STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of General Sessions
Honorable John C. Hayes, Circuit Court Judge

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Appellate Case No. 2016-002433

THE STATE, .....RESPONDENT,

v.

DAJLIA SYMONE TORBIT, .....APPELLANT.

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# INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases:**



**Statutes:**



**Rules:**

## STATEMENT OF ISSUES ON APPEAL

The trial judge properly denied Appellant's motion for a directed verdict of acquittal for resisting arrest because the State presented direct evidence Appellant resisted her arrest following her physical assault of a police officer, an act independent of law enforcement's request to search her mother's residence for marijuana. Moreover, law enforcement was justified in performing a warrantless search of the home based on exigent circumstances: officers plainly viewed and smelled marijuana in the apartment and needed to act quickly to prevent the destruction of the marijuana evidence. Finally, even if the search of the residence was improper and Appellant's resisting arrest was tied to her refusal to allow the search, Appellant was not permitted to harm officers because physical resistance is always improper for police searches.

## STATEMENT OF THE CASE

On July 21, 2016, the York County Grand Jury indicted Appellant for resisting arrest. On November 20, 2016 the Appellant waived her right to a jury trial, and proceeded to a bench trial before the Honorable John C. Hayes, III. The State was represented by Assistant Solicitor Aaron Hayes of the Sixteenth Judicial Circuit Solicitor's Office and Appellant was represented by Chief Deputy Public Defender B.J. Barrowclough of the Sixteenth Judicial Circuit Public Defender's Office. The trial judge found the Appellant guilty as charged, and Judge Hayes sentenced the Appellant to three years' incarceration suspended upon the service of three years' probation.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

## STATEMENT OF FACTS

On April 15, 2016, at or around 1:00 pm, Officer Christopher Revels of the Rock Hill Police Department responded to 2265 Eden Terrace to assist Rock Hill Emergency Medical Services (EMS) with securing the scene of an EMS call for service When Officer Revels arrived he saw a patient, Timothy Holley, on the ground of a breezeway of the apartment complex being treated by EMS and the Rock Hill Fire Department. Along with Officer Revels and Holley, there were two paramedics, three firefighters, Officer Schurig of the Rock Hill Police Department, and between three and six citizens in the breezeway. Officer Revels arrived at the aforementioned location approximately four minutes after the other emergency service units. (Tr.pp.15, 16, 26).

As Officer Revels and Schurig approached the breezeway, they smelled an "overwhelming odor" of marijuana coming from Apartment 104 along the breezeway. Firefighters with the Rock Hill Fire Department also smelled the pervasive odor of marijuana coming from Apartment 104. While emergency services were there, the door to the apartment opened two to three times. Each time it did the breezeway flooded with the smell of burnt marijuana, and smoke from that marijuana was visibly coming from the apartment. After the medical patient had been appropriately treated, Officers Revels and Schurig privately discussed their observations about the apartment, and determined that a further investigation was warranted. Seeing a woman standing outside of the apartment, the officers approached and identified themselves. The woman outside of apartment 104 was Tolley's sister, Appellant. (Tr.pp.17, 33, 42, 64).

The officers told the Appellant that they could smell the odor of marijuana coming from Apartment 104. Though the door was closed, the Appellant was blocking the door. The officers asked who the apartment belonged to; the Appellant told the officers that the apartment belonged to her mother. Officers Schurig and Revels stated that they would like to step inside the

apartment with the Appellant in order to speak to her about the smell of marijuana. The Appellant told the officers that the apartment belonged to her mother, and that she wished to wait for her mother to get back to the apartment before letting the police inside. The officers advised her that based upon the obvious odor and sight of smoke coming directly from the apartment, the officers had probable cause that marijuana was being smoked on the premises. The officers reiterated that they would like to speak to her about that smoke and smell inside the residence. The Appellant again refused, and told the officers that they couldn't enter the apartment without a warrant. The Appellant told the officers that they had no right to enter the apartment, and then the Appellant shoved Officer Schurig. Officer Schurig told the Appellant that he only wanted to talk to her, and directed her to not touch him again. Despite the warning, Appellant once again shoved Officer Schurig. (Tr.pp.17–18, 28, 32, 42–43, 65).

