

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from York County

John C. Hayes, Circuit Court Judge

RECEIVED
DEC 06 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DENNIS KENNEDY,

APPELLANT

APPELLATE CASE NO 2016-002538

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

ARGUMENT

The trial judge erred in denying defense counsel’s motion to suppress the items seized during the execution of the search warrant against appellant as it was carried out in violation of the Fourth Amendment because the underlying affidavit lacked probable cause, and included false statements, and contained insufficient corroboration from a videotape that neither the signing magistrate nor trial counsel viewed, which in turn meant further that this additional Rule Five¹ violation that occurred also with respect to the unseen videotape deprived appellant of his Sixth Amendment right to present a complete defense during the Franks² hearings held regarding the defective affidavit and warrant prior to trial and at trial in the case.3

CONCLUSION.....14

¹ A motion to compel discovery hearing was held prior to trial during which time the defense requested the production of the videotape of the drug buy that lead to issuance of the search warrant in this case. Pretrial Hearing Transcript p. 9, l. 4-9; p. 1, l. 16-17.

² 438 U.S. 154 (1978).

TABLE OF AUTHORITIES

Cases

<u>Franks v. Delaware</u> , 438 U.S. 154 (1978).....	11, 13
<u>Illinois v. Gates</u> , 462 U.S.213 (1983)	8
<u>State v. Adolphe</u> , 314 S.C. 89, 441 S.E.2d 832 (1994).....	8, 9
<u>State v. Dunbar</u> , 354 S.C. 479, 581 S.E.2d 840 (S.C. Ct. App. 2003).....	10
<u>State v. Dunbar</u> , 356 S.C. 138, 587 S.E.2d 691 (2003)	10
<u>State v. Dupree</u> , 354 S.C. 676, 583 S.E.2d 437 (2003).....	8, 13
<u>State v. Forrester</u> , 343 S.C. 637, 541 S.E.2d 837 (2001).....	10
<u>State v. Gore</u> , 408 S.C. 237, 758 S.E.2d 717 (S.C. Ct. App. 2015).....	11
<u>State v. Johnson</u> , 302 S.C. 243, 395 S.E.2d 167 (1990)	9, 10
<u>State v. Jones</u> , 342 S.C. 121, 536 S.E.2d 675 (2000)	8, 10, 11, 12
<u>State v. Martin</u> , 347 S.C. 522, 556 S.E.2d 706 (SC Ct. App. 2001).....	8
<u>State v. Missouri</u> , 337, 524 S.E.2d 394 (1999).....	12
<u>State v. Philpot</u> , 317 S.C. 458, 454 S.E.2d 905 (1995).....	9
<u>State v. Robinson</u> , 415 S.C. 600, 785 S.E.2d 355 (2016).....	9, 12
<u>State v. Rutledge</u> , 373 S.C. 312, 644 S.E.2d 789 (2007).....	9

Statutes

S.C. Code Ann § 17-13-140 (1985).....	10
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Constitutional Provisions

S.C. Const. art. 1 §10	10
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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying defense counsel's motion to suppress the items seized during the execution of the search warrant against appellant as it was carried out in violation of the Fourth Amendment because the underlying affidavit lacked probable cause, and included false statements, and contained insufficient corroboration from a videotape that neither the signing magistrate nor trial counsel viewed, which in turn meant further that this additional Rule Five³ violation that occurred also with respect to the unseen videotape deprived appellant of his Sixth Amendment right to present a complete defense during the Franks⁴ hearings regarding the defective affidavit and warrant held prior to trial and at trial in the case.

³ A motion to compel discovery hearing was held prior to trial during which time the defense requested the production of the videotape of the drug buy that lead to issuance of the search warrant in this case. Pretrial Hearing Transcript p. 9, l. 4-9; p. 1, l. 16-17.

⁴ 438 U.S. 154 (1978).

STATEMENT OF THE CASE

Appellant Dennis Demario O'Brian Kennedy was convicted of trafficking in cocaine, possession with intent to distribute crack cocaine, and possession of a weapon during the commission of a violent crime per jury trial held at the December 2016 term of the York County General Sessions Court before Judge John C. Hayes, III. Appellant was sentenced to imprisonment for an aggregate period of fifteen years. Mindy Lipinski represented appellant at trial, and Assistant Solicitor Marina Hamilton appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

ARGUMENT

The trial judge erred in denying defense counsel's motion to suppress the items seized during the execution of the search warrant against appellant as it was carried out in violation of the Fourth Amendment because the underlying affidavit lacked probable cause, and included false statements, and contained insufficient corroboration from a videotape that neither the signing magistrate nor trial counsel viewed, which in turn meant further that this additional Rule Five⁵ violation that occurred also with respect to the unseen videotape deprived appellant of his Sixth Amendment right to present a complete defense during the Franks⁶ hearings held regarding the defective affidavit and warrant prior to trial and at trial in the case.

