THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2019-001063
Trial Court Case No. 2016-CP-40-06960

Dennis J. Powell, Jr. Respondent,

v.

Mark Keel, Chief, State Law Enforcement Division, and the State of South Carolina Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF THE FACTS

Respondent improperly claims that the Richland County Sheriff's Office falsely lists victim information for the Respondent's Criminal Solicitation of a Minor Conviction. Not only is this factually incorrect, but also the Richland County Sheriff's Department is not a party to this litigation and Respondent has not properly challenged any conduct of the Richland County Sheriff's Department. As such, Respondent's claims in this regard are spurious. Moreover, Respondent was in fact indicted for Criminal Solicitation of a Minor, to wit: a person Respondent believed to be a 12 year old girl, on December 1, 2008. Respondent's indictment reads:

> That Dennis Powell, Jr., on or about November 12, 2007 to February 15, 2008, did willfully and knowingly commit the crime of criminal solicitation of a minor. To wit: Dennis Powell, Jr. a person eighteen years of age or older, did knowingly through the Internet contact and communicate with a person located within the County of Lexington, State of South Carolina, whom he reasonably believed to be a twelve year-old girl, for the purpose of or with the intent of persuading, inducing, enticing, or coercing this person to engage or participate in a sexual activity as defined in Section 16-15-375(5). This is in direct violation of Section 16-15-342 of the South Carolina Code of Laws (1976), as amended.
>
> Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

See Indictment (R. pp. 182-83). Respondent pled guilty to this indictment straight up, which constitutes an admission of his conduct under oath. *See* Sentencing Sheet. (R. p. 184).[1] As such, the fact is that the Respondent criminally solicited a person he believed to be a twelve year-old girl and Respondent cannot factually allege otherwise in this action. Accordingly, this claim has absolutely no merit.

[1] It is noteworthy that the age listed in the indictment is "twelve year-old girl"; however, the trial court erroneously found that Respondent's SORA listing "falsely" includes the age of 12 for the victim in deciding this matter. *See* Order p. 4. (R. p. 6).

ARGUMENT

The trial court committed reversible error in disregarding clear and unambiguous South Carolina law and binding South Carolina jurisprudence in this matter, and Respondent's arguments do not change such. To that end, Appellants would note the following:

I. Statutory Compliance

Respondent's arguments torture not only the plain language of South Carolina's Sex Offender Registry Act (SORA) but also appear to disregard the clear intent of SORA. It is settled law that "the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal." Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003). And it is settled law that SORA "reasonably protects South Carolinians **because the registry notifies them of Appellant's sex offense**." *Id.* (emphasis added). As such, public access to SORA information is the very purpose of SORA and Respondent's arguments seeking to limit the public's access to Respondent's SORA information must fail.

Moreover, the Respondent's argument that S.C. Code Ann. § 23-3-490 does not authorize SLED to make SORA information available to the public on the internet is manifestly absurd. This statute specifically mandates that SLED provide requestors with specific information, to wit: "SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction." S.C. Code Ann. § 23-3-490(B). Moreover, this statute goes

on to state, "[f]or purposes of this section, use of computerized or electronic transmission of data or other electronic or similar means is permitted." S.C. Code Ann. § 23-3-490(E). Respondent's argument that the language **computerized or electronic transmission of data or other electronic or similar means** does not authorize SLED to make SORA information available via internet access on computers is simply without merit and must be rejected. *See* Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) ("we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute.").

In addition, beyond the plain language of the statute, the South Carolina Supreme Court has specifically directed SLED to list certain items under specific headings on SLED's internet publication of SORA. In Hendrix v. Taylor, in 2003, the Supreme Court specifically directed that

> under the "Offense" heading on the registry, SLED should provide (1) the state where the offense was committed; (2) the citation of that state's statute that was violated; (3) the name of the crime committed; and (4) the date of conviction. For example, in this case, Appellant's offense would appear under the "Offense" heading as follows:
>
> Colorado
> § 18-3-404: Third Degree Sexual Assault
> 2000-03-08

Hendrix v. Taylor, 353 S.C. 542, 551–52, 579 S.E.2d 320, 325 (2003). This decision eviscerates Respondent's argument that courts in South Carolina were unaware of SLED's internet publication of SORA. It is also notable because the remedy for SLED's admittedly incorrect listing on offense information on SORA via the internet was not removal of the

individual from SORA, but rather a simple directive that SLED list the correct information on the internet.

