STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-002623

THE STATE,

Respondent,

v.

LUTHER BRIAN MARCUS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court correctly held Appellant failed to show warrant affidavit contained deliberately false statements.

STANDARD OF REVIEW

"On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error. Under the clear error standard, an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. Rather, the appellate court must determine whether, based on the evidence, it is left with the definite and firm conviction the trial court committed a mistake." State v. Vickery, 399 S.C. 507, 514, 732 S.E.2d 218, 221 (Ct. App. 2012) (citations omitted).

STATEMENT OF THE CASE

A Pickens County grand jury indicted Appellant for Indecent Exposure. Appellant proceeded to jury trial before the honorable Edward W. Miller on December 11-12, 2017. Appellant was convicted and sentenced to three years' incarceration. This appeal follows.

STATEMENT OF FACTS

Samuel Owen was an assistant principal at Pickens Middle School. Tr. 62. On December 13, 2016, Owen was supervising children playing outside during lunch. Tr. 63. A student approached him and told him there was a man masturbating outside the chain link fence. Tr. 64-65. Owen approached and confronted the man, prompting him to run to his truck and drive away. Tr. 65. Owen was able to view the man "eye to eye" and had an opportunity to look at him for a total of 45 seconds to one minute. Tr. 69. The man was driving a two-tone pickup truck that was blue on top and a lighter color on bottom. Tr. 66; 74. Owen believed the truck was a Ford, but was not sure. Tr. 66. He alerted the school resource officer, who reported the incident to Pickens city police. Tr. 65. Owen gave police a description of the man and his truck. Tr. 67. Police then put out a be-on-the-lookout-for (BOLO) advisory for the suspect. Tr. 82-83.

At the time, Art Taylor, a detective with the Pickens County Sheriff's Department, was investigating Appellant for eight burglaries that had occurred in the preceding weeks. Tr. 29-31. Taylor was familiar with Appellant and his truck. Tr. 95-96. As part of his burglary investigations, Taylor viewed photographs and videos captured by security cameras at the burglary locations. Tr. 38-43. Based on the security photos, his knowledge of Appellant's appearance and vehicle, and Appellant's history of committing similar crimes, Detective Taylor secured a search warrant and attached a GPS device to Appellant's truck in order to track his movements and hopefully catch him in the commission of a burglary. Tr. 96; 29-43. Coincidentally, on the day of this incident, Taylor followed Appellant to the Pickens County Courthouse to replace the batteries on the GPS tracker. Tr. 44-45. Taylor noticed that Appellant's truck stopped on Queens Court, where Pickens Middle School is located, before and after his trip to the county courthouse. Tr. 100-01. Taylor was able to observe Appellant driving

the truck and observe what he was wearing on the incident date. Appellant was wearing a striped sweater and stocking cap, just as described by Owen. Tr. 92; 65-66. The State produced security photos from the courthouse to corroborate Taylor's description. Tr. 90-91.

The following day, Detective Taylor heard radio communications related to the incident at Pickens Middle School. Taylor called Sam Byers, an investigator with Pickens city police, to find out more information. Tr. 101. After speaking with Byers and learning Owen's description of the suspect, Taylor checked the GPS records and confirmed that Appellant's truck was present on Queens Court at the time of the incident. Tr. 101. Taylor alerted Byers of his findings. Tr. 77-78. With this knowledge, Byers retrieved Appellant's picture from the DMV database and sent it to SLED to prepare a six-person photo lineup. Tr. 78. Police showed the lineup to Owen, and Owen identified Appellant. Tr. 84-85.

ARGUMENT

The trial court correctly held Appellant failed to show warrant affidavit contained deliberately false statements.

