THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Diane Schafer Goodstein, Circuit Court Judge

Case No. 2016-000999

The City of Columbia..... Respondent,

v.

Johnnie L. Clark and Harriet Clark. ..... Appellants.

APPELLANT'S FINAL BRIEF

Henry P. Wall
Bruner, Powell, Wall
& Mullins, LLC
1735 St. Julian Place, Suite 200 (29204)
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITES

CONSTITUTION FIRST AMENDMENT

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. Whether the First Amendment defenses, based upon free speech and free exercise, were presented to both the Trial Court and Circuit Court and were therefore properly preserved for Appellate review?

II. Whether the Trial Court erred in resolving Appellant's First Amendment defenses pursuant to the incorrect legal standard, thus warranting a reversal of the convictions?

Statement of the Case

This appeal arises from the prosecution and conviction of two ministers of the gospel by the City of Columbia for six municipal code citations[1] alleging violations of the City's noise ordinance. The City issued all of the citations during active, corporate worship services of Rehoboth United Assemblies of the Apostolic Faith stemming from incidents that took place on February 27, 2013, February 28, 2013, March 10, 2013, April 19, 2013, October 4, 2013, November 21, 2013, and April 4, 2014. After a jury trial in which Appellants were not able to raise or argue their constitutional rights to free speech or free exercise of religion as a defense to the allegations, both of the Appellants were convicted on September 11, 2014. Appellant Johnnie L. Clark was imprisoned for fourteen days and fined Two Thousand One Hundred Eighty-five dollars; Appellant Harriet Clark was sentenced to a fine of One Thousand ninety-two dollars and fifty cents or fifteen days imprisonment. The trial court refused to stay either sentence pending further judicial review. Pastor Clark served a two week sentence in Alvin S. Glenn Detention Center, and both Appellants have paid the fines.

Appellants appealed their convictions to Circuit Court on September 12, 2014, and filed an amended appeal on September 17, 2014, raising, among other issues, their First Amendment Rights (Free Speech and Free Exercise) as viable defenses, seeking reversal of the convictions, and requesting a new trial under the proper standard of proof required under South Carolina

---

[1] City of Columbia Municipal Noise Ordinance Sec. 8-67 – Radios, phonographs, musical instruments and other sound-amplifying devices.

. . . .

(c) *Creating public nuisance.* It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

law. By order dated April 14, 2016 the Honorable Diane S. Goodstein, affirmed the convictions and denied the appeal. Appellants filed this timely appeal to the South Carolina Supreme Court.

Facts

Rehoboth United Assemblies of the Apostolic Faith Church ("Rehoboth" or "The Church") is a small, predominately African-American, Pentecostal, Christian Church located at 611 Laurel Street in downtown Columbia, South Carolina. Appellant, Pastor Johnnie Clark and his wife, Harriet Clark, have led the worship of this small congregation for more than thirty years without legal incident. A church building has existed at this location for more than sixty years. Until approximately ten years ago, the character of the church's neighborhood which is located in the "Arsenal Hill" area of Columbia, was modest and poor.

In approximately 2004-2005, a developer acquired the entire city block surrounding the church and applied to the City of Columbia to construct a planned unit development or "PUD". In 2006, pursuant to the PUD, the City re-zoned the entire block, except the church. Pursuant to the development plans, the commercial developer intended to raze all of the existing residences in order to make room for a more densely populated, urban, upscale residential neighborhood consisting of townhouses and single family homes. Perhaps more significantly, minimum setback lines for structures and buildings were significantly compressed from the former setback lines of approximately 20-30 to as few as eight to ten feet between structures. The City approved the PUD, and the little church continued to worship with no immediate effect on their regular routine.

The historical and biblical tradition of Pentecostal worship is robust, spiritual, enthusiastic, and loud. Members of Rehoboth and Pastor and Mrs. Clark fully embrace the heritage and faith tradition of Pentecostal Christian worship of making a "joyful noise". Pastor and Mrs. Clark hold sincere religious convictions that preaching, teaching, singing and worship should be easily heard, and they lead bold worship services; consequently, they use loud voices and shouting during their

meetings and services, both with and without amplification. The congregation also encourages the practice of speaking in tongues, dancing and shouting with joy, and expository, lengthy preaching. Prior to the approval of the PUD, the church never had any legal troubles, and was never cited as violating the City's ordinances.