As such, even assuming that SLED was in fact acting *ultra vires* and was providing the public with **too much information** in **too convenient a manner** (which is not *ultra vires*), the remedy for such would never be removal of the Respondent from the SORA registry. There is no authority for removal in this manner and this would actually be in direct contravention of the plain language of SORA's removal provisions – S.C. Code Ann. § 23-3-430(E), (F), and (G). The South Carolina Supreme Court has held that a "court's equitable powers must yield in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). As such, even a finding that SLED were acting *ultra vires* (which SLED is not) could in no way justify any trial court re-writing SORA's clear and ambiguous removal provisions.

In addition and also contrary to Respondent's assertions, every South Carolina appellate decision upholding the constitutionality of SORA, all of which remain binding precedent, were decided after SLED's online publication of SORA registry information on the internet in 1999. *See* Temple Affidavit (R. p. 245); State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003); Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (reaffirming the constitutionality

of SORA, even as related to online publication of juvenile Registry information, and reaffirming unequivocally that SORA is not punishment). In 2017, the Supreme Court conclusively resolved this issue in the case of *In the Interest of Justin B.* noting,

> Justin B.'s age and the resulting **public registration** does not change our constitutional analysis. The Supreme Court held that an adult does not have a constitutionally protected liberty interest in his reputation. *See* Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 420 (1976) (stating an "interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). A delinquent juvenile's reputation may be in greater need of protection than the reputation of an adult convicted of a felony sex crime, but the juvenile's interest in that reputation is still neither liberty nor property. The responsibility of balancing the need to protect a juvenile's reputation against the need to "to promote the state's fundamental right to provide for the ... safety of its citizens," § 23-3-400, falls to the Legislature, not the courts, S.C. Const. art. I, § 8.

In Interest of Justin B., 419 S.C. 575, 586, 799 S.E.2d 675, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added). Accordingly, the trial court's decision, which disregards South Carolina's clear law and binding jurisprudence, must be reversed.

II. Equitable Relief

Binding South Carolina jurisprudence provides that a declaratory judgment action challenging sex offender registration is a question of law – not equity. *See* Lozada v. S.C. Law Enf't Div., 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011). As such, the trial court's reliance on equitable relief is a clear error of law mandating reversal. *Id. see also* Johnson v. Lloyd, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Ct. App.2012) *reversed on other grounds by* Johnson v. Lloyd, 407 S.C. 610, 611, 757 S.E.2d 705, 706 (2014).

The South Carolina Supreme Court has held in binding jurisprudence that a "court's equitable powers **must yield** in the face of an unambiguously worded statute." Santee

Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (emphasis added); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) (finding error in fashioning an equitable remedy in the face of an unambiguously worded statute setting forth certain remedies). To that end, the South Carolina Legislature has made the sovereign policy decision that SORA registration in South Carolina is "for life". *See* S.C. Code Ann. § 23-3-460. This clear and unambiguous language forecloses any reliance on equity and the trial court's ruling to the contrary must be reversed. *See* Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007); Johnson v. Lloyd, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Ct. App.2012) (finding that "[c]ourts may not ignore statutes, precedent, or other binding authority while providing an equitable remedy.") *reversed on other grounds by* Johnson v. Lloyd, 407 S.C. 610, 611, 757 S.E.2d 705, 706 (2014).

In *Johnson*, this Court considered an identical challenge and found that "[t]he General Assembly enacted an unambiguously worded statute that sets forth the legal remedies available to an individual on the registry. Because the sex offender statute provides an adequate remedy for Johnson [identical to the remedies available to Respondent in this case], it was error for the circuit court to fashion an equitable remedy in this case." *Id.* at 476-77. This jurisprudence remains binding precedent that conclusively mandates reversal of the trial court's improper exercise of equitable jurisdiction.

III. Equal Protection

Respondent's equal protection argument disregards the binding precedent set forth by the South Carolina Supreme Court in both *Hendrix v. Taylor* and *In Interest of Justin B.* and accordingly must fail. Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003); In the Interest of Justin B., 419 S.C. 575, 586, 799 S.E.2d 675, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). In fact, the South Carolina Supreme Court conclusively resolve this issue by finding

