STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-001971

THE STATE, Respondent,

v.

BRIAN NEIL WHITE, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BYRON E. GIPSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29201
(803)-576-1800

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse her discretion in admitting Appellant's recorded jail phone call, when the issue of the State's noncompliance with the Omnibus Crime Control and Safe Streets Act is not preserved for appeal, because Appellant did not object to the admission of the phone call on those grounds at trial and when Appellant conceded the jail was allowed to record his call? And if Appellant properly preserved the issue for appeal, was the phone call properly admitted under the law enforcement and consent exceptions to the Act? Furthermore, was the phone call obtained in violation of the Fourth Amendment when Appellant did not have a reasonable expectation of privacy in his jail phone call? Finally, even if the call was admitted in error, was any error in its admission entirely harmless in light of the overwhelming evidence presented against Appellant at trial?

STATEMENT OF THE CASE

In June 2019, a Richland County Grand Jury indicted Appellant for murder. On November 18-22, 2019, Appellant proceeded to trial before a jury in the Richland County Court of General Sessions with the Honorable DeAndrea G. Benjamin, presiding. Appellant was represented by Megan Eigenbrot, Esq., Tracy Pinnock, Esq., and Richard Marsh, Esq. The State was represented by Deputy Solicitor April Sampson, and Assistant Solicitors Samuel McGlothin and Harrison Pratt of the Fifth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant as charged. Following the verdict, the trial judge sentenced Appellant to a term of thirty-eight years' imprisonment. Appellant timely filed a notice of appeal and an initial brief.

STATEMENT OF FACTS

On December 7, 2016, Crystal Posey returned to her mobile home on Patricia Drive in Richland County and discovered her TV was missing. (R. 208). Posey suspected her TV was stolen and sold by her longtime boyfriend, James Scott Turner (Victim). (R. 204-08). Posey theorized Victim sold her TV to buy drugs and that he was currently high on crack cocaine. (R. 206-08). Posey contacted her daughter, Shena Nicole Bryant, and asked her to come home. (R. 208). When her mother called, Bryant was at the Marriott Hotel in downtown Columbia with Appellant, Brittany Steen, and Elexia Tucker[1]. (R. 265-68, 432-33). At Bryant's request, Appellant drove Bryant, Steen, and Tucker to Posey's residence. (R. 268-69).

Appellant, Bryant, Steen, and Tucker arrived at Posey's residence and tried to comfort her. (R. 269). While at the residence, Appellant told both Steen and Bryant he would "handle" or "take care of" Victim. (R. 270-72, 438). At some point in the early morning hours of December 8, 2016, Appellant, Steen, and Tucker left the residence to return to the Marriott. (R. 438). Bryant remained with Posey and they both went to bed at Posey's residence. (R. 209, 273). Bryant and Posey were awakened by gunshots outside the front door. (R. 210, 273). When Bryant and Posey went outside to investigate the gunshots, they witnessed Victim's van riddled with gunshots on the driver's side door. (R. 211, 273). Bryant opened the driver's side door and witnessed Victim bleeding and laying across the front seat of the van. (R. 274). Bryant asked Posey to call 911 and bring towels from inside to help stop the bleeding. (R. 211).

[1] Bryant and Appellant had a previous romantic relationship. (R. 261-62). After Appellant and Bryant began dating, Appellant lived with Bryant, Posey and Victim at the residence on Patricia Drive until approximately August or September of 2016 when Appellant and Bryant broke up. (R. 262-63). Appellant moved out of the residence after his breakup with Bryant, but their relationship remained amicable. (R. 263).

Deputy Jeffrey Cahill of the Richland County Sheriff's department was the first law enforcement officer to arrive at the scene. As Cahill approached the residence, he was flagged down by a white male individual who was walking away from the scene. The white male identified himself as Appellant and told Cahill he was smoking a cigarette when he felt bullets "whiz by him." (R. 104-05). Cahill continued to the residence to secure the scene. Paramedic Richard Hill arrived soon thereafter and tended to Victim's injuries. Hill observed that Victim had no pulse and multiple gunshot wounds to the left side of his body including his head, shoulder and chest. (R. 109-11). Victim was subsequently pronounced dead as a result of multiple gunshot wounds. (R. 582).

