STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
R. Markley Dennis, Jr. Circuit Court Judge

Appellate Case No.: 2018-000504

THE STATE,

RESPONDENT,

V.

DARELL ONEIL BOSTON,

APPELLANT.

FINAL BRIEF OF APPELLANT

David N. Lyon (S.C. Bar # 100676)
Duff & Childs, LLC
P. O. Box 1486
Columbia, South Carolina 29202
(803) 790-0603

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by denying Appellant's motion to suppress evidence seized after law enforcement conducted a "knock and talk" without reasonable suspicion of illegal activity in violation of Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution and *State v. Counts*, 413, S.C. 153, 776 S.E.2d 59 (2015)?

STATEMENT OF THE CASE

Appellant Boston was indicted for manufacturing crack cocaine, possession with the intent to distribute crack cocaine, and possession with the intent to distribute a controlled substance within proximity of a school. Indictments. On February 7, 2018, a jury found Boston guilty of manufacturing crack cocaine. (R. p. 481). The Honorable R. Dennis Markley, Jr. sentenced Boston to a term of 17 years. (R. p. 500). On March 15, 2018, Judge Markley denied Boston's motion for a new trial.

STATEMENT OF FACTS

Appellant and his co-defendant moved pretrial to suppress evidence seized in violation of his Fourth Amendment rights, and his right to privacy under Article I, Section 10, of the South Carolina Constitution, after the police conducted a knock and talk without reasonable suspicion. The court held a hearing on the motion on November 30, 2017.

At the hearing, Officer Joseph Sherwood from the North Charleston City Police Department ("NCCPD") testified that on March 6, 2015, at around 5:25 p.m., he was dispatched to a service call in the Chicora Cherokee community. (R. p. 10, ln. 6-7; p. 11, ln. 17-22; p. 14, ln. 14-16). He did not remember the specific reason he had been dispatched to the area, but he admitted the reason was completely unrelated to Appellant Boston or the apartment where Officer Sherwood eventually conducted the knock and talk. (R. p. 14, ln. 14-16; p. 51, ln. 20 – p. 52, ln. 2).

According to Officer Sherwood, the Chicora Cherokee community was a "hot spot for narcotics activity" and he mentioned several previous complaints of drug activity and illegal trespassing in the area. (R. p.13, ln. 4-9). Officer Sherwood also testified that some of the apartments in that area were single occupancy housing for people with mental impairments who needed assistance and could "easily [be] taken advantage of." (R. p.13, ln. 12-17).

Officer Sherwood, along with two other NCCPD officers stayed in the area after their service call, "just keeping a presence." (R. p. 14, ln. 2-20). While doing so, they saw two men exit a taxi cab and walk into the apartment where Officer Sherwood knew Denise Holman lived. (R. p.14, ln. 21 - p. 15, ln. 3). Officer Sherwood testified that he recognized the two men, Appellant Boston and his co-defendant Holmes, from several previous "run-ins with them." (R. p.15, ln. 12-17). The only specific detail Sherwood offered regarding his prior "run-ins," was recalling that he had seen Boston and Holmes at a house on Osceola Street, where the NCCPD had conducted several drug searches. (R. p.16, ln. 1-8). Sherwood admitted he did not know whether Boston and Holmes lived at that house, only that he had seen them there. (R. p.16, ln. 3-4).

Officer Sherwood also testified he knew Denise Holman and was familiar with her "mental status." (R. p. 15, ln. 1-11). He indicated that he had stopped her once and had a "couple of little run-ins with her" on narcotics related issues, but "nothing too serious." (R. p. 15, ln. 9-11; p. 50, ln. 21). Officer Sherwood referred to Ms. Holman as "mentally handicapped," though he used that term "loosely." (R. p. 48, ln 19-25). He stated that due to her mental condition, she may not have fully understood what was occurring on that day. (R. p. 50, ln. 7-11).