On January 7, 2016, three police officers executed a search warrant at a house where appellant was present inside. The purpose of the search was to locate a gun. During the execution of the search warrant, a gun was found under a couch cushion, and immediately thereafter, crack cocaine and cocaine were found on appellant after he was arrested and searched. Tr. 142, l. 1 - p. 153, l. 19. Also, the state introduced a statement wherein appellant stated that the gun was given to him by a friend, and that he had crack cocaine and cocaine on him at the time of his arrest. Tr. 206, l. 22 – p. 208, l. 4.

Prior to trial, counsel moved to compel the production of the videotaped drug buy in the form of a discovery request because the videotape was used as corroboration and probable cause to support the underlying affidavit for the search warrant signed by the magistrate in the case.

⁵ A motion to compel discovery hearing was held prior to trial during which time the defense requested the production of the videotape of the drug buy that lead to issuance of the search warrant in this case. Pretrial Hearing Transcript p. 9, l. 4-9; p. 1, l. 16-17.

⁶ 438 U.S. 154 (1978).

Ultimately, this was in effect the commencement of a motion to suppress as well. During the pre-trial/Franks hearing held prior to trial, counsel argued in effect that the affidavit was insufficient to support probable cause and that the challenge attacking the affidavit and search warrant would be incomplete without access to or a viewing of the videotape or the still photographs from the videotape. Apparently, the affidavit and warrant and the no knock justification emanated from a videotape of a prior drug buy from appellant. Counsel argued that a proper and complete Franks hearing could not be had without the production of this videotape. In addition, counsel argued that there were falsehoods included in the affidavit regarding appellant's alleged prior violent convictions and a lack of corroboration for the assertion that appellant was known to possess a weapon. Pre-trial Hearing Transcript Tr. 12, l. 12 – Tr. 14, l. 23; Tr. 16, l. 19 – p. 17, l. 4; Tr. 4, l. 16 – Tr. 10, l. 13.

The state argued in effect that there was no obligation to produce the videotape because appellant was not on trial for the buy that was videotaped. Pre-trial Hearing Transcript p. 6, l. 19 – p. 12, l. 11. The position of the defense was that this videotaped buy led to the affidavit and warrant and was the basis for the subsequent search, which meant appellant had a right to view and challenge the tape via a Franks hearing prior to trial and at trial. Pre-trial Hearing Transcript p. 10, l. 19 – p. 12, l. 11; Tr. 14, lines 13-23; Tr. 16, l. 1-18. Defense counsel argued further that the goal from a defense standpoint would be to fact check the affidavit and challenge the affidavit and warrant with respect to the reliability of the CI and the sufficiency of the corroboration via an inspection of the videotape. Pre-trial Hearing Transcript p. 13, lines 6-24; p. 14, l. 4-12; Tr. 16, l. 8 – p. 17, l. 2; Tr. 8, l. 18 – p. 9, l. 13. The court in effect denied the pretrial motion to compel regarding the discovery request for the videotape.

At trial and out of the presence of the jury, the issue was revisited via a motion to suppress. The defense argued that not being privy to that informant's information based on the videotape hindered the Franks challenge to the affidavit and warrant. Tr. 10, l. 17-21; Tr. 16, l. 6 – p. 17, l. 2. Defense counsel questioned the reliability and credibility of the representations made in the underlying affidavit for the search warrant. Tr. 17, l.3-4. Counsel's argument follows:

The reason for the affidavit's belief, Your Honor, it goes to say that instead of vouching for the credibility of the CI it stated that the officer was able to monitor the transaction via body wires (videotape)...[and] the CI identified Kennedy the defendant by name and photo [and] the CI communicated via cell phone although I don't know that that was ever corroborated...and then it says that the CI provided information that Kennedy regularly carried a firearm and I believe the corroboration would then [be] visible in the video of a purchase. Tr. 17, l. 19 – p. 18, l. 7

During the hearing held at trial, local magistrate Mandrile Young, who signed off on the warrant in the instant case, testified that he saw no videotape, and that there was nothing in the warrant regarding the reliability of the informant, and that the "buy" was the only thing that corroborated the informant's reliability. Tr. 19, l. 19 – p. 28, l. 10. In other words, the conclusory presentation by the police officer was the only ground for issuing the warrant. The affidavit read as follows:

