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Allen v. State Appellant's Reply Brief Dckt. 45910

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

WESTON DAVID ALLEN,	)	
	)	**NO. 45910**
Petitioner-Appellant,	)	
v.	)	**WASHINGTON COUNTY**
	)	**NO. CV-2016-441**
STATE OF IDAHO,	)	
	)	**APPELLANT'S**
Respondent.	)	**REPLY BRIEF**
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

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STATEMENT OF THE CASE

Nature of the Case

Mr. Allen contends the district court erred by denying his post-conviction petition because the preponderance of the evidence showed his attorney had failed to file a viable motion to suppress. The State's responses are based on unjustified attempts to distinguish the applicable precedent, and adopting its positions would result in the impoundment exception swallowing the Fourth Amendment's protections against unreasonable searches and seizures. Therefore, this Court should reject those arguments and reverse the order denying Mr. Allen's petition for post-conviction relief.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Allen's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court erred by denying Mr. Allen's petition for post-conviction relief because the preponderance of the evidence showed his attorney was ineffective for not filing a viable motion to suppress.

ARGUMENT

The District Court Erred By Denying Mr. Allen's Petition For Post-Conviction Relief Because The Preponderance Of The Evidence Showed His Attorney Was Ineffective For Not Filing A Viable Motion To Suppress

A. The Uncontroverted Evidence Before The District Court Established That, Had Trial Counsel Filed The Motion To Suppress In This Case, It Would Not Have Failed For Lack Of Standing

Where testimony is not contradicted, the following, well-established rule governs:

> The rule applicable to all witnesses, whether parties or interested in the event of an action, is, that either a board, court or jury must accept as true the positive, uncontroverted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. . . . [N]either the trial court nor a jury may arbitrarily and capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability. . . . Testimony which is inherently improbable may be disregarded, * * * [sic] but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions.

Dinneen v. Finch, 100 Idaho 620, 626-27 (1979) (internal quotations and citations omitted); *accord Hartgrave v. City of Twin Falls*, 163 Idaho 347, 355-56 (2018) ("this Court has repeatedly held that the uncontroverted testimony of a credible witness should not be disregarded").

This rule demonstrates why the Court of Appeals' decision in *Hoffman v. State*, 153 Idaho 898 (Ct. App. 2012), despite the State's assertion to the contrary in a footnote, remains relevant to this case. (*See* Resp. Br., p.11 n.4.) *Hoffman* articulated the legal principle which is at issue when a post-conviction petition deals with whether an unfiled motion to suppress would fail for lack of standing – the petitioner has to show that he had permission to use the property (in this case, as in *Hoffman*, permission to be driving the car) in order to show that he could have proved he had standing. *Hoffman*, 153 Idaho at 904. Given the procedural stance of *Hoffman*,

the petitioner's burden in *Hoffman* was to establish a genuine issue of material fact. In meeting that burden, the petitioner in *Hoffman* could rely on a presumption that his allegations of fact were true even in the face of contradictory facts. *See id.* However, he still needed to actually present allegations of fact to support his claims in order to meet his burden. While he could have supported his claims with allegations of fact in affidavits from other people, the petitioner in *Hoffman* chose to provide only his own affidavit instead. And yet, the *Hoffman* Court concluded his lone allegations were sufficient to show he could establish standing.

While Mr. Allen may bear a heavier burden, and may not be entitled to be believed in the face of contradictory facts, that does not make *Hoffman* irrelevant, either in terms of what the legal principle is, or whether the evidence provided by the petitioner himself could, by itself, satisfy that burden. In fact, the United States Supreme Court found precisely that – that the defendant's testimony that he had the apparent owner's permission to use the property – was sufficient to meet the defendant's burden to prove he had standing to challenge the search of the property. *Jones v. United States*, 362 U.S. 257, 259 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980). Because Mr. Allen's uncontradicted testimony on that point was capable of carrying that burden, the district court could not arbitrarily disregard it. *Dineen*, 100 Idaho