The developer constructed a large model home within ten feet of the church. The unoccupied model home presented no difficulties for anyone; however, the developer eventually sold the model home to Mr. Tim Ellis. Mr. Ellis lived in the home during weekdays, worked long hours, and was rarely at home on weekends. For several years the Church and Mr. Ellis peaceably coexisted as good neighbors without any incident. Eventually however, this circumstance changed when Mr. Ellis's girlfriend and her child moved into the home, and relations between the Ellis household and Rehoboth became strained as a consequence of the Church's typically loud worship style.

Ultimately, the Ellis family called the City of Columbia Police Department on more than fifty occasions during 2013-2014, initiated a civil suit for nuisance and intentional infliction of emotional distress against the Church and the Clarks, and sought criminal prosecution of the Clarks for what they perceived as violations of the City's noise ordinance.

In all, the City of Columbia Police Department issued more than 35 criminal citations, warnings, or incident reports against the Defendants, and many of the citations remain pending and unresolved. This appeal involves seven of the citations. The citations were called for trial in the municipal court and the Defendants demanded a jury trial. Prior to the jury trial, Defendant's trial counsel [2] filed a motion to dismiss the charges, claiming that the ordinance was unconstitutionally

[2] Counsel for Appellant in this appeal did not serve as trial counsel before the Municipal Court.

vague based upon the First Amendment. R.pp.2-24. Counsel raised the First Amendment to the United States Constitution, arguing both issues of both free speech and free exercise of religion. In response to the motion, counsel for the City filed a detailed memorandum, similarly addressing both the free speech and free exercise of religion claims. R.pp.25-31. Among other things, the City argued that its noise ordinance was facially neutral, and consequently, the court need not concern itself with the First Amendment questions or issues raised in the motion so long as the ordinance had a rationale relationship to the public interest. R.pp.29-30. In its memorandum, the City cited Christian Methodist Episcopal Church v. Rizzo, 2010 U.S. Dist. LEXIS 15246, 2010 WL 619061 (D.S.C. 2010), a case which relied upon the United States Supreme Court Decision in Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L. Ed. 2d 876 (1990), for the proposition that neutral laws of general applicability do not implicate First Amendment issues if they are rationally related to a public purpose. R.p. 29.

The case came to trial before Honorable Steven D. Dennis on September 10-11, 2014. Before the commencement of the trial, Judge Dennis addressed and denied the motions, relying upon the neutral principals doctrine in Smith and holding that the neither the free speech nor freedom of religion provisions of the First Amendment presented a viable defense to the prosecution. [3] R.pp. 128, 170. Judge Dennis concluded that because the noise ordinance was content neutral, the Defendants could not assert the First Amendment as a defense. R.p 169, lines 11-14. Counsel for Defendant expressly requested that the written motions be made a part of the

[3] During the trial, counsel for the defendants, the City Prosecutor, and the Trial Judge were apparently unaware that the "neutral principals" analysis of Smith had been statutorily modified overruled in this state pursuant to the South Carolina Religious Freedom Act, S.C. Code Ann.§1-32-10 ed.seq., and the noise ordinance was therefore subject to "strict scrutiny" and that the Defendants had a statutorily protected legal defense under the Act.

record. R.p. 170, lines 15-17. From this interchange, there is no question but that trial counsel raised the First Amendment issues and the trial court actually ruled on them.

As the case proceeded through trial, counsel for the defendants attempted to raise the First Amendment on at least two other occasions: at the jury charge phase (R.p. 197, Lines 15-18) and during closing argument. (R.pp. 188-189) Both times the defense was rebuffed, but the record is nonetheless clear that the First Amendment was in fact raised and addressed by the trial court. (see also R.p. 201, lines 11-16).

Similarly, there is no question that the issue was raised and presented to the Circuit Court both in the Appellant's brief R.pp. 37-110, the proposed order R.pp. 111-119, and the notices of appeal. R.pp. 332-36 After briefing, oral argument, and submission of proposed orders from both parties, all of which raised numerous First Amendment issues, the Circuit Court refused to address the Appellant's First Amendment Arguments, asserting that the issues had not been properly raised and preserved on appeal R.p. 120. This determination left Appellants' convictions unaffected even though they were prosecuted under the incorrect legal standard as a matter of law.