The affiant received information from a confidential informant (CI) that Dennis Kennedy is selling cocaine from the residence. Within the past 72 hours, the affiant utilizing the same CI wa(s) able to make a controlled cocaine purchase from Dennis Kennedy while at the residence of 64 Reynolds St. Rock Hill, S.C. The CI was given government currency and fitted with a body wire. The CI and CI's vehicle was searched with no contraband being found. Surveillance officers followed the CI to and from the residence and di recover the cocaine after the purchase. The officer did monitor the transaction via the body wires. The CI identified Kennedy by name and a SCDMV photo. The CI communicated with the Kennedy via cell phones. Based on the affiant's training and

experience in narcotics investigations, it is common practice for drug dealers to use and store information on cell phones such as text messages (sent and received), emails (sent and received) and all incoming and outgoing calls. The CI provided information that Kennedy regularly carries a firearm. A firearm is visible in a video of the purchase. Kennedy's criminal history has convictions for violence against the police for these reason(s), the affiant is requesting a no knock warrant."

The defense's argument was in effect that the videotape of the prior informant's buy was the linchpin for the corroboration in support of the affidavit that led to the authorization for the search warrant, but yet neither the magistrate nor defense counsel viewed the videotaped buy. Furthermore, there was no mention of the informant's reliability and credibility, i.e., whether the informant had been used in the past, and whether the informant's information led to convictions in the past, and the basis for the informant's assertion that appellant allegedly carried a firearm routinely. Moreover, there was error with respect to falsehoods contained in the affidavit regarding appellant's alleged prior violent convictions when there were no plural prior convictions on his record. All of this was presented in support the defense's motion to suppress under Franks. Tr. 29, l. 4 – p. 32, l. 13. The state admitted error as to a misstatement in the search warrant regarding appellant's alleged violent priors, but maintained that the videotaped controlled buy alone was sufficient probable cause for the warrant to be issued despite the fact that neither the magistrate nor the defense team viewed the videotaped buy. Tr. 35, l. 14 – p. 43, l. 6.

The trial judge viewed the videotape in question, and then ruled that appellant's motions were in effect denied and that the search warrant contained sufficient indicia of reliability of the informant to support probable cause based on the information about there being a controlled buy at the residence by the informant and corroborating information from the video that appellant

carried a gun as there was a firearm in the videotape, but the trial judge did note that the gun was being “handled by someone but [that he could not] tell who [was] actually handling [the gun]” although the gun was present in the room.” Tr. 44, l. 20 – p. 45, l. 21. In addition, the trial judge stated that he was keeping the videotape sealed as court’s exhibit #2 for the purpose of appeal. Tr. 45, l. 8-9; Tr. 45, l. 24 – p. 46, l. 1. The trial judge admitted that the search warrant did not state who was holding the gun. Tr. 48, l. 24 – p. 49, l. 11; Tr. 49, l. 21 – p. 50, l. 3. The trial judge agreed that pistols were mobile. Tr. 50, l. 15-17.

However, because appellant was arrested for possession of a stolen weapon, the trial judge took more testimony in the matter because the question arose as to how the pistol found during the search was linked to appellant. Tr. 51, l. 11-15. Thereafter, Officer Clevenger testified in camera that he entered the residence, started searching, and found a gun located under the cushion of a couch, and that he believed that this was the pistol from the videotape and learned through dispatched after a track on the serial numbers from the gun was stolen. Officer Clevenger admitted that it was not clear from the videotape who in fact was handling the gun. Tr. 53, l. 7 – p. 56, l. 9; Tr. 60, l. 15-18. The state argued that appellant claimed that the keys found in the door (at the time the SWAT team arrived before the search) belonged to him and that appellant had constructive possession of the gun. Tr. 61, l. 24 – p. 62, l. 5; Tr. 62, l. 4. Note that multiple people were receiving mail at that residence. Tr. 60, lines 1-3. The defense argued the arrest and the gun confiscation were illegal and that the gun and drugs found on appellant should be suppressed. Tr. 64, l. 1-22.

A.) Reliability of the Confidential Informant

Nowhere in the affidavit did the issue of the reliability of the informant come into play. There was no mention in the search warrant of whether the informant had been used successfully

in the past and if arrests were made based on the use of the informant involved in this case. The fact that the informant made a controlled buy from appellant in this case was the extent of the magistrate's knowledge in the matter. There was no information given as to the reliability of the informant in this case or any basis to substantiate the informant's claim that appellant routinely carried a gun. The affidavit stated that appellant "regularly carri[e]d a firearm" sans any basis for this assertion.