Officer Schurig then told the Appellant that she was under arrest, and Officer Revel stepped forward to take the Appellant into custody. Tr. 18. Several bystanders moved to intervene against the police officers, and tried to prevent the arrest of the Appellant. Officer Revels moved to intercept the three bystanders attempting to hinder the arrest of the Appellant, and the Appellant continued to physically assault Officer Schurig and resist arrest. At or around this time one of the officers used their radio to transmit a "10-33", indicating that the officers were in distress and needed immediate assistance. Additional officers and supervisors from the Rock Hill Police Department began to respond to the officers' location. In an attempt to gain physical control of the Appellant Officer Schurig drew his Taser, but did not fire. At or around this time the apartment door opened, and Officer Schurig and the Appellant struggled past the threshold and into the apartment. (.Tr.pp.18–19, 36, 44, 59, 65–66, 95).

Inside the apartment were a number of adults and children. People inside the apartment began to threaten the police and firefighters with physical violence. Officer Schurig determined that, due to the number of people present, the deployment of the Taser would dramatically escalate the situation and place everyone in danger. As the people inside began to flee the apartment, and the struggle between the Appellant and Officer Schurig continued, Officer Revel placed one of the additional persons attempting to intercede under arrest and was attempting to arrest another. While Officer Revel was doing so, firefighter Anthony Baker was trying to hold back the people in the apartment from attempting to attack Officer Schurig. Appellant and Officer Schurig spilled out of the apartment, and Officer Schurig grabbed the Appellant by the hair and threw her to the ground in an attempt to finally gain control of the Appellant and effectuate the arrest. Both the Appellant and the officer ended up on the concrete floor of the breezeway, with the Appellant on top of the officer. The Appellant, in an attempt to incapacitate Officer Schurig, struck him in the face in or around his eye using her cell phone as a weapon while yelling "I don't give a fuck about the police." (Tr.pp.19–20, 44, 52–53, 66–67).

At this time the Appellant's sister, Chantavious Torbit, ran past Officer Revel and leapt onto Officer Schurig's back. The Appellant's sister began to beat the officer in an attempt to hinder the arrest of the Appellant. Seeing the threat to Officer Schurig, Officer Revel directed a firefighter on the scene to remain with the individual who was handcuffed and under arrest while he went to Officer Schurig's aid. Officer Revel removed the Appellant's sister from Officer Schurig. Officer Schurig was able to gain control of the Appellant and place her under arrest after firefighters on the scene grabbed the Appellant and pulled her off of Officer Schurig. At that point several males began approaching the officers in an attempt to intervene, and Officer Revel directed these men to stay where they were. At this time additional police officers began

to arrive to assist the two officers who had been attacked and assaulted. Officer Revel's car was positioned in such a fashion as to record this incident with the patrol car's dashcam recording system. (Tr.pp.20–21, 23, 35).

After the Appellant and her sister were arrested and placed in handcuffs, Baker was able to examine Officer Schurig for injuries at Officer Schurig's request. FF Baker noted that the officer had numerous scratches to his face, and that one eye was red and swollen. Additionally, he had two cuts over his eyes. The Appellant was placed into Officer Schurig's patrol car, and her sister Chantavious was placed into Officer Revel's patrol car. Officer Schurig received medical treatment for his injuries at Riverview Medical Center.[1] (Tr.pp.24, 54, 60).