Standard of Review

The standard of review for appeals from municipal court convictions is limited to errors of law. City of Cayce v. Norfolk S. Ry. Co., 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011), Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011). In cases where an appeal does not involve disputed facts, an appellate court "is free to review whether the trial court properly applied the law to those facts." Gov't Employees Ins. Co. v. Draine, 389 S.C. 586, 698 S.E.2d 866, (2010). Furthermore, the "appellate court owes no particular deference to the trial court's legal conclusions." *Id.* 389 S.C. at 591, 698 S.E.2d at 698-99.

Argument

I. The First Amendment Arguments Were Properly Raised, Understood, and Ruled Upon Before the Trial Court and on Appeal Before the Circuit Court. The First Amendment Defenses Are Therefore Properly Preserved for Appellate Review.

Appellants have consistently raised and pursued their First Amendment defenses both before the trial court, and in their initial appeal to Circuit Court. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, (1998). The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Id. at 76, 497 S.E.2d at 733. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Malloy v. Thompson, 409 S.C. 557, 561 (S.C. 2014).

Before the Municipal Court, Appellants filed and argued their motion to dismiss which was based entirely on the First Amendment. R.pp. 2-24. Appellants subsequently attempted to raise the First Amendment during closing argument, to no avail. R.pp. 188-189. Finally, Appellants requested a jury charge on the First Amendment defense. R.p. 197. Before the Circuit Court, Appellants noted the First Amendment defenses in both the initial notice of appeal and amended notice of appeal, R.pp. 32-36, briefed the issue in their memorandum of authorities, R.pp. 37-110, argued the point during the hearing on oral argument, R.p. 206, and raised the issue yet again in the submission of a draft proposed order for the Circuit Court. R.p. 111. The suggestion that the First Amendment issues were raised for the first time on appeal is utterly unsupported by the record.

The trial court admitted its understanding of the importance of the First Amendment throughout the trial, R.p. 144, lines 6-8, P.p. 201 lines 12-16. The trial judge's repeated recognition of the importance of the fundamental rights protected by the First Amendment establish that the issue was "reasonably understood by the judge," and thus is reviewable by the appellate court. Malloy, 409 S.C. at 561, 762 S.E.2d at 692. Furthermore, the Trial Judge ruled on the issue by applying a neutral principles approach with minimal judicial scrutiny, albeit an incorrect approach under South Carolina law. R.p. 161, lines 1-5. R.p. 168, lines 14-18, R.pp. 169 – 171, lines 11-25.

In raising a constitutional argument, a party may frame or present an issue or argument according to its own terms. This should not be confused with the question of whether or not an issue is raised for purposes of issue preservation. For example, a Petitioner to the Supreme Court can "formulate[ ] any argument [it] like[s] in support of [a] claim" that it properly raises in the Supreme Court. Yee v. City of Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.153 (1992); *accord* Citizens United v. FEC, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). Thus, while it is true that Appellant included the South Carolina Religious Freedom Act argument to support its previously made the First Amendment argument on appeal when it became apparent that both parties and the trial court had overlooked its application below, the First Amendment claims were obviously previously raised, presented, and ruled upon, though not precisely in the manner at trial as they were on appeal.

Further, courts in South Carolina have historically allowed the appeal of general First Amendment and constitutional issues where the principle, rather than specific statutes were raised in the trial court as a defense to ordinance violations. *See* City of Beaufort v. Baker, 315 S.C. 146, 432 S.E.2d 470 (1993); City Of Chester v. Addison, 277 S.C. 179, 284 S.E.2d 579 (1981). While the Appellants were precluded by the trial judge from raising their constitutional arguments, the

issue was effectively raised and ruled on. The court ruled on the issue of the proper standard of review to be applied to the case when the court read the City of Columbia Noise Ordinance § 8-67 several times, stating that this ordinance was the standard the jury was to apply to the facts of the case. R.p. 195, see also R.p. 36. The municipal court's final holding that the Appellants violated the ordinance was based on an obvious error of law resulting from the court's failure to apply the proper standard of review under either legal standard applicable to this case and these facts: the *Smith* hybrid situation or the standard of South Carolina Religious Freedom Act.