As a rule, the reliability of an informant is a chief factor for the analysis in assessing the reliability of the affidavit/warrant. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (SC Ct. App. 2001). The Martin Court quoted Illinois v. Gates, 462 U.S.213 (1983), regarding the test to ascertain sufficient probable cause for a warrant's issue as being a totality of the circumstances test in judging whether the magistrate made a proper "practical, common sense decision [on] whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge" of persons supplying hearsay information," that probable cause existed. Under the totality of the circumstances test in these cases, all circumstances, including the basis of the knowledge and the veracity of the informant, are factors to be considered when determining whether probable cause is present to support a search warrant. State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (2003). In State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000), the Court held that a deficiency regarding reliability or veracity could be a problem under the totality of the circumstances test outlined above. For example, in Martin, the affidavit stated the reliability of the informant by explaining that the informant's past information given had been true and correct.

In State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (1994), the Court reiterated the totality of the circumstances test by repeating once again that the magistrate must consider "the veracity

of the person supplying the information and the basis of his or her knowledge,” in order to decide “whether [there can be] a substantial basis for concluding probable cause existed. In Adolphe, the Court held that the warrant was not supported by probable cause where the affidavit stated that “an individual, positively identified by a confidential informant, as having sold crack cocaine to the confidential informant within the last 48 hours” as the presentation to the magistrate because it was unclear as to which of the confidential informants made the drug buy and/or identified the defendant as the seller, and because there was no information regarding the informant’s reliability or whether or not his conclusions were corroborated. Compare also, State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (1995), where the Court held that the search warrant affidavit was insufficient to establish probable cause for a search of the defendant’s residence because the affidavit stated that an informant saw drugs being sold at the residence, but there was “absolutely no showing of the confidential informant’s reliability” Compare further State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990), where the Court struck down the affidavit used to issue the warrant for lack of probable cause where it was stated that the informant saw the drugs in the defendant’s home, but did not “set forth any information as to the reliability of the informant.” Finally, compare State v. Robinson, 415 S.C. 600, 785 S.E.2d 355 (2016), where the Court held that the search warrant affidavit did not contain probable cause in part because a third party rather than the informant made the drug purchase to support probable cause, but there was no information given regarding the reliability of the third party “whose credibility ha[d] not been established.” By way of summary, a warrant based on the confidential informant’s information must contain information supporting the credibility of the informant and the basis of his or her knowledge. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (2007). Here, in appellant’s

case, no information about the reliability and veracity of the confidential informant or the basis for the informant's assertions were made available to the magistrate.

B. Corroboration of Representations Made in the Affidavit

Apparently, the police substituted the videotape of the controlled drug buy in question for the veracity of the informant. As a result, the videotape was essentially the corroboration for the informant, and therefore, said videotape should have been produced for the affidavit challenge via the Franks hearing to attack the search warrant. The trial judge viewed the videotape and found it sufficient to support the affidavit and search warrant, but defense counsel had no opportunity to view the videotape and the magistrate did not view the videotape.

As a rule, corroboration is as important as reliability and veracity with respect to the analysis of an affidavit for the existence of probable cause. Thus, corroboration is a chief component also to examine when determining if probable cause exists in an affidavit. Note the holding in Johnson, where the warrant was struck down the underlying affidavit lacked probable cause because it contained insufficient information regarding the reliability of the informant, and furthermore, the Court also struck down the warrant because the information in that affidavit was not "corroborated." See also State v. Dunbar, 354 S.C. 479, 581 S.E.2d 840 (S.C. Ct. App. 2003), where the Court held that the affidavit issued based solely on the officers relay of information about the informant's buy without corroboration as to the facts surrounding the buy rendered the affidavit defective and the warrant illegal. The Dunbar case was vacated in part and remanded based on error preservation issues. See State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Note that South Carolina law has stricter requirements that are greater than the federal Fourteenth Amendment requirements. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) and State v. Jones, 342, S.C. 121, 536 S.E.2d 675 (2000). See also Article 1, §10 of the

South Carolina State Constitution and S.C. Code Ann § 17-13-140 (1985). Here, the only corroboration for the informant's buy was the videotape that neither defense counsel nor the magistrate issuing the warrant viewed.

C. Inclusion of False Statements in the Affidavit

The use of false or misleading information in an affidavit by police to secure a search warrant can invalidate a search warrant. In Franks v. Delaware, 438 U.S. 154 (1978), the Court outlined the following two-pronged test for challenging the veracity of a search warrant affidavit: 1.) proof establishing deliberate falsehoods or a reckless disregard for the truth found in the warrant affidavit, and 2.) whether the remainder of the affidavit supports probable cause despite proof of the falsehoods. See also State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (S.C. Ct. App. 2015). Instructions were given in State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000), regarding how to conduct a Franks hearing, and how the defendant may raise an insufficient probable cause claim based on false allegations in a warrant if: 1.) the defendant's attack is more than conclusory and supported by more than a mere desire to cross-examine, and 2.) the allegations of the deliberate falsehoods alleged are accompanied by proof of the falsehoods.