Officer Sherwood testified he knew Boston and Holmes did not live with Ms. Holman. (R. p. 15, ln. 5-6). He explained that he "found it odd just because of where he knew them from" and "kind of weird" that the two men would go inside Ms. Holman's apartment. (R. p. 15, ln. 1-11).

Officer Sherwood testified that after the men had been in the house for about 15 minutes, he decided to perform a knock and talk at Ms. Holman's apartment. (R. p. 15, ln. 23-24; p. 17, ln. 5-6). According to Sherwood, the purpose of conducting the knock and talk was to "make sure that, one, [Ms. Holman] is ok and two, see if there is any possibly any crime or if she had any information for us." (R p. 17, ln. 7-12).

Officer Sherwood testified that he knocked on the door, Holman opened the door, and she indicated he could come into the house. (R. p. 17, ln 22 – p. 18, ln. 1; p. 53, ln. 7). As Officer Sherwood came into the doorway, he testified he saw Appellant Boston and his co-defendant in the kitchen "huddled around the microwave," which was on. (R. p. 23, ln. 4-10). Despite being across the living room from the kitchen, Officer Sherwood testified that he saw two plastic baggies on the kitchen counter next to the microwave with white residue on them, which he immediately believed to be cocaine residue. (R. p. 23, ln. 10-14; p. 56, ln. 21– p. 57, ln. 3). And, though not mentioned in his initial incident report, Officer Sherwood also testified the two men appeared to be concealing something in their hands, based on how they had positioned their bodies toward him. (R. p. 34, ln. 10-25; p. 41, ln. 1-14). Officer Sherwood stated the two men then ran to the bathroom. (R. p. 28, ln. 18-20).

Officer Sherwood testified he ordered the men to come out of the bathroom, which they did, and he brought them into the living room. (R. p. 28, ln. 21 – p. 29, ln. 4). Another officer searched Mr. Holmes' person and found a scale and some cocaine. (R. p. 29, ln. 1-4). No contraband was found on Boston. (R. p. 359, ln. 5-20)

Officer Sherwood next performed a protective sweep of the kitchen and bathroom. (R. p. 29, ln. 5-8). In the bathroom he saw a Pyrex measuring cup containing what appeared to him to be crack cocaine with steam still coming off of the cup. (R. p. 29, ln. 9-12). Based on Sherwood's observations during the protective sweep, he secured a search warrant for the apartment. (R. p. 31, 11-15). Sherwood testified the evidence seized suggested crack had been cooking in the apartment when he came in. (R. p. 31, ln. 2-5). Boston and Holmes were arrested; Ms. Holman was not arrested. (R. p. 48, ln. 19-22).

On cross examination, Sherwood admitted his initial incident report did not mention that he observed the Defendants huddled around the microwave, nor did it mention that he saw the men hiding something in their hands. (R. p. 41, ln. 11 – p. 43, ln. 6). He also admitted there was no prior drug complaint or any other complaint about Holman's apartment. (R. p. 51, ln. 1-14). Sherwood further admitted that at the time he approached the door to conduct the knock and talk, he had seen nothing suggesting criminal activity. (R. p. 69, ln. 2-16).

Ms. Holman testified that she used to use crack cocaine. She also admitted she had had an aneurism and a stoke and that she had slight trouble remembering things. (R. p. 96, ln. 5-22). She stated that Boston and Holmes had permission to be at her house. (R. p. 97, ln. 24 – p. 98, ln. 6). She also stated that there was a curtain covering the doorway between the living room and the kitchen, which was not see through, though she could not recall the exact position of the curtain on that day. (R. p. 98, ln. 23 – p. 99, ln. 10; p. 101, ln. 5-8; p. 102, ln. 3-9).

Boston testified that he had known Denise Holman for about 15 years and that he had visited her on prior occasions and at prior addresses. (R. p. 104, ln. 14 – p. 105, ln. 5). His reason for going to Holman's apartment on the day of the incident was to upload music onto his phone. (R. p. 106, ln. 3-7). He denied he came to Holman's apartment to manufacture crack cocaine. (R. p. 106, ln. 11-13). He also stated he was never in the kitchen during the time he was at Holman's apartment, but was instead sitting on the couch when the police came in. (R. p. 113, ln. 2-25).