Appellant claims the warrant authorizing GPS monitoring on his truck was based on "unreliable information" and the trial court erred when it admitted the "evidence that derived therefrom." Brief of Appellant, 11; 13. Appellant does not argue the affidavit alleged facts insufficient to constitute probable cause. Rather, he disputes the truth of the affidavit's allegations. However, the trial court correctly ruled Appellant failed to prove that any of the representations in the affidavit were false, much less intentionally misleading. Furthermore, this issue is not preserved for review because Appellant stated he had no objection when the GPS records were offered into evidence. Appellant further alleges Samuel Owen's eyewitness identification of Appellant should have been excluded as "fruit of the poisonous tree" because "Officer Taylor would not have thought to contact Lieutenant Byers with Appellant's information" without the GPS data, meaning "Appellant would not have been placed in the photo-id lineup for Owen to identify him." Brief of Appellant, 13. However, Appellant failed to allege at trial that Owen's identification "derived from" the GPS device, and the trial court made no such ruling. Appellant also failed to object during Owen's trial testimony. Appellant has thus failed to preserve this issue for appellate review. If this Court finds the warrant invalid and the identification issue preserved, it should remand the case to the trial court for an evidentiary hearing so the trial court can conduct a "fruit of the poisonous tree" analysis. However, a remand is not necessary because Appellant failed to show a Franks violation and failed to raise the identification issue at trial. This Court should affirm.

Issue Preservation

Appellant may not challenge the introduction of the GPS records on appeal because he waived his pretrial objection to this evidence by not objecting when they were offered at trial. A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). When the State offered the GPS records into evidence, defense counsel stated "No objection." Tr. 98. The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996); see also State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding that defense counsel waived his objection when he specifically stated that he had no objection). This issue is not preserved for review.

Alleged False Statements

Upon a sufficient offer of proof, a defendant is entitled to a hearing where he may challenge the veracity of a warrant affidavit after the warrant has been issued. "In order to obtain relief, the defendant must prove the affiant knowingly and intentionally, or with reckless disregard for the truth, included false statements in the search-warrant affidavit. The burden is on the defendant to establish the falsity by a preponderance of the evidence." State v. Robinson, 415 S.C. 600, 606, 785 S.E.2d 355, 358 (2016). "'[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing' (emphasis in original). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct[....] But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the

affiant as true." Franks v. Delaware, 438 U.S. 154, 164–65 (1978), quoting United States v. Halsey, 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966). There is a presumption of validity with respect to the affidavit supporting the search warrant. Id., 438 U.S. at 171 (1978). "The burden of making the necessary showing is thus a heavy one to bear." United States v. Tate, 524 F.3d 449, 454 (4th Cir. 2008). Even if an affidavit contains a deliberately false statement, suppression of evidence obtained pursuant to the warrant is not required if the remainder of the affidavit contains "sufficient content [...] to support a finding of probable cause." Franks, 438 U.S. at 154.

Appellant challenges several of the representations made by Detective Taylor in his affidavit to obtain GPS tracking of Appellant's truck. First, Appellant claims Detective Taylor's description of the burglaries Appellant was suspected of committing were "mischaracterized as similar to" past burglaries. In his warrant affidavit, Detective Taylor summarized the facts of the eight burglaries. Defendant's Exhibit 10. Six of the eight burglaries involved Appellant gaining access to buildings by cutting through outside walls. The other two involved breaking through a window and a front door, respectively. Defendant's Exhibit 10. Photographic evidence showed the person who entered through the front door was the same person who entered through a wall at another location. Defendant's Exhibit 10, paragraph 13. In his warrant affidavit, Detective Taylor wrote that the burglaries "appear to follow the same modus operandi." Defendant's Exhibit 10, paragraph 14. Detective Taylor explained Appellant had been previously convicted for breaking into area convenience stores by employing a unique method of entry which consisted of breaking through cinder block walls. Defendant's Exhibit 10, paragraph 16. Detective Taylor further noted Appellant had been released from prison on September 30, 2016, and the burglaries in question occurred in October and November of 2016. Defendant's Exhibit

10, paragraph 15. The affidavit concluded that "it is reasonable to consider [Appellant] as a viable suspect." Defendant's Exhibit 10, paragraph 17.

There is nothing misleading about these statements. Appellant claims Taylor overstated the similarities between the burglaries, but the details of each burglary were laid out in detail and not misrepresented in any way. The trial judge correctly noted that the similarity of the burglaries was "a matter of subjective opinion." Tr. 52. Detective Taylor stood by his affidavit at trial, insisting that it was "reasonable to believe that he was a viable suspect." Tr. 34. Appellant has not only failed to show any of the information was false, he has failed to show bad faith or intent to deceive.