During the trial the Appellant took the stand in her own defense. Appellant testified that she had no possessory interest in the apartment, and that her home address was 966 Eastwood Drive. The Appellant further testified that her mother had given her a key to her mother's apartment, and that this key was so that the Appellant could let herself in on mornings her minor siblings had school so that the Appellant could wake her siblings and make sure that those children got to school on those mornings. The Appellant further claimed that when she was questioned by Officer Schurig on scene during the course of treatment for the gentleman in the breezeway, the Appellant stated that she "didn't live [t]here, but [it] was her mother's home . . ." The Appellant admitted that she threatened to sue Officer Schurig if he tased her and refused to comply with his lawful orders. While Appellant was arguing with Officer Schurig, "someone opened the door from inside" which allowed the officers to clearly see inside the apartment, as

[1] The medical staff at Riverview confirmed Officer Schruig's injuries, including the swelling to the injured eye, and found the officer's vision was recorded as 20/70. Before the attack by the Appellant the officer's vision was previously stable and recorded as 20/15. The hospital provided a referral to an ophthalmologist, who confirmed the hospital's assessment of the officer's vision as being 20/70. *Id.* By the time of trial, Officer Schurig's vision improved to 20/25. However, doctors told the officer that his vision is likely to be permanently impaired at 20/25 and that it would not return to 20/15. (Tr.p.68).

well as the five people inside, and that those people became "hostile" towards the officers. The Appellant confirmed the remaining facts from previously called witnesses. (Tr.pp.98–99, 103–04, 107-11).

Tolley also testified. He admitted that after the fight erupted, he went inside the apartment's restroom and was able to flush the toilet. (Tr.pp.89–90).

After weighing the evidence, evaluating the credibility of the witnesses presented, and reviewing the case law, the trial judge denied Appellant's Directed Verdict motion. He found no "real attempt to enter" had been made to enter the residence, and Appellant did not have the right to assault Officer Schurig simply because he asked to enter the house. Accordingly, it was unnecessary for him to even consider the exigent circumstances justifying a search of the home. However, he found the smell of marijuana was an exigent circumstance which would have justified entering the apartment, noting marijuana can easily be hidden, flushed down a toilet, or otherwise destroyed. Based upon these determinations, the trial court also found Appellant guilty of resisting arrest. (Tr.pp.78–79; 123–28).

## ARGUMENT

**The trial judge properly denied Appellant's motion for a directed verdict of acquittal for resisting arrest because the State presented direct evidence Appellant resisted her arrest following her physical assault of a police officer, an act independent of law enforcement's request to search her mother's residence for marijuana. Moreover, law enforcement was justified in performing a warrantless search of the home based on exigent circumstances: officers plainly viewed and smelled marijuana in the apartment and needed to act quickly to prevent the destruction of the marijuana evidence. Finally, even if the search of the residence was improper and Appellant's resisting arrest was tied to her refusal to allow the search, Appellant was not permitted to harm officers because physical resistance is always improper for police searches.**

Appellant argues the trial judge improperly denied her motion for a directed verdict because she was arrested for resisting officers' unlawful search of her mother's apartment. The State disagrees with this allegation of error. Appellant's charge for resisting arrest stemmed from her refusal to submit to police following her physical assault of Officer Schurig. Moreover, even if this Court determines Appellant's charge was inextricably linked to Officer Schurig's request to search her mother's apartment, Appellant could not resist the search because: (1) the search was justified by two exigent circumstances, the plain view doctrine and the destruction of evidence; and (2) regardless of the lawfulness of the search, South Carolina law does not grant defendants the right to use physical force to resist a search by law enforcement.

### No Right to Resist a Search, Lawful or Unlawful, Exists in South Carolina

Pursuant to S.C. Code Ann. § 16-9-320(B) (2015):

> It is unlawful for a person to knowingly and willfully assault, beat or wound a law enforcement officer engaged in serving, executing, or attempting to serve or execute a legal writ or process or to assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. A person who violates the provisions of this subsection is guilty of a felony and, upon conviction, must be fined not less than one thousand dollars nor more than ten thousand dollars or imprisoned not more than ten years, or both.