Defense counsel argued that the evidence collected in Ms. Holman's apartment was the result of an unconstitutional knock and talk, and that the evidence should be suppressed. Specifically, Defense counsel argued that Officer Sherwood did not have reasonable articulable suspicion of illegal activity and therefore, the knock and talk was improper under the South Carolina Constitution Article I, Section 10 and *State v. Counts*. (R. p. 139-140; p. 534). Defense

counsel noted that while Sherwood's incident report incorrectly stated that he approached Holman's apartment because of a "drug complaint," his testimony was that there was no such complaint and his reason for being in the neighborhood was unrelated to Boston, Holmes, or Holman. (R. p. 132, ln. 13-14; p. 535). Counsel further argued that Sherwood's claimed knowledge of Boston's criminal history or association with a "known drug house" was not sufficient to demonstrate reasonable suspicion of illegal activity justifying a knock and talk on Holman's apartment. (R. p. 536). Boston's counsel argued that unlike the situation in *Counts*, there was no complaint regarding Ms. Holman's apartment, no complaint regarding either defendant, and no indication that criminal activity was occurring in Ms. Holman's apartment. (R. p. 150-151). Defense counsel also argued that Boston had a reasonable expectation of privacy in Ms. Holman's apartment, but even if the judge found he did not, Boston had a heightened privacy protection under the South Carolina Constitution. (R. p. 128; p. 534).

In its January 10, 2018 Order, the trial court found that the knock and talk was proper and declined to suppress the evidence. Specifically, the trial court found that both Defendants had standing to challenge the admissibility of the evidence, and considering the totality of the circumstances, Officer Sherwood had reasonable suspicion to conduct a knock and talk at Ms. Holman's apartment. (R. p. 610). The trial court cited the following facts to support its finding that Officer Sherwood had reasonable suspicion: there were complaints of drug activity in Ms. Holman's apartment complex; Officer Sherwood was familiar with Defendants through prior interactions involving drug activity; and Officer Sherwood knew Ms. Holman as the sole occupant of the apartment and as a person with a history of drug use and a vulnerable mental state. (R. p. 609).

At trial, prior to opening arguments, Boston's counsel renewed the motion to suppress. (R. p. 167, ln. 16-18). The trial judge indicated that his written order included all of the reasons supporting his finding that Officer Sherwood had the requisite reasonable suspicion to perform the knock and talk. (R. p. 167, ln. 1-15).

During Officer Sherwood's testimony, the State introduced evidence collected at Holman's house including photos of the following: the microwave and counter area; a cocaine swab of the microwave; and a Pyrex cup with a white substance in it positioned beside a whisk on the lip of the bathroom tub. (R. pp. 208–220). Additional evidence introduced during Sherwood's testimony included the baggie that Sherwood saw on the kitchen counter, a digital scale, the Pyrex cup, the whisk, and baking soda, all of which Sherwood explained were involved in the manufacture of cocaine. (R. pp. 208–220). Defense counsel renewed her objection to each piece of evidence, and the evidence was admitted subject to counsel's continuing objections. (R. pp. 208–220). Testimony from the other officers at the scene revealed no contraband was found on Boston. (R. p. 359, ln. 5-20). The physical evidence was not checked for fingerprints or DNA. (R. p. 74, ln. 5-9; p. 250, ln. 23–p. 252, ln. 14).

The jury found Boston guilty of manufacturing crack cocaine. (R. p. 481). The court imposed a sentence of 17 years. (R. p. 500).

