, and "[t]he Fourth Amendment is not triggered unless the state intrudes into an area in which there is a 'constitutionally protected reasonable expectation of privacy." Van Poyck, 77 F.3d at 290. As the Ninth Circuit further explained in Van Poyck, "a constitutionally protected reasonable expectation of privacy exists only if (1) the defendant has an 'actual subjective expectation of privacy' in the place searched and (2) society is objectively prepared to recognize that expectation." Id (internal citations omitted). Moreover, even if there were valid Fourth Amendment considerations, "institutional

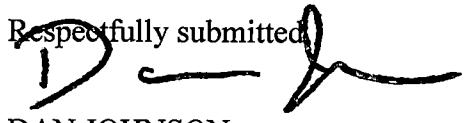
security concerns justify [telephone] recordings and render them reasonable for Fourth Amendment purposes. Id. at 291. See also, e.g., United States v. Eggleston, 165 F.3d 624, 626 (8th Cir. 1999) (explaining that "If someone agrees that the police may listen to his conversations and may record them, all reasonable expectation of privacy is lost, and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible.") Ultimately, just like the defendants in Van Poyck and Eggleston, the Petitioner does not have an objectively reasonable privacy interest in his outgoing jail calls and the substance of the recordings should be admissible at trial.

CONCLUSION

The State asserts that based upon the facts of the case, the statements of the Petitioner were lawfully obtained pursuant to South Carolina Code sections 17-30-15 and 17-30-30 (Supp. 2012), and the applicable law enforcement and consent exceptions do not entitle him to suppression of the recorded jail telephone calls under section 17-30-110. The State contends that the Petitioner's motion, in light of the facts of the case and the applicable law, is without merit and will have an unintended consequence of merely delaying the ultimate disposition of the matter at trial.

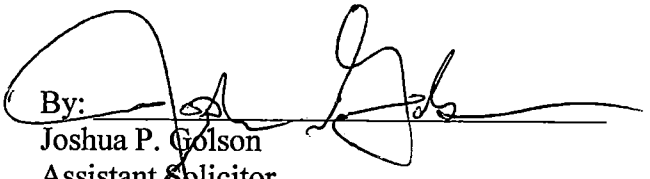
WHEREFORE, the State respectfully asks this Court for an order denying a hearing, denying the motion, and remanding the case for trial.

Respectfully submitted,



DAN JOHNSON
Solicitor, Fifth Judicial Circuit

By:



Joshua P. Golson
Assistant Solicitor
Fifth Judicial Circuit Solicitor's Office
1701 Main Street
Columbia, South Carolina 29201
(803) 576-1800

ATTORNEYS FOR RESPONDENT

September 7, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

PRETRIAL FROM RICHLAND COUNTY

Court of General Sessions

Indictment No. 2014-GS-40-03853
and 2016-GS-40-00587

State of South Carolina

Respondent,

vs.

Perez Antwan Brooks,

Petitioner.

PROOF OF SERVICE

I certify that I have served the STATE'S RETURN TO PETITIONER'S MOTION TO SUPPRESS AND STATE'S MOTION TO DENY PETITIONER'S MOTION TO SUPPRESS to Petitioner's attorney of record, by causing it to be deposited with the United States Postal Service, to Reginald Lloyd, Esq., Lloyd Law Firm, LLC, 715 West Dekalb Street, Post Office 1555, Camden, South Carolina, 29201, on this 7th day of ~~August~~ September, 2016.