Furthermore, it is worth noting that this court may, in its discretion, consider this appeal even if it were to determine that Appellants failed to raise the First Amendment issue below. In Wolper v. City of Charleston, 287 S.C. 209, 336 S.E. 2d 871 (1985), this Court addressed a constitutional law question notwithstanding technical errors in issue preservation because the issue presented was "obviously addressed" by the parties below and was "ruled upon". The Court noted that the matter raised was of significance for the future, and Appellant reminds this court that there are remaining pending charges against Appellants and the First Amendment question remains looming in this case. While Appellant remains confident that the First Amendment was properly raised and preserved for appeal from a close examination of the record, if the record is nonetheless lacking, Appellant would urge this Court to address the Frist Amendment claims based upon its discretion and the decision in Wolper.

II. The Trial Court Erred in Resolving Appellant's First Amendment Challenges Under the Incorrect Legal Standard.

Appellants have a constitutional, common law, and statutorily protected right to worship God without unreasonable interference from the City, and the City's noise ordinance is subject to strict judicial review. In order to be lawful under South Carolina and Federal Constitutional

Law, the noise ordinance must: 1) serve a compelling state interest, and 2) impose the least restrictive means of accomplishing that compelling interest. Moreover, the burden of establishing these two elements is upon the City. However, the trial court never undertook this analysis, finding instead that because the noise ordinance was facially neutral, the Appellant's First Amendment rights were of no moment, and the ordinance was presumptively valid as being rationally related to the public interest.

Appellants contend, at the very least, that they should have been able to raise and assert their constitutional rights and arguments as a defense to the prosecution, and that the burden was upon the City to establish that the ordinance in issue served a compelling state interest, and, as drafted, was narrowly tailored to achieve its purpose. Appellants do not argue these rights are absolute, but that they at least give rise to a defense which they should have been able to raise, argue, and charge to the jury. Even though the City's noise ordinance does not facially discriminate against religion and appears neutral on its face, Appellants maintain the manner in which the ordinance has been enforced impairs their free exercise and free speech, and the trial court erred in its failure to recognize these fundamental protections provided by the South Carolina Religious Freedom Act ("SCRFA"), and both the U.S. and South Carolina Constitutions.

The trial court erroneously concluded that because the City of Columbia noise ordinance was "content neutral", the Appellants could neither raise nor argue religious freedom as a defense to the enforcement of the ordinance, even though the City issued all of the citations during the Appellant's worship services or congregational meetings. From the inception of the case during pretrial motions and discussion, the trial court determined that the First Amendment defenses and

arguments could not be raised as a defense. Having made this determination, the court thereafter refused to allow the Appellants to raise the issue of religious freedom or constitutional vagueness of the statute before the jury or the court. The court viewed the case as merely about loud noise, devoid of regulating any speech content because it determined the noise ordinance was "content neutral" and therefore absolutely immune from religious freedom challenge or any challenge whatsoever on the basis of constitutional vagueness and free speech. R.pp. 168-169, 187, 201. The clearest example on the record is found in the closing argument. When the religious freedom and free speech argument was raised by counsel during closing argument, the court characterized the argument as legally impermissible "jury nullification". The Court then advised the jury to disregard the argument and do their duty, in effect directing a verdict as to the constitutional challenges. R.pp. 188-189. The court refused to charge the jury on the constitutional challenge, despite the request, nor would the court consider the question of constitutional vagueness, Free Speech, and Free Exercise whether based upon strict scrutiny, or otherwise. R.pp. 197-201.[4]

The trial judge obviously relied upon Employment Division v. Smith, 494 U.S. 872. 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), given its repeated references in the record to the "content neutral" nature of the ordinance. In Smith, the United States Supreme Court ruled it would no longer apply heightened scrutiny to the government's refusal to grant exemptions to generally applicable laws that unintentionally and tangentially burdened religious beliefs or practices. In Smith, the Court addressed the question of whether or not the ingestion of peyote, a religious practice of certain Native Americans, would, in and of itself, render an otherwise content-neutral law unenforceable and void on the grounds of religious freedom, standing alone. The Court was

[4] I'm going to tell you my interpretation, Mr. Briggs. First of all, I respect the First Amendment; I respect the Right to Speech and Religion. But if I'm in my own home with my doors and windows shut and there's any level of volume that interferes with my normal life, it is too much. I have a right to have privacy and peace in my own home. (emphasis added).

obviously concerned with individuals raising religious objections as a trump card in order to avoid otherwise general lawful requirements such as paying taxes or registering for the selective service. The Court determined that Free Exercise, standing alone, cannot be stretched so far so as to implicate strict scrutiny each and every time there is a conceivable effect on religious freedom.