In the case at bar, the defense accused police officers of making false statements about appellant within respect to the allegation that appellant regularly carried a firearm and appellant's "criminal history has convictions for violence against the police," all in request for the issuance of the "no knock" search warrant against him. Prior to trial, the solicitor here admitted that there was a misstatement in the affidavit regarding his priors being violent, but offered no proof that appellant regularly carried a gun.

Compare the affidavit in State v. Gore supra, where the officer gave misleading information that a search warrant was needed for the defendant's residence on the basis that

cocaine was purchased at the residence when the last purchase within 72 hours of securing the affidavit when actually the recent sale occurred in a place other than that residence, and where the residential buy occurred seven months prior to the buy that transpired 72 hours before the warrant was obtained. The Gore Court did not strike down the affidavit /warrant only because there was sworn testimony supplementing and curing the deficiencies and clearing the way for the use of the second drug transaction to justify the issuance of the search warrant. Additionally, in State v. Missouri, 337, 548, 524 S.E.2d 394 (1999), the police officers' false statements in the affidavit rendered it insufficient and lacking in probable cause. In Missouri, the defendant and "hot sauce" were said "to be manufacturing crack cocaine inside [a known] apartment," but the Court found that this was false and misleading information because the informant was told that the drugs were not in the apartment and that the informant would receive a call when it was "right," and as a result, the affidavit lacked probable cause.

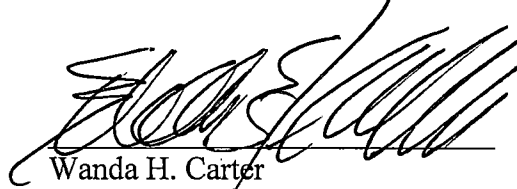
See again State v. Jones, supra, where the Court found no probable cause to issue the search warrant where the affidavit contained false and misleading information. In Jones, the magistrate believed the "agent" listed in the affidavit was a police officer who made the controlled buy (thus lending false credibility to the affidavit) and the magistrate was unaware that the "agent" was the informant. Had the magistrate known this, he would have required additional information about to informant. Moreover, a similar ruling was handed down in State v. Robinson, 415 S.C. 600, 785 S.E.2d 355 (2016), where the court held that the false statements contained in the search warrant affidavit "that a confidential informant purchased illegal drugs from the occupants of the home" rendered the affidavit defective when in fact it was a third party who purchased drugs from that house and the informant watched the third party go in and purchase drugs, which meant there was a reliability of the third party problem, and a false

statement problem, and a lack of corroboration problem as to what really went on during the third party's drug purchase; and thus no probable cause existed to support the affidavit and search warrant absent the falsehoods.

The case law in South Carolina regarding search warrant requirement can be found in State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003), where the Court held that on appeal on the legality of a search warrant, it must be decided on whether "the magistrate had a substantial basis for concluding that probable cause existed...based on the totality of the circumstances," and that in reviewing the validity of the warrant, the appellant may consider "only information brought to the magistrate's attention." The legality of the affidavit and search warrant were not established in this case. Clearly, the Fourth Amendment was violated in this case because there was a lack of probable cause to issue a search warrant for a gun at the residence where appellant was found inside as there was no testing of the reliability of the informant listed in the affidavit, who stated that appellant carried a gun, and no corroboration via the production of the videotape on proof of the informant's allegations, and no corroborative proof that the person handling the gun on the videotape was appellant or that the gun belonged to appellant, or that he routinely carried a gun, and finally, because neither the signing magistrate nor counsel had been privy to and afforded a viewing of the videotape from which the affidavit and search warrant were spawned, which prohibited the defense and from presenting a full defense guaranteed under the Sixth Amendment in order to present the Fourth Amendment violation attack of the affidavit and search warrant at the Franks hearings held prior to trial and at trial.

CONCLUSION

Based on the foregoing argument, counsel for appellant requests the reversal of appellant's convictions and sentences, and that his case be remanded to the lower court for a new trial.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 2017.

STATE OF SOUTH CAROLINA
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Honorable John C. Hayes, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DENNIS KENNEDY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Dennis Demario Obrian Kennedy, #348757, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 6th day of December, 2017.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of December, 2017.



(L.S)

Notary Public for South Carolina

My Commission Expires: 10/30/2022.