On February 14, 2018, Appellant filed a Motion for a New Trial with an accompanying memo, arguing that the court should have granted Boston's motion to suppress the drug evidence because NCCPD officers did not have reasonable suspicion to approach Holman's apartment and knock on the door as required by *State v. Counts* and the South Carolina Constitution. (R. pp. 611-620). Defense counsel further argued Officer Sherwood's testimony that he saw nothing suggesting that a crime was being committed at Holman's house during the 15 minutes prior to

the knock and talk demonstrated that he did not have reasonable suspicion. (R. pp. 616-618). Additionally, defense counsel argued that Officer Sherwood's knowledge of a suspects' past arrests or convictions was insufficient to constitute reasonable suspicion, citing *United States v. Foster*, 634 F.3d 243, 256 (4th Cir. 2011). (R. p. 617).

Judge Dennis denied the motion at a short hearing on March 15, 2018. (R. pp. 505-507)

ARGUMENT

1. **The court erred by denying Appellant's motion to suppress evidence seized after law enforcement conducted an impermissible "knock and talk" without reasonable suspicion of illegal activity in violation of Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution and *State v. Counts*, 413 S.C. 153, 776, S.E.2d 59 (2015).**

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." *State v. Forrester,* 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Const. art. I, § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Const. art. 1 § 10. contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." *Id.* at 644, 541, S.E.2d at 840-841 (emphasis in original). Accordingly, South Carolina courts have ruled that the state constitution's express right to privacy "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." *Id.* at 645, 541 S.E.2d at 841. Thus, "[b]y articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." *State v. Weaver,* 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing *Forrester,* 343 S.C. at 644-45, 541 S.E.2d at 841).

A knock and talk has been described as an investigative technique in which law enforcement, without a warrant, knock on a person's door and seek to speak to an occupant for the purpose of gathering evidence. *Florida. v. Jardines*, 569 U.S. 1, 21, 133 (2013). The procedure does not constitute a *per se* violation of the Fourth Amendment, and thus "an officer generally does not need probable cause or reasonable suspicion to justify knocking on the door and then making verbal inquiry." *Counts*, 413 S.C. at 165, 776 S.E.2d at 66 (quoting *United States v. Cephas,* 254 F.3d 488, 493 (4th Cir. 2001)).

However, in *Counts* our supreme court also considered the knock and talk technique under the "unreasonable invasion of privacy" provision of the South Carolina Constitution. *Id.* at 172, 776 S.E.2d at 70. The court concluded that our constitution requires that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." *Id.* The court's stated reason for requiring reasonable suspicion prior to conducting a knock and talk was rooted in a concern for "the potential for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with the hope of discovering contraband without a search warrant." *Id.*

The "reasonable suspicion" language from *Counts* evokes the standard enunciated by the United States Supreme Court in *Terry v. Ohio,* 392 U.S. 1, 30 (1968) where the Court held that in the absence of probable cause for arrest, a police officer may stop and briefly detain a person for investigative purposes, so long as the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot." Reasonable suspicion "requires a particularized and objective basis that would lead a person to suspect another of criminal activity." *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016) (citing *United States v. Cortez,* 449 U.S. 411, 418 (1981)). Accordingly, law enforcement officers "must have more than an 'inchoate and

unparticularized suspicion' or 'hunch.'" *United States v. Slocumb*, 804 F.3d 677, 682 (4th Cir. 2015) (quoting *Terry*, 392 U.S. at 27 (1968)).

"A court must look to the totality of the circumstances in determining whether the officer had a particularized and objective basis for suspecting criminal activity." *Foster*, 634 F.3d at 246. Nevertheless, it is appropriate for a reviewing court to separately evaluate all of the factors articulated by the state and considered by the trial court. *Id.*