Moreover, Appellant misstates the record. He claims "Taylor stated in his affidavit that he believed the series of robberies were connected because the robberies happened at convenience stores and the burglars entered **all** the stores through the wall." Brief of Appellant, 6 (emphasis in original). Contrary to Appellant's claim, the affidavit does not state this at all. As noted above, the affidavit explicitly states that in two of the burglaries, the suspect entered through a door and a window. Defendant's Exhibit 10, paragraphs 11 and 12. Curiously, Appellant does not cite to the warrant affidavit to support his claims, or designate the affidavit for this Court's review. Appellant takes further liberties with the facts when he alleges that "other break-ins using a similar entry technique occurred while Appellant was still incarcerated." Brief of Appellant, 6. Though the testimony from this part of the transcript is admittedly confusing and apparently contradictory, Appellant omits Detective Taylor's testimony on lines 20-21 where trial counsel asks: "So no others through cinder block walls?" and Taylor responds "That's correct." Tr. 33.

Next, Appellant claims there were "differences in appearance" between Appellant's truck and the pickup truck photographed by a game camera at the scene of one of the burglaries. Brief of Appellant, 5. Appellant claimed at trial that a photograph showed the suspect's vehicle had a license plate attached to the tailgate instead of the normal placement on the bumper. Detective Taylor flatly disputed this claim, and testified that to him the "white square" appeared to be a reflection. Tr. 39. Regardless of the true nature of the "white square," Detective Taylor's testimony establishes he did not believe the square in question to be a license plate, and he still held that belief at trial. Tr. 39. Detective Taylor was asked: "And it would be your testimony, or more importantly what you presented to the judge for this affidavit, that these are these same vehicle?" He responded: "That's correct." Tr. 40. This shows Detective Taylor's affidavit was based on his sincerely held belief. Appellant has again failed to show the affidavit was inaccurate or that Detective Taylor intentionally misled the magistrate. Again, Appellant did not designate any of the pictures for this Court's review.

Finally, Appellant complains about Taylor's statement that images of the suspect taken from surveillance videos at two of the locations bore a "striking resemblance" to Appellant. Brief of Appellant, 5. Appellant claims that "all of the pictures or videos of the suspect had the suspect wearing a mask." Brief of Appellant, 5; 7. Again, Appellant has misstated the record. Detective Taylor testified there were videos of the suspect where he was not wearing a mask. Tr. 41. Taylor made the same representation in the affidavit. Defendant's Exhibit 10, paragraph 18. Appellant nonetheless complains that "No explanation was given for why the photographs that allegedly showed the suspect's face were not presented at trial." Brief of Appellant, 7. They were likely not produced by the State because they had nothing to do with the Indecent Exposure charge for which Appellant was on trial. It was Appellant's burden to show a false affidavit, not

the State's. State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). Defense counsel could have subpoenaed these photos or requested them in his Rule 5 motion, but apparently did not do so, or simply neglected to bring them to trial. The absence of the pictures at the trial for Indecent Exposure does not prove the affidavit related to the burglaries was defective. Rather, it shows that Appellant failed to make an offer of proof as required by Franks.

Simply put, it was Appellant's burden to prove Detective Taylor made deliberately false statements in his warrant affidavit. The trial court ruled he failed to do so. He now attempts to re-litigate the trial court's findings of fact at the Appellate level. However, this Court is bound by the trial court's factual findings if there is any evidence to support them. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015). Appellant has not designated any exhibits for this Court's review— not even the affidavit itself— nor has he cited any portion of the trial transcript proving any portion of the affidavit was inaccurate. He has not come close to showing the clear error necessary for this Court to reverse the trial court's ruling. Id. This Court should affirm.

Harmless Error

Even if this Court concludes the issue is preserved and the GPS data should not have been admitted, Appellant's conviction should still be upheld because Appellant would have been convicted even without it. Appellant's guilt was proven beyond a reasonable doubt by Samuel Owen's identification alone. Owen was able to view him "eye to eye" and had an opportunity to look at him for a total of 45 seconds to a minute. Tr. 69. Owen stated he was "100% sure" Appellant was the suspect. Tr. 69. Owen was able to correctly describe Appellant's distinctive two-tone pickup truck and the clothes he wore. The GPS data showing Appellant's truck (not necessarily Appellant) was present on the same street as the middle school at the time of the crime is comparatively unimportant. Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d

785, 795 (Ct. App. 2003). Even if the trial court erred by admitting the GPS data, it was harmless.