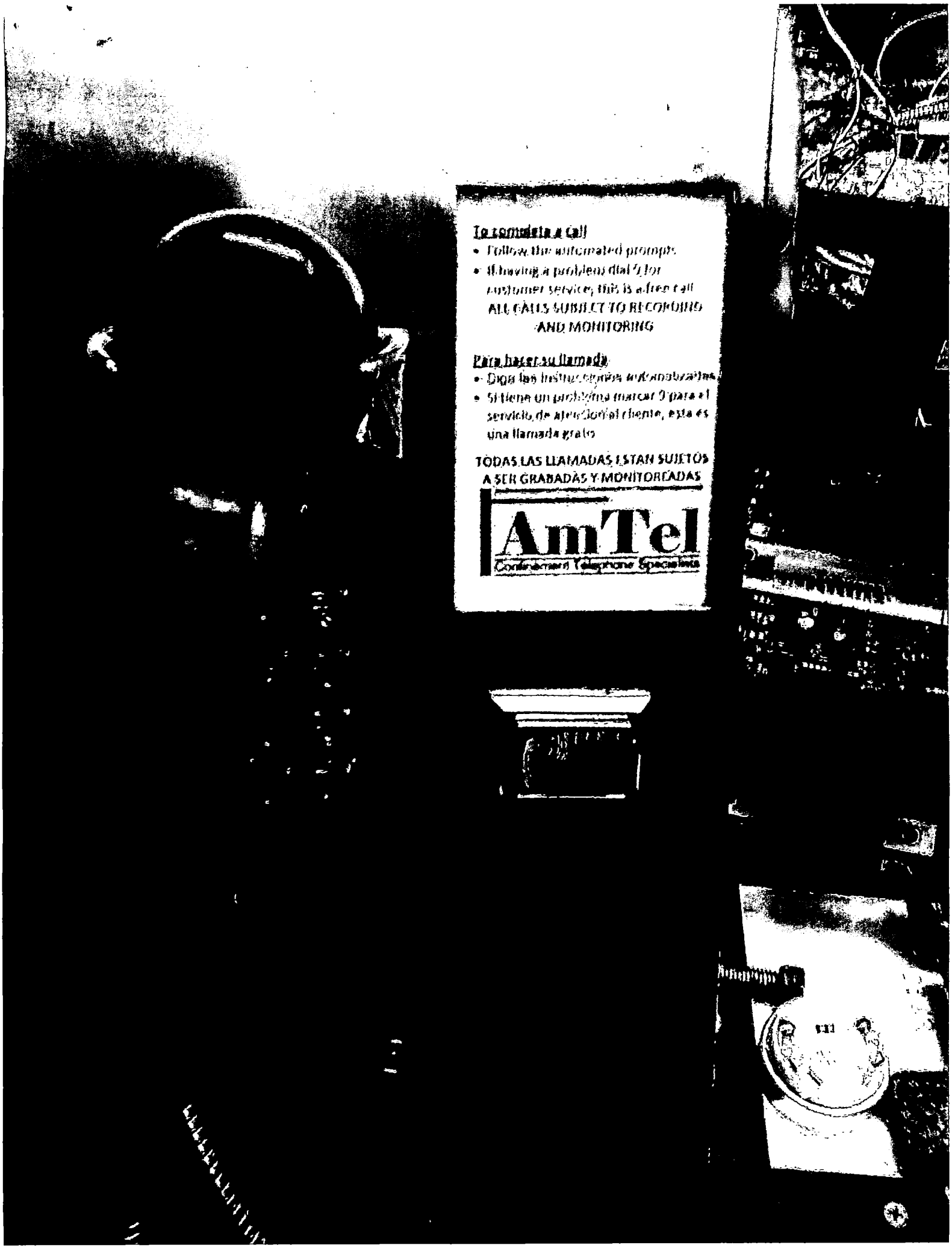
DAN JOHNSON
Solicitor, Fifth Judicial Circuit

By: Paulina Gomez
Paulina Gomez
Paralegal to Asst. Solicitor Joshua P. Golson
Fifth Judicial Circuit Solicitor's Office
1701 Main Street
Columbia, South Carolina 29201
(803) 576-1800

ATTORNEYS FOR RESPONDENT

September 7, 2016

STATE EXHIBIT A


To complete a call
• Follow the automated prompts
• If having a problem dial 0 for customer service, this is a free call
ALL CALLS SUBJECT TO RECORDING AND MONITORING
Para hacer su llamada
• Digas las instrucciones automatizadas
• Si tiene un problema marcar 0 para el servicio de atención al cliente, esta es una llamada gratis
TODAS LAS LLAMADAS ESTAN SUJETOS A SER GRABADAS Y MONITOREADAS
AmTel
Communications Telephone Specialists

The State of South Carolina

Dan Johnson
Solicitor

Paulette Edwards
Deputy Solicitor

SOLICITOR'S OFFICE
Fifth Judicial Circuit
1701 Main Street
Post Office Box 192
Columbia, South Carolina 29201

Phone: (803) 576-1800
Fax: (803) 576-1718

Daniel R. Goldberg
Deputy Solicitor

Brett Perry
Deputy Solicitor

September 7, 2016

Hon. Jenny Abbott Kitchings
Clerk of Court
1015 Sumter Street
Columbia, South Carolina 29201

RE: State of South Carolina v. Perez Antwan Brooks, Indictment Nos.: 2014-GS-40-03853 and 2016-GS-40-00587; Return to Petitioner's Motion to Suppress Pretrial Detention Telephone Calls

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find the original and two (2) copies of State's Return to Petitioner's Motion to Suppress and State's Motion to Deny Petitioner's Motion to Suppress. This motion is filed pursuant to Rule 240, SCACR.

Please file the original and two (2) copies and return any additional copies to Assistant Solicitors Joshua P. Golson and John Steadman. Additionally, it is Respondent's understanding that filing fees for a criminal case are not required; however, please advise if this is incorrect and must be corrected.

Thank you very much for your assistance and consideration in this matter. Please do not hesitate to contact us as required.

Respectfully submitted,

DAN JOHNSON
Solicitor, Fifth Judicial Circuit

By:
Joshua P. Golson
Assistant Solicitor
Fifth Judicial Circuit Solicitor's Office

1701 Main Street
Columbia, South Carolina 29201
(803) 576-1800

ATTORNEYS FOR RESPONDENT

September 7, 2016