Officer Sherwood's testimony precludes a finding that he had reasonable suspicion of illegal activity at Ms. Holman's residence. He admitted that he was not called to the scene for anything related to Ms. Holman's apartment or the two Defendants. During the 15 minutes between the time Boston and Holmes went into the apartment and the knock and talk, Officer Sherwood admitted that he saw nothing suggesting criminal activity occurring there. Instead, he testified only that he was familiar with the people involved, which gave him a feeling that it was "kind of weird" and "odd" that Boston and Holmes would go into Ms. Holman's apartment. At most, Officer Sherwood's testimony describes only an "inchoate and unparticularized suspicion" or "hunch," which is not sufficient to support a finding of reasonable suspicion. *See Slocumb,* 804 F.3d at 682. Furthermore, Officer Sherwood's stated reason for approaching Ms. Holman's door was to, "see if there is any possibly any crime or if she had any information for us." (R. p.17, ln. 7-12). Officer Sherwood's testimony that he was looking for evidence of "any possibly any crime" proves that any suspicion he had was at best, unparticularized. At worst, it approaches he the kind of indiscriminate knocking on a person's door in search of contraband that so concerned the *Counts* court. Thus, based on Officer Sherwood's stated reason for approaching Ms. Holman's door, the trial court should have found that reasonable suspicion of illegal activity did not exist.

Moreover, the factors articulated by the State and cited by the trial court do not support a finding that Officer Sherwood had reasonable suspicion of illegal activity. As a first factor, Officer Sherwood stated that the area around Ms. Holman's apartment was a hot spot for narcotics activity. While the characteristics of the neighborhood can be considered in the totality of the circumstances analysis, it carries no weight standing alone. *Anderson*, 415 S.C. at 447–48, 783 S.E.2d at 55. Moreover, courts have noted the inherent unfairness of relying on this factor in establishing reasonable suspicion. *See United States v. Perrin*, 45 F.3d 869, 873 (4th Cir. 1995) ("Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside of his control."); *Anderson*, 415 S.C. at 448, 783 S.E.2d at 55 (expressing concern about the erosion of an individual's right to be free from warrantless searches by virtue of the fact that a person has the "misfortune of living in an area plagued by crime"); *see also Counts*, 413 S.C. at 172, 776 S.E.2d at 70 (noting as its primary concern, "the potential for abuse if law enforcement targets a particular neighborhood in the hope of discovering contraband without a search warrant").

In this case, the fact that Mr. Boston was in a high crime area should be given little or no weight. The police were not in the area for the purpose of investigating the narcotics activity for which Mr. Boston was ultimately arrested. *See Anderson*, 415 S.C. at 448, 783 S.E.2d at 55 (affording little weight to the suspect's presence in a high crime area when the suspect was merely near a property being searched). Moreover, Mr. Boston was not observed doing anything suspicious, much less anything indicative of narcotics activity. He was observed merely walking from a taxi to an apartment of someone he knew.

As a second factor, Officer Sherwood cited his prior "several run-ins with" Boston and Holmes, including Sherwood's claim that he recognized the two from a house where the NCCPD

had "a lot of run-ins with drug activity." (R. p. 15, ln. 12-17; p.16, ln. 1-10). "A prior criminal record is not, standing alone, sufficient to create reasonable suspicion." *Foster*, 634 F.3d at 246-47 (citing *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997)). Prior knowledge of a suspect's criminal record must be paired with "some more concrete factors to demonstrate that there was a reasonable suspicion of current criminal activity." *Id.* (internal quotation marks and citations omitted).

In the present case, Officer Sherwood did not indicate that he had any *specific* knowledge of Boston's arrest or criminal record; he stated only that he had "run-ins" with Boston and Holmes that involved narcotics, some of which included their mere proximity to or presence in a house known for drug activity. *See id.* at 246. (discounting the state's reliance on a suspect's prior record in the reasonable suspicion analysis where the police officer "lacked any explicit familiarity" with the suspect's prior drug arrests or the disposition of those arrests). Here, the record indicates only that Officer Sherwood knew Boston from prior "run-ins." He did not say whether these "run-ins" involved arrests or convictions for drug crimes. Sherwood's vague knowledge of Boston's prior history with narcotics is too vague to warrant the court giving this factor any significant weight in the reasonable suspicion analysis.[1] Moreover, there are no other "concrete factors" that can be paired with this knowledge to demonstrate that Officer Sherwood had reasonable suspicion of current criminal activity.