> In *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003), we [the South Carolana Supreme Court] considered whether requiring a convicted Colorado sex offender to register in South Carolina violated the equal protection and due process clauses of the state and federal constitutions. 353 S.C. at 547, 579 S.E.2d at 322. As to the equal protection challenge, we found classifying an out-of-state sex offender as a sex offender in South Carolina "did not affect a fundamental right," and therefore we applied the "rational relationship" test. 353 S.C. at 550, 579 S.E.2d at 324. Under that test, a statutory classification will be constitutional if the "classification bears a reasonable relation to the legislative purpose," "the members of the class are treated alike under similar circumstances and conditions," and "the classification rests on some reasonable basis." *Id.* (quoting *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001)). We held requiring an out of state offender to register in South Carolina was "reasonably related to the legitimate state purpose of protecting the public and aiding law enforcement in limiting the risk that sex offenders pose to communities." *Id.* As to the due process challenge, we followed our holding in *Walls* that the sex offender registry is non-punitive and did not implicate a liberty interest, and therefore held there was no due process violation. 353 S.C. at 552, 579 S.E.2d at 325 (citing *Walls,* 348 S.C. at 31, 558 S.E.2d at 526).

In the Interest of Justin B., 419 S.C. 575, 586, 799 S.E.2d 675, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). This binding precedent was similarly disregarded by the trial court. Accordingly, the trial court must be reversed and Respondent's arguments must be rejected.

Moreover, Respondent's entire equal protection argument is fundamentally flawed in that it seeks arbitrary and disparate treatment for the Respondent. Respondent

specifically claims that he should not be "lumped together" with all other South Carolina registrants and that he is entitled to special treatment contrary to South Carolina law. This assertion is simply incorrect and absolutely cannot form the basis of a successful equal protection challenge. *See* State v. Walker, 422 S.C. 89, 92, 810 S.E.2d 38, 40 (2018). ("The initial inquiry in [this as with] any equal protection analysis is whether the plaintiff made 'a showing that similarly situated persons received disparate treatment.'"). The fact that the trial court and Respondent believe that the South Carolina Legislature SHOULD treat certain offenders differently that others is simply of no consequence to this action and cannot justify disregarding binding precedent. *See* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) (indicating that it is beyond a Court's power to change a statute or second guess the wisdom or folly of the Legislature); S.C. Const. art. I, § 8 (mandating separation of powers between the Legislature and the Courts). As such, the Respondent's equal protection claim fails as a matter of law and the trial court's decision that Respondent arbitrarily deserves special treatment separate from that of all other offenders in South Carolina must be reversed in its entirety.

IV. Due Process

The binding precedent of this state, which is largely disregarded by Respondent, forecloses any due process challenge in this action. As far back as 2003, the South Carolina Supreme Court found that "the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest. As such, Appellant has not shown a due process violation." Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003). This case remains binding precedent. Moreover, the Supreme Court has also gone so far as to hold that lifetime registration for

an 11-year-old did not implicate a liberty interest to substantiate a due process challenge in South Carolina. *See* In re Ronnie A., 355 S.C. 407, 409–10, 585 S.E.2d 311, 312 (2003). And most recently, the South Carolina Supreme Court yet again rejected this argument in *In Interest of Justin B.* from 2017. 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017).

Accordingly, contrary to Respondent's assertions, there is no viable due process claim based on the lack of individual judicial review of an individual's lifetime registration requirement. In fact, the Supreme Court in the *Dykes* case relied on by Respondent specifically rejects this very argument. *See* State v. Dykes, 403 S.C. 499, 510 n. 9, 744 S.E.2d 505, 511 n. 9 (rejecting Dykes' procedural due process claim under Rule 220, SCACR). Moreover, the statutory arbitrariness found by the *Dykes* Court was based upon one line in a statute that in treated certain offenders differently than others. State v. Dykes, 403 S.C. 499, 509–10, 744 S.E.2d 505, 510–11 (2013)("The only provision invalidated by today's decision is the portion of section 23–3–540(H) that prohibits only those convicted of CSC–First and lewd act on a minor from petitioning for judicial relief from the satellite monitoring."). This concern is not present in this case as SORA's lifetime registration requirement applies equally to all registrants. In fact, the trial court's order arbitrarily treats Respondent differently than all other similarly situated offenders and is thus constitutionally suspect pursuant to rationale set forth by the Supreme Court in State v. Dykes, 403 S.C. 499, 509–10, 744 S.E.2d 505, 510–11 (2013). Accordingly, Respondent's due process claim fails as a matter of law and the trial court's decision to arbitrarily treat Respondent differently than all other registrants in South Carolina must be reversed.