Investigator Cris Truluck of the Richland County Sheriff's Department arrived on the scene and questioned Posey's neighbors. Truluck learned Cahill encountered Appellant leaving the scene and two neighbors, Samuel Knowles and Randell Wilson, also saw Appellant near Posey's residence that morning. (R. 626-28). Truluck considered Appellant a suspect and asked Bryant to call Appellant. As Truluck listened to their phone conversation[2], Appellant told Bryant that he "took care of it" and got rid of the gun, but Appellant did not confess to the shooting. (R. 636-37). Truluck returned to Posey's residence later that day to speak with her again and saw Appellant at the residence. (R. 639). Posey and Appellant were taken to the Sheriff's office for questioning. (R. 640). Appellant waived his Miranda rights and agreed to speak with Truluck. (R. 643-47, 937). Appellant confessed to shooting Victim. (R. 649-53, 938-40). Appellant stated he parked his car on Woodford Street and walked to Posey's house in the early morning hours of December 8th. (R. 938-40). Appellant fired a pistol approximately six times into Victim's driver's side window. (R. 938-40). After shooting Victim, Appellant claimed he ran from the

[2] It does not appear this phone call was played for the jury. Truluck testified there were technical issues with the volume of Appellant's voice on the phone call. (R. 16, 636).

scene, took his gun apart, and threw the pieces into the woods. (R. 938-40). Appellant did not tell law enforcement where he obtained the gun. (R. 938-40). After his confession, Appellant was arrested and charged with murder. (R. 659).

On December 9th, Jerry Rabon contacted the Richland County Sheriff's Office to tell them he may be in possession of the murder weapon. (R. 398). Appellant was living with Rabon at the time and had access to his home. (R. 383-84). Rabon explained that he awoke early on the morning of the 8th to find Appellant looking for something in Rabon's spare bedroom. (R. 386). Appellant asked Rabon to borrow his gun so Appellant could help his boss shoot some coyotes. (R. 386-87). Rabon gave Appellant his pistol and some ammunition. (R. 387). Appellant returned the pistol a few hours later and told Rabon he shot at some coyotes, but missed. (R. 391-92). When Appellant returned the gun, he was speaking to Bryant on the phone. (R. 392). Bryant told Rabon that Victim had been shot. (R. 392). Rabon contacted law enforcement after learning that Appellant had been arrested for murder. (R. 397-98). Rabon gave his gun to law enforcement. (R. 413). Forensic analyst Amanda Metz of the Richland County Sheriff's office analyzed the gun and determined the bullets extracted from Victim's body were fired by the same gun. (R. 371).

Appellant testified in his own defense at trial. Appellant admitted telling Steen via text message that he would "handle" Victim. (R. 828). Appellant further admitted he borrowed a pistol from Rabon and lied to Rabon about why he needed the weapon. (R. 803-04). However, Appellant claimed he obtained the weapon from Rabon because Bryant asked him to bring her a gun. (R. 800). Appellant claimed Bryant shot Victim. (R. 806). At the conclusion of trial, Appellant was convicted of murder.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." Id. "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

Because Appellant did not object to the admission of his recorded jail phone call based on the State's noncompliance with the Omnibus Crime Control and Safe Streets Act and because Appellant conceded the jail was allowed to record his phone calls, Appellant's argument is not preserved for appeal. Furthermore, the phone call was properly admitted under the law enforcement and consent exceptions to the Act, and Appellant did not have a reasonable expectation of privacy in his jail phone call. Finally, any error in the call's admission is entirely harmless in light of the overwhelming evidence presented against Appellant at trial.