Under past South Carolina law, a person had the right to resist an unlawful arrest, even to the extent of taking the life of the aggressor if it was necessary in order to regain her liberty. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001) (emphasis added). The person resisting arrest could resist with equal and opposite force, but was not permitted to "use force disproportionate to the injury threatened." Id. at 623–24, 557 S.E.2d at 660.

The United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional search "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, 564 U.S. 229, 236 (2011) (citations omitted).

Initially, the State notes that Appellant is incorrect in her assertion that South Carolina currently recognizes a right to resist an arrest. Under the original version of § 16-9-320, persons could only be prosecuted for resisting lawful arrests. S.C. Code Ann. § 16-9-320 (1980). However, the legislature amended the statute in 1990, removing the "lawful" language and making it illegal for citizens to resist any arrest. S.C. Code Ann. § 16-9-320 (1990). As noted by this Court, individuals are now only permitted to resist the use of excessive force by an arresting officer; citizens are not permitted otherwise resist an arrest. State v. Williams, 367 S.C. 192, 199, 624 S.E.2d 443, 446–47 (Ct. App. 2005).

Regardless, Appellant is unable to cite to a single situation in which South Carolina courts have ever recognized the right to resist an unlawful search. In the past, South Carolina law allowed individuals to use force to resist an unlawful arrest because such an action "stands upon the same footing as any other nonfelonious assault, or as a common assault and battery."

See McGowan, 347 S.C. at 623, 557 S.E.2d at 660 (quoting State v. Francis, 152 S.C. 17, 34–39, 149 S.E. 348, 355–56 (1929). However, an unlawful search is not similarly viewed under the law; a person was never permitted to use force "to prevent a mere trespass . . . unaccompanied by any imminent danger of great bodily harm or felony." Id.

By definition, lawful resistance requires a degree of force reasonable in the situation. Id. at 622, 557 S.E.2d at 659. In situations involving unlawful searches, no use of force is reasonable because the injury threatened, a search of immediate vicinity, is not an attempt to injure someone or illegally restrain her freedom. Because the search, unlike an unlawful arrest, does not involve the use of force against a person, any use of physical force by the person resisting the search is an inherently disproportionate response to the actions of the officers. While Appellant opines physical force was needed to protect her privacy interests, victims of unlawful searches are not without a legal remedy. Both federal and state law use the exclusionary rule to bar prosecution based on evidence discovered during an unlawful search. See, e.g., Davis, 564 U.S. at 236. If officers' had uncovered anything during an unlawful search, the exclusionary rule would prevent such evidence from being used in Appellant's criminal prosecution.

**Origin of Resisting Arrest Charge**

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 477–78 (2004). "If there is

any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (emphasis added). A circuit judge should grant a directed verdict motion only when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

To determine whether a defendant could have lawfully resisted arrest, a court must consider whether, at the moment the arrest was made, the officers had probable cause to make it. Accordingly, the court must decide whether the facts and circumstances known to the officers constituted reasonably trustworthy information sufficient to warrant a prudent person believing the person committed or was committing an offense. State v. Maybank, 352 S.C. 310, 318, 573 S.E.2d 851, 855–56 (Ct. App. 2002).

Despite Appellant's claims to the contrary, her charge resisting arrest stemmed from her physical assault of Officer Schurig and not from a forceful attempt to enter the apartment. Officers Revels testified Appellant began shoving Officer Schurig immediately following the latter's verbal request to talk to her inside the apartment about the marijuana smoke he saw and smelled. Similarly, Officer Schurig testified Appellant began shoving him when he was near the front door, prior to any attempt to forcibly gain entry to the premises. Accordingly, because there was direct evidence Appellant's charge for resisting arrest stemmed from her physical assault against Officer Schurig, the trial judge did not err in denying the motion for a directed verdict.

**Exigent Circumstances**

A warrantless search may be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement." See State v. Brown, 401 S.C. 82,

89, 736 S.E.2d 263, 266 (2012) (recognizing the following exceptions to the warrant requirement: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment). "The exigent circumstances doctrine provides an exception to the Fourth Amendment[']s protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exists." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct.App.2004); see State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (acknowledging the exigent circumstances doctrine as an exception to the warrant requirement).

"Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced in evidence." State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). To satisfy the "plain view" exception, two elements must be met: "(1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. State v. Wright, 391 S.C. 436, 443, 702 S.E.2d 324, 327 (2011); Brown, 289 S.C. at 587-88, 347 S.E2d 882. *See also* State v. Abdullah, 357 S.C. 344, 351-52, 592 S.E.2d 344, 348-49 (Ct. App. 2004).

Another exigent circumstance is the imminent destruction of evidence. In Schmerber v. California, 384 U.S. 757 (1966), the United States Supreme Court found the exigency created by the dissipation of alcohol in a defendant's blood stream combined with the necessity of securing the scene of an accident justified an officer's decision to obtain a blood draw from a defendant without obtaining a warrant. Noting the test was a common, minimally invasive procedure

which was performed in a reasonable manner, the Court found the Constitution "does not forbid the States minor intrusions into an individual's body under stringently limited conditions." To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, a court must look to the totality of the circumstances. See Brigham City v. Stuart, 47 U.S. 398, 406 (2006). The fact-specific nature of such an inquiry demands a court evaluate each case of alleged exigency based on its own facts. Missouri v. McNeely, 133 S.Ct. 1552, 1559 (2013).

Should this Court find Appellant's arrest was inextricably linked to Officer Schurig's request to speak with her inside of the apartment and that such action constituted a search, the State asseverates Officer Schurig's actions were justified by the exigencies of the situation. Officer Schurig smelled marijuana and saw marijuana smoke inside the apartment. Thus, evidence of the marijuana was in his plain view—and "plain smell"—and would justify his warrantless search of the interior of the home.[2] See Beckham, 334 S.C. at 317, 513 S.E.2d at 613.

Moreover, as noted by the trial judge, the potential destruction of the marijuana further justified a warrantless search of the premises. Petitioner claims the various cases cited in his brief stand for the proposition that the smell of drugs, alone, does not create the presumption that the evidence will be destroyed unless officers take immediate action. However, South Carolina courts recognize the destructibility of drug evidence and the inherent exigency that creates. See State v. Dobbins, 420 S.C. 583, 594, 803 S.E.2d 876, 881 (Ct. App. 2017) (citing U.S. v. Grissett, 925 F.2d 776 (4th Cir. 1991)). Tolley admitted that due to the fight, he was able to enter the apartment, go to the restroom, and flush the toilet. Taking the time to obtain a warrant

[2] While the trial judge ultimately did not reference the plain view doctrine in his ruling, he was presented with such evidence during the trial. Accordingly, this Court may affirm Appellant's conviction on this ground. See Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record).

would have allowed individuals inside more than enough time to destroy any marijuana evidence.[3]

[3] Throughout his brief, Appellant claims officers were unable to locate evidence of marijuana. However, there is no evidence in the record a search was ever performed. As the record indicates, after the fight broke out officers focused their efforts on arresting the individuals whom assaulted police.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 27, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of General Sessions
Honorable John C. Hayes, Circuit Court Judge



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Appellate Case No. 2016-002433

THE STATE, .....RESPONDENT,

v.

DAJLIA SYMONE TORBIT, .....APPELLANT.

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**PROOF OF SERVICE**

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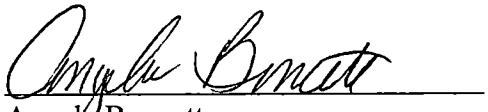
I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 27th day of November, 2017.



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November 27, 2017

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RE: State v. Dajlia Symone Torbit – Appellate Case No. 2016-002433

Dear Mr. Pachak:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher
Assistant Attorney General
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WFS/
Enclosures

cc: Honorable Jenny A. Kitchings
(original and one enclosed)
Victim Advocacy Division