V. Punishment

Subsequent to SLED's publication of SORA information on the internet, South Carolina courts uniformly and conclusively held that registration pursuant to SORA is **not** punishment. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding that "the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest."); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."); Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008)(finding registration as a sex offender is not a punishment, but rather is a regulatory requirement imposed to promote public safety); Thompson v. State, 415 S.C. 560, 564 n. 3, 785 S.E.2d 189, 191 n. 3 (2016) ("As we have repeatedly stated, the sex offender registry is a civil requirement separate and apart from the criminal punishments associated with sexual offenses in this state."); In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). Simply put, Respondent's argument that each of the above decisions should be disregarded must fail. The registry that existed in 2017 that the South Carolina Supreme Court found was not punitive as applied to a juvenile registrant is the same registry that applies to Respondent. Accordingly, there was simply no legal basis for the trial court to disregard decades of binding precedent in finding SORA punitive. Therefore the trial court's decision must be reversed.

VI. *Ex Post Facto*

Respondent's argument that the "evolving practice" of internet publication of SORA information renders SORA an *ex post facto* violation is factually incorrect and legally flawed. SLED first published SORA information on the internet in 1999. *See* Temple Affidavit. (R. p. 245). As such, at the time Respondent pled guilty to Criminal Solicitation of a Minor in which Respondent admitted that he "did knowingly through the Internet contact and communicate with a person... whom he reasonably believed to be a twelve year-old girl, for the purpose of or with the intent of persuading, inducing, enticing, or coercing this person to engage or participate in a sexual activity" and was required by South Carolina law to register on the SORA registry, SLED published SORA information on the internet. As such, there is no factual *ex post facto* argument.

In addition, this is yet another argument that completely disregards binding South Carolina precedent that is determinative in this matter. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) ("We [the South Carolina Supreme Court] find the [Sex Offender Registration] Act is not so punitive in purpose or effect as to constitute a criminal penalty. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions."); *see also* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003); In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). Accordingly, Respondent's arguments fail as a matter of law and the trial court's decision that is contrary to binding South Carolina jurisprudence must be reversed.

VII. Legal Avenues of Removal from SORA

The South Carolina Legislature has mandated that SORA registration in South Carolina is for life. *See* S.C. Code Ann. § 23-3-460 (mandating registration "for life"). This lifetime mandate is set forth in clear, unequivocal, and unambiguous statutory language and represents the clear policy of South Carolina's lawmakers. As such, the trial court must be reversed. *See* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.") (internal citations omitted). Further, South Carolina jurisprudence on this issue is clear, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261, 262 (1998) (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)).

SORA, and more specifically S.C. Code Ann. § 23-3-430(E), (F), (G), provides the only lawful mechanisms and avenues by which an individual can be removed from the SORA registry. However, Respondent does not even endeavor to argue that he meets any of these statutory criteria and, in fact, he concedes that he does not. *See* Respondent's Brief. Accordingly, there is no legal or constitutional basis for the Respondent to be removed from the SORA registry and the Appellants were entitled to judgment as a matter of law. As was conclusively held in *Justin B.*,

> **If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts.** The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is **AFFIRMED**.

In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). As such, the Respondent brought his arguments to the wrong forum as only the South Carolina Legislature can re-write the clear and unequivocal laws applicable to this case. Accordingly, the trial court's decision to the contrary must be reversed in its entirety.

VIII. Binding Precedent

Respondent also misapprehends the argument on binding precedent and the separation of powers. It is axiomatic that the function of the judicial branch is to resolve constitutional issues. However, it is similarly axiomatic that when the South Carolina Supreme Court has resolved a constitutional question, as is the case with every issue in this action, all lower courts must follow this binding precedent. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (recognizing decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. Accordingly, the trial court's disregard of binding precedent is in fact reversible error that must be reversed.

Similarly, it was reversible error for the lower court to act as a "superlegislature" and to re-write a clear, unambiguous, and constitutional statute to add an avenue of removal from SORA that does not exist. Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007). This conduct clearly offends the separation of powers mandated by the South Carolina Constitution and mandates reversal. S.C. Const. art. I, § 8.

CONCLUSION

In conclusion, based on the foregoing, the clear and unambiguous sovereign laws of the State of South Carolina applicable to this matter, and the binding jurisprudence applicable to this matter; Appellants respectfully request that this Court REVERSE the trial court's decision in its entirety and grant Appellants' judgment as a matter of law.

Respectfully Submitted,

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RULE 211(b) CERTIFICATION

I hereby certify that the Final Brief of Appellants and the Final Reply Brief of Appellants comply with Rule 211(b), SCACR and the August 13, 2007 Supreme Court Order regarding personal identifiers.

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