Appellant argues the trial judge erred in admitting a jail phone call made by Appellant because the phone call was obtained in violation of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 2511, hereafter referred to as the Act) which prohibits the unauthorized interception of electronic communications. Specifically, Appellant claims the State violated the Act because the State failed to prove the phone call was obtained pursuant to either the law enforcement or consent exceptions of the Act. Additionally, Appellant asserts the interception of his phone call was a violation of the Fourth Amendment to the United States Constitution. As an initial matter, Appellant's argument regarding whether the State complied with the Act is not preserved for appellate review because it was not raised by Appellant at trial and because Appellant conceded the jail was allowed to record his phone call. Even if Appellant properly preserved the issue for appeal, Appellant's argument fails for three reasons. First, the trial judge properly admitted Appellant's jail phone call because the call was admissible under both the law enforcement and consent exceptions to the Act. Second, to the extent Appellant preserved a general objection under the Fourth Amendment, Appellant's argument fails because Appellant did not have a reasonable expectation of privacy in his jail phone call. Finally, even if the trial judge erred in admitting the phone call, any error was harmless in light of the overwhelming evidence presented against Appellant at trial.

Error Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "[A]n issue is not preserved for appeal merely because the trial judge mentions it." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) *rev'd on other grounds by* State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). "A litigant cannot concede an issue at trial and then raise it on appeal." CFRE LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011).

At trial, Appellant offered a thorough objection to the admission of his jail phone call based on multiple grounds. Appellant alleged the interception of his phone call violated Rule 5 of the South Carolina Rules of Criminal Procedure, the First, Fourth, and Sixth Amendments to the United States Constitution, and the Equal Protection Clause of the United States Constitution. (R. 19-46, 941-51). However, Appellant never alleged the interception of his phone call violated the Act. The Act was not mentioned by either party until the State raised it as a possible sustaining ground shortly before the trial judge made her ruling on the admissibility of the call. (R. 177). The Assistant Solicitor noted the interception of the phone call didn't violate the Act because

both the law enforcement and consent exceptions applied. (R. 177). Counsel for Appellant responded to the State's argument as follows:

> Ms. Eigenbrot: ...as to the solicitor's first point about this not violating any federal laws, the rule that the solicitor is citing to is essentially a federal wiretapping allowance. There's still things that they're required to do in order to listen in on people's conversations. That's besides (sic) the point. I'm not—and I'm not arguing that the jail or AmTel is not allowed to record and/or monitor these phone calls. That has been litigated, Your Honor, recognizing that is in—that the recording of those phone calls is needed for the safety and assurances of the detention center. Again, it goes back to solicitors and law enforcement having direct access to these phone calls without any other protections in place. As I stated the—the before, [Appellant] stands in—in the detention center as an innocent individual. And he still has constitutional rights. While limited and curtailed by his incarceration, that doesn't mean they disappear completely.

(R. 182, lines 2-22). Counsel for Appellant then proceeded to reiterate the constitutional arguments raised in her initial objection, but she did not argue the phone call should be suppressed because of a violation of the Act. (R. 182-86). In fact, Counsel for Appellant explicitly conceded the jail was allowed to record and monitor Appellant's phone calls, going so far as to note the issue "has been litigated." (R. 182, line 9-14). In making her ruling on the admissibility of the call, the trial judge responded to Appellant's objection on Fourth Amendment grounds by noting the State complied with the law enforcement and consent exceptions to the Act. (R. 189-91). However, the trial judge's ruling was made in response to Appellant's Fourth Amendment objection, not an objection under the Act because Appellant made no such objection.

Appellant failed to preserve any issue for appeal related to the State's noncompliance with the Act. Not only did Appellant fail to raise noncompliance with the Act as a ground to suppress the phone call, but Appellant explicitly conceded the jail was allowed to record Appellant's phone calls. (R. 182). The mere fact that the trial judge noted the State's compliance with the Act in her ruling does not excuse Appellant's failure to properly preserve this issue for

appellate review. Appellant is attempting to raise the State's alleged non-compliance with the Act for the first time on appeal after he explicitly conceded his phone call was properly recorded at trial. Appellant cannot concede an issue at trial and then raise it on appeal. Even if this Court determines Appellant did not concede this issue at trial, Appellant certainly did not raise noncompliance with the Act as a ground to suppress the call to the trial judge. Therefore, this issue is not preserved for appellate review. Appellant's conviction and sentence should be affirmed.