Suppression of Eyewitness Identification

Appellant's challenge to the introduction of Samuel Owen's identification is not preserved for review. At trial, Appellant moved to suppress "any and all evidence or testimony related to— or derived from may be more appropriate— a GPS device that was attached to a vehicle that was driven at times by the defendant[.]" Tr. 28. Appellant did not specify which pieces of evidence he claimed "derived from" the GPS device. The most reasonable interpretation of "evidence derived from a GPS device" is the GPS data itself, and this is presumably how the trial judge understood Appellant's argument. Appellant goes much farther in his argument on appeal, arguing that even Samuel Owen's identification of Appellant should have been suppressed because "Officer Taylor would not have thought to contact Lieutenant Byers with Appellant's information" without the GPS data, and "Appellant would not have been placed in the photo-id lineup for Owen to identify him.". Brief of Appellant, 13. This argument is not preserved because it was not raised to and ruled upon by the trial judge. The suppression of Owen's identification is a completely separate issue from the suppression of the GPS data itself.

An issue must be raised to and ruled upon by the circuit court in order to be considered on appeal. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002). Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful appellate review. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). Appellant has the burden of presenting an adequate record that is sufficiently

complete so that the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011). Because Appellant did not allege at trial that Owen's identification "derived from" the GPS device, this issue was not ruled upon by the trial court and is not preserved for review.

Furthermore, Appellant waived any challenges to this evidence by not objecting during Owen's testimony. Appellant did not object to Owen's in-court identification of Appellant. Tr. 70. When Owen testified regarding the out-of-court lineup identification, defense counsel stated only "Subject to prior objection." Tr. 67. Trial counsel was presumably referring to his pretrial objection to the six-photo lineup on the basis of police suggestiveness. Tr. 57. Notably, trial counsel referred to his prior objection, not objections. The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Accordingly, Appellant's argument regarding Owen's identification is not preserved.

Remedy

Assuming for the sake of argument that the warrant was invalid and that Appellant preserved his challenge to the identification testimony, this Court should remand for further proceedings rather than reverse the conviction. Because the trial court did not conduct a "fruit of the poisonous tree" analysis, this Court does not have an adequate record from which to assess this claim. Remand would allow the trial court to conduct an evidentiary hearing to determine whether Owen's identification was procured by an exploitation of the GPS device.

Appellant embarks on an ambitious effort to show Owen would not have had the opportunity to identify him but for the State's use of the GPS data. He claims "Without the GPS

tracking evidence, Officer Taylor would not have thought to contact Lieutenant Byers with Appellant's information. Therefore [...] Appellant would not have been placed in the photo-id lineup for Owen to identify him." Brief of Appellant, 13. Appellant's claims rest entirely on speculation. It is equally possible that Detective Taylor connected Appellant to the crime based solely on the description of the suspect and his truck. Taylor was conducting an intensive investigation of Appellant involving the extraordinary step of tracking Appellant's movements in order to catch him in the act of committing a burglary. Given these circumstances, Detective Taylor likely would have made the connection between Owen's description and Appellant even without the knowledge that Appellant was present on the same street as the middle school the day before. The GPS data was, at best, a supplement to Detective Taylor's preexisting knowledge of Appellant. Accordingly, the record supports a finding that Owen's identification of Appellant was not the result of an "exploitation" of the GPS data.

The "fruit of the poisonous tree" doctrine provides that evidence may be excluded if it is the product of unconstitutional police conduct. See Wong Sun v. United States, 371 U.S. 471 (1963). But more is required than simple but-for causation. As explained in Wong Sun:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Id., 371 U.S. at 487–88 (internal citation omitted). Furthermore, even if evidence is determined to be "fruit" of official misconduct, its admission may still be justified under three recognized exceptions— the "independent source," "inevitable discovery," and "attenuation" doctrines. See Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016). Any three of these exceptions may be applicable in this case, depending on whether and to what extent Detective Taylor relied on his knowledge

of Appellant's whereabouts on the day before the incident. Because of his ruling that no Franks violation occurred, the trial court did not reach the issue.