Smith, however, is not the correct legal standard in this state, and therein lies an obvious and fatal error of law to the trial court's reasoning. Although the prosecutor, defense counsel and trial judge were apparently unaware of the appropriate legal standard during the trial, the fact remains that a man has been imprisoned under an incorrect legal standard. The correct legal standard is not Smith, but is rather, Wisconsin v. Yoder, 406 U.S. 205 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) because the South Carolina Religious Freedom Act ("SCRFA"), S.C. Code Ann., Section 1-32-10 et. seq., statutorily overruled Smith and re-established the Yoder legal standard in cases of this kind:

> SECTION 1-32-40. Restriction on state's ability to burden exercise of religion.
> The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:
>
> (1) in furtherance of a compelling state interest; and
>
> (2) the least restrictive means of furthering that compelling state interest.

Under the SCRFA, the standard applies even to an ordinance which is of "general applicability" (i.e. "content neutral"). Under SCRFA, the Appellants in this action were entitled to raise the statue and the Free Exercise Clause as a defense, and the appropriate legal standard was not Smith, but Yoder:

> The purposes of this chapter are to: (1) restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of compelling state interest will be imposed on all state and

> local laws and ordinances in all cases in which the free exercise of religion is substantially burdened; and (2) *provide a claim or defense to persons whose exercise of religion is substantially burdened by the State.* (emphasis added). S.C. Code Ann. § 1-32-30.

The Appellants were tried, convicted, fined, and imprisoned under the wrong legal standard. The error committed here is open and obvious; it is tantamount to a member of a suspect class raising a question of equal protection and the court refusing to apply "strict scrutiny" in addressing that challenge.

The trial court's error is further compounded because the court misapplied Smith to the facts of this case. Even if one overlooks the application of SCRFA, Smith also recognized that there are circumstances involving both Free Exercise and Free Speech or expression, and in those circumstances, strict scrutiny is appropriate. Justice Scalia noted this "hybrid" situation and acknowledged that a blanket disregard of First Amendment rights would be unwarranted in cases which involve freedom of both expression and religion:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see Cantwell v. Connecticut, 310 U. S., at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U. S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U. S. 573 (1944) (same), or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U. S. 510 (1925), to direct the education of their children, see Wisconsinv. Yoder, 406 U. S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. Wooley v. Maynard, 430 U. S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); West Virginia Bd. of Educationv. Barnette, 319 U. S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). *And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.* Cf. Roberts v. United States Jaycees, 468 U. S. 609, 622 (1984) ("An *individual's freedom to speak, to worship, and to petition the government for the redress*

> *of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").*
>
> *The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity* or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. *There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since Reynolds plainly controls.* "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." Gillette v. United States, *supra,* at 461.

The noise ordinance in the case at hand presents this hybrid circumstance because the ordinance regulates both free exercise of religion, and the communication those beliefs within their congregation (free speech and free association). The proscribed conduct always occurred during the gathering of the congregation for worship services, singing, preaching, and praying. The constitutional defenses are indeed applicable here as a matter of law, even under the Smith standard. This case presents the very hybrid situation (speech and religion) contemplated in Smith.[5]

---

[5] All free speech activity is protected from criminal prosecution, except by regulation as to time, place, and manner under a narrow, objective, and definitive law which prevents arbitrary discretion in decision-making by the law enforcement officer. Here, the City's ordinance merely applies the standard of "unreasonable" which is necessarily subjective. Indeed according to the trial court, "any level of volume is too much".

In Furr v. Town of Swansea, 594 F Supp. 1543 (1984), the court addressed a South Carolina ordinance which prohibited preaching and public speaking on the streets without a permit. The court ultimately found the ordinance too subjective and thus unconstitutional as it did not contain "narrow, objective and definite standards to guide the licensing authority" and further that is was a "restraint upon the plaintiffs' freedoms of speech and assembly, in violations of the First and Fourteenth Amendments to the United States Constitution." *Id.* at 1552 (citing Suttlesworth v. Birmingham, 394 U.S. 147, 89 S. Ct. 935, 22 L.E.2d 162 (1969).