Exceptions to the Act

Title III of the Omnibus Crime Control and Safe Streets Act generally prohibits the unauthorized interception of "any wire, oral, or electronic communication." 18 U.S.C. § 2511 (1)(a). The Act "protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." Abraham v. County of Greenville, 237 F.3d 386, 389 (4th Cir. 2001). The statute provides two notable exceptions to the prohibition against intercepting communications. First, the law enforcement exception "excludes from the definition of 'interception' recordings made by 'any telephone or telegraph instrument, equipment or facility, or any component thereof...being used by...an investigative or law enforcement officer in the ordinary course of his duties.'" United States v. Hammond 286 F3d 189, 192 (4th Cir. 2002) (quoting 18 U.S.C. § 2510(5)(a)(ii)). Second, the consent exception provides that "it shall not be unlawful...for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c).

Even if Appellant preserved this issue for appeal, the trial judge properly admitted the phone call because the call was obtained pursuant to the law enforcement exception and the

consent exception to the Act. Appellant asserts the State did not comply with the Act pursuant to the law enforcement exception, because the "state failed to establish the call at issue was intercepted by law enforcement for investigative purposes." (Initial Brief of Appellant 18). Appellant's argument is meritless. The law enforcement exception to the Act doesn't require law enforcement to intercept the call for investigative purposes. The Act merely requires a law enforcement officer to be acting in "the ordinary course of his duties" when a call is intercepted. 18 U.S.C. § 2510(5)(a) Even if an investigative purposes requirement existed, Truluck explicitly testified he intercepted the call for investigative purposes. (R. 81). Therefore, the trial judge correctly ruled the State complied with the law enforcement exception to the Act.

Appellant additionally argues the consent exception to the Act does not apply to the interception of his phone call, because he was not sufficiently notified his calls were being recorded. On the contrary, Appellant was notified before he made his call that "all phone calls are subject to monitoring and recording." (State's Exhibit #92). Appellant compares this warning with the thorough warning given to the defendant in United States v. Hammond. Hammond 286 F3d at 191. Appellant argues the warning he received "could hardly satisfy the strictures of consent to waiving one's constitutional right to be free from warrantless searches and seizures." (Initial Brief of Appellant 19). While the straightforward warning Appellant received may not have been as exhaustive as the warning Hammond received, the Fourth Circuit did not specify a litmus test or a minimum threshold for what constitutes a sufficient warning to a defendant to satisfy the consent exception to the Act. The Fourth Circuit merely noted the consent exception applies to prison inmates and other Federal Circuit Courts have reached the same conclusion. Hammond 286 F3d at 192. See United States v. Footman, 215 F.3d 145, 154-56 (1st Cir. 2000); See also United States v. Horr, 963 F.2d 1124, 1126 (8th Cir. 1992). Furthermore, the text of the

Act merely requires that "one of the parties to the communication has given prior consent to such interception" for the exception to apply. 18 U.S.C. § 2511(2)(c). It strains credulity to suggest the simple warning given to Appellant, "all phone calls are subject to monitoring and recording", was not sufficient for the trial judge to determine Appellant had consented to the recording of his phone call. Therefore, the trial judge correctly ruled the State complied with the consent exception to the Act. Appellant's conviction and sentence should be affirmed.

No Expectation of Privacy

The Fourth Amendment to the United States Constitution protects citizens "against unreasonable searches and seizures" by the State. U.S. Const. Amend. IV. "Nonetheless, the State's intrusion into a particular area...cannot result in a Fourth Amendment violation unless the area is one in which there is 'a constitutionally protected reasonable expectation of privacy.'" New York v. Class, 475 U.S. 106, 112 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967)). "Such a 'constitutionally protected reasonable expectation of privacy' exists only if (1) the defendant has an 'actual subjective expectation of privacy' in the place searched and (2) society is objectively prepared to recognize that expectation." United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (quoting United States v. Davis, 932 F.2d 752, 756 (9th Cir. 1991). "[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell...accordingly, the Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of a prison cell." Hudson v. Palmer, 468 U.S. 517, 526 (1984). Even if a prisoner believes his phone calls are private, "no prisoner should reasonably expect privacy in his outbound telephone calls." Van Poyck, 77 F.3d at 290-291.