The final factor was Officer Sherwood's knowledge that Ms. Holman was a drug user, and that she had some non-specific mental impairment. As to Sherwood's knowledge of Ms. Holman's

[1] Judge Dennis rightly expressed concern that law enforcement's decision to conduct the knock and talk was based in part on knowledge of the Defendant's prior drug use, the testimony about which he described as "generic." Judge Dennis stated he was bothered by the notion that "just because these gentlemen have used drugs in the past, we got the right to go wherever they go any time." (R. pp. 370 – 374).

drug use, he testified that he had stopped her only once and referred generically to other "run-ins" with her which were not serious. As to Officer Sherwood's knowledge of Ms. Holman's mental state, it is not clear how specifically this knowledge bolsters the reasonable suspicion analysis. Arguably, Ms. Holman's mental state combined with her prior "run-ins" with Officer Sherwood related to drugs increased the inherent coerciveness of him knocking on her door, requesting to speak with her, and ultimately stepping into her apartment. The potential for such abuse was of considerably concern to the court in *Counts*. *See* 413 S.C. at 165, 776 S.E.2d at 66 (citing Fern L. Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions,* 15 A.L.R.6th 515, 515 (2006 & Supp.2015) for the proposition that "police must conduct themselves in a manner that does not communicate to a reasonable person that he or she is not free to ignore the police presence, and police must remain in those areas of the property that are impliedly open to the public"). In this case, rather than adding to the reasonable suspicion analysis, Officer Sherwood's knowledge of Ms. Holman's mental deficiencies adds to the notion that the knock and talk, which then led to Officer Sherwood actually coming into the home, was more coercive than average.

Accordingly, the above factors considered together, do not support a finding that Officer Sherwood had reasonable suspicion of illegal activity. Moreover, the facts in the instance case stand in stark contrast to those in *Counts*, in which the Supreme Court held that law enforcement had reasonable suspicion of illegal activity prior to conducting the knock and talk at Counts' residence. *Id.* at 173, 776 S.E.2d at 70. In *Counts*, the police received two separate anonymous tips from citizens who alleged that Counts was selling drugs, along with information identifying his vehicles, his phone number, and his use of multiple identities. *Id.* The police made efforts to corroborate the information by reviewing Count's rap sheet, which confirmed that Counts had

prior drug convictions and had two false identification cards on record. *Id.* At one point, law enforcement even attempted an ultimately unsuccessful drug buy at Counts' residence. *Id.* at 157, 776 S.E.2d at 62. The court held the specificity of the anonymous tips and law enforcement's efforts to corroborate the tips indicated "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" *Id.* at 173, 776 S.E.2d at 70.

In Mr. Boston's case, there was no anonymous tip, no investigation into Boston's, Holmes' or Ms. Holman's prior arrest or conviction records, and no attempts to independently corroborate any of the vague knowledge upon which Officer Sherwood relied. There was only Officer Sherwood's prior "run-ins" with the people involved and their collective presence in a high crime area. These facts demonstrate that Officer Sherwood was relying upon nothing more than a hunch that he might uncover some kind of current criminal activity if he randomly knocked on the door of a mentally impaired woman with a history of drug use who lived in a high crime neighborhood. On these facts, the court should have found that Officer Sherwood did not have reasonable suspicion. Accordingly, the evidence seized following the knock and talk should have been suppressed.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse Appellant Boston's convictions and sentence, or, in the alternative, remand for a new trial, directing that the evidence illegally seized by law enforcement be suppressed.

By: RM

David N. Lyon
Duff & Childs, LLC

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 12th day of April, 2019

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for Appellant certifies that this Final Brief of Appellant contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

By: DM

David N. Lyon, Esquire
Duff & Childs, LLC

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent
Defense Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEYS FOR APPELLANT

This 12th day of April, 2019.