There is a further distinction to be made between the out-of-court and in-court identifications. In United States v. Crews, 445 U.S. 463 (1980), the United States Supreme Court found a victim's in-court identification was not subject to the exclusionary rule even though an out-of-court identification was conceded as inadmissible. Id. at 472. This was so because the victim's observation of and resulting ability to identify the defendant predated any government involvement in the case. Even though a subsequent investigation was aided by an impermissible detention of the defendant, the constitutional violation had no causal relationship to the victim's ability to identify him in court. In Crews, as here, the witness "constructed a mental image" of the perpetrator that was not infected by the government's actions. Id. at 472. In Crews, as here, the police knew the perpetrator's identity before the alleged constitutional violation and had already obtained the victim's description of his appearance. "The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality." Id. at. 463. This Court cannot conduct a full constitutional or harmless error analysis without more information regarding the reliability of Owen's in-court identification.[1]

[1] The Crews trial court explicitly found the out-of-court identification did not taint the in-court identification. See United States v. Wade, 388 U.S. 218, 229 (1967) (noting "once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on"). Notably, the Wade court held it would be unfair to reverse the conviction "without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." Id. at 240.

The trial court did not have an opportunity to consider whether Owen's identification was "come at by an exploitation" of the GPS data. Nor did the court consider whether any of the exceptions to the exclusionary rule applied, or whether the out-of-court identification procedure tainted Owen's ability to identify Appellant in court. Rather than engage in speculation, Respondent recognizes that an appellate court is not an appropriate venue to explore these fact-intensive questions. Simmons v. State, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016) (explaining "making findings of fact de novo would be contrary to this appellate setting"); In re Treatment & Care of Luckabaugh, 351 S.C. 122, 131–34, 568 S.E.2d 338, 342–44 (2002) (refusing to engage in speculation when record is incomplete); Cook v. Cook, 280 S.C. 91, 93, 311 S.E.2d 90, 91 (Ct. App. 1984) (holding remand for an evidentiary hearing is appropriate when the record is insufficient to permit review). Instead, if the Court determines the trial court erred in denying Appellant's pretrial motion to suppress evidence "derived from the GPS device," and that Appellant preserved his challenge to the admission of Owen's identification, the case should be remanded for an evidentiary hearing. The hearing would allow the trial court to make findings as to whether Owen's identification was arrived at by an exploitation of the GPS data, whether an exception to the exclusionary rule applies, and whether the out-of-court identification procedure tainted Owen's in-court identification. See, e.g. State v. Sampson, 317 S.C. 423, 426, 454 S.E.2d 721, 723 (Ct. App. 1995) (remanding for evidentiary hearing where Franks issue was not litigated at trial); State v. Johnson, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990) (remanding to trail court for probable cause hearing); State v. Jenkins, 398 S.C. 215, 230, 727 S.E.2d 761, 769 (Ct. App. 2012) (remanding to trial court for evidentiary hearing as to whether inevitable discovery exception applied because that determination "should not be made

by this court on a blank record"), rev'd, 412 S.C. 643, 773 S.E.2d 906 (2015) (conviction reinstated because error was harmless).

Of course, Respondent does not believe a remand is necessary. Appellant has failed to show a Franks violation. Suppression of Owen's identification is not preserved for review because it was not raised with specificity to the trial court. Finally, Appellant waived his objection to the GPS data and Owen's identification because he did not object when this evidence was offered at trial. Accordingly, this Court should affirm.

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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ATTORNEYS FOR RESPONDENT

November 9, 2018

STATE OF SOUTH CAROLINA
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APPEAL FROM PICKENS COUNTY
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Appellate Case No. 2017-002623

THE STATE, Respondent,

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LUTHER BRIAN MARCUS, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by delivering two copies of the same, addressed to Victor R. Seeger, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 9th day of November, 2018.

Anne Mueller

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ALAN WILSON
ATTORNEY GENERAL

November 9, 2018

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RE: State v. Luther Brian Marcus
Appellate Case No. **2017-002623**

Dear Mr. Seeger:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

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