To the extent Appellant argues the admission of his phone call was an unreasonable search or seizure under the Fourth Amendment, apart from the State's alleged noncompliance with the Act, such an argument is preserved for appeal. However, Appellant's argument on this ground fails because Appellant had no reasonable expectation of privacy in his prison phone call. Therefore, the interception of Appellant's phone call could not be a Fourth Amendment violation. Appellant did not have a subjective expectation of privacy in his phone call because he was explicitly informed that "all phone calls are subject to monitoring and recording." (State's Exhibit #92). Furthermore, even if Appellant had a subjective expectation of privacy in the phone call, there is no objective expectation of privacy in prison phone calls recognized by society. Appellant's conviction and sentence should be affirmed.

Harmless Error

An "error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008).

Even if the trial judge erred in admitting Appellant's jail phone call, any error was harmless in light of the overwhelming evidence presented against Appellant at trial. Appellant made the following statement in the challenged call:

> Appellant: "I ain't worried about nothing but the fact that I'm in here for a murder that I didn't commit, I am not worried about anything except for the fact that the only people who were anywhere around at any time whenever [Victim] got shot by somebody was me, [Victim], and whoever was in their houses at that time."

(State's Exhibit #92). The aforementioned statement is the only inculpatory statement from the phone call and the only statement from the call highlighted by the State at trial. (R. 704). Appellant's statement places him at the scene of the crime and acknowledges he was one of the few people present when Victim was shot. However, Appellant does not confess during the call. In fact, Appellant maintains his innocence and insists Victim was shot by someone else.

It is unlikely Appellant's phone call affected the outcome of his trial in light of the overwhelming evidence presented against him. First and foremost, Appellant confessed to shooting Victim. (R. 649-53, 938-40). Appellant's admission in the jail phone call that he was at the scene of the crime when Victim was shot is merely cumulative to his written confession of guilt. Steen and Bryant both testified that Appellant told them he would take care of Victim. (R. 270-72, 438). Truluck overheard Appellant tell Bryant he "took care of it" and disposed of the gun. (R. 636-37). Rabon testified Appellant borrowed a gun on the morning of December 8th and returned it later that morning after he claimed he shot at some coyotes. (R. 386-92). The bullets removed from Victim's body were matched to the gun Rabon provided to law enforcement. (R. 371). Because the evidence presented against Appellant at trial was overwhelming, any error in the admission of Appellant's jail phone call was entirely harmless and cumulative to other evidence. Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BYRON E. GIPSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29202
(803)-748-4785

BY: s/ Scott Matthews
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 25, 2021

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Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

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v.

BRIAN NEIL WHITE, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BYRON E. GIPSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29202
(803)-748-4785

BY: s/ Scott Matthews
Scott Matthews
Bar # 101464

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail

Susan B. Hackett, 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 twenty-fifth day of January, 2021.

Sally Ellison

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Sally Ellison

From: Sally Ellison
Sent: Monday, January 25, 2021 11:17 AM
To: 'shackett@sccid.sc.gov'; Kasperski, Katriel
Cc: Scott Matthews; Sally Ellison; Victim Services
Subject: State v. Brian Neil White Final Brief of Respondent Appellate Case No. 2019-001971
Attachments: Brian Neal White Letter Serving FBOR Appellate Case No. 2019-00197 (02473210xD2C78).pdf; FBOR Brian Neil White Appellate Case No. 2019-001971 (02473207xD2C78).pdf

Good Morning:

Attached for service this date are the Service Letter and Final Brief of Respondent in the above-referenced appeal. This Brief will be filed with the Court of Appeals today through the AIS One Drive System. A copy will also be served by mail as indicated on the Proof of Service.

Please confirm receipt of the letter and Brief.

Sally Ellison
Legal Assistant
SC Attorney General's Office
1000 Assembly Street
Columbia, South Carolina 29201