The City of Columbia ordinance arguably grants too much discretion to the police enforcing the ordinance, providing no objective standard for what actually constitutes a noise

The authority of governments to place restrictions on or prohibit the Exercise of Religion and the Exercise of Free Speech in the public square is limited by the First Amendment and federal common law. Edwards v. South Carolina, 372 U.S. 229 83 S.Ct. 680, 9 L.Ed.2d 697(1963); Furr v. Town of Swansea, 594 F. Supp. 1543 (D.S.C.1984). see also Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S.Ct. 2751 189 Led.2d 675 (2014);

In City of Beaufort v. Baker, 315 S.C. 146, 432 S.Ct.2d 470 (1993) a post-Smith decision, the Appellants appealed their convictions for the violation of a noise ordinance to the Municipal Court. The Appellants contended that the ordinance was unconstitutional as applied because it infringed upon their Freedom of Speech in violation of both the U.S. and South Carolina Constitutions. *Id.* 315 S.C. at 150, 432 S.E.2d at 472. While the Supreme Court ultimately held

---

violation. The City of Columbia ordinance being enforced in the instant case is Sect. 8-67 (a) and (c):

> (a) *Disturbing the public generally.* It shall be unlawful for any person to maintain and operate in any building or on any premises in the city any radio device or mechanical musical instrument or device of any kind whereby the sound therefrom is cast directly on the public streets and places in such a manner as to create unreasonably loud, excessive or disturbing noises and where such device is maintained and operated for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street, park, public place or of persons on neighboring premises.
>
> (c) *Creating public nuisance.* It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

Recently, U.S. District Court Judge Joseph F. Anderson, Jr., in McCoy v. City of Columbia, March 11, 2013, reviewed a City of Columbia ordinance for vagueness and held:

> A statute is impermissibly vague if it either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement."

The City's ordinance does not contain a "narrow, objective, and definite" standard to guide the police in the enforcement of the ordinance, yet the Appellants were not allowed to make these arguments at trial.

the ordinance survived the Appellants' constitutional challenges, the court applied the proper heightened standard to the "content-neutral" ordinance to make its final court order. *Id.* 315 S.C. at 150, 432 S.E.2d at 472. The court's standard of review for the "content neutral" ordinance, where "the complaints were based solely on the noise level of the preaching" was that it must be narrowly tailored to serve a significant governmental interest. *Id.* 315 S.C. at 150, 432 S.E.2d at 472-73. Just as in this case, Baker presented a hybrid situation involving both free speech and free exercise; therefore strict scrutiny was appropriate and the defendant was able to argue its constitutional defenses.

CONCLUSION

The trial court erred in failing to allow the Appellants to raise or assert their First Amendment Rights as a defense to this action. The First Amendment issues were properly raised and preserved for appeal. The trial court further erred in failing to apply the legal standard of a compelling state interest narrowly tailored to achieve its purpose before finding Appellants guilty. The court erred in failing to allow the defense that the City's ordinance, as written and enforced, was unconstitutionally vague and subjective in violation of the Free Speech and Free Exercise of Religious Freedom. The Circuit Court erred in failing to address the properly raised and preserved First Amendment issues. The only just decision in this appeal is a reversal of convictions and instructions to dismiss them and any other alleged violations of the City of Columbia ordinance 8-67, a refund of all court costs and fines, and an award of fees and costs pursuant to the Statute. Any decision short of a total reversal of these "convictions" would be a gross miscarriage of justice.

Henry P. Wall SC Bar #5797
Bruner Powell Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260
803/252-7693
Email: hwall@brunerpowell.com

December 12, 2016
Columbia, South Carolina

RECEIVED

DEC 1 2 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Diane Schafer Goodstein, Circuit Court Judge

Case No. 2016-000999

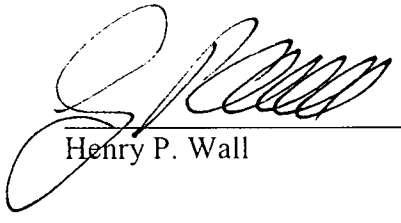
The City of Columbia..... Respondent,

v.

Johnnie L. Clark and Harriet Clark. ..... Appellants.

PROOF OF SERICE AND APPELLATE RULE 211 (B) CERTIFICATION

I certify that I have served the *Appellant's Final Brief* by depositing a copy of it in the United States Mail, postage prepaid, on December 12, 2016, addressed to the Respondent The City of Columbia's attorneys of record, Jessica R. Mangum, Esquire at City Attorney's Office, 1401 Main Street, 10th Floor, Columbia, South Carolina 29201. I further certify that my Final Brief is in compliance with rule 211(b).



Henry P. Wall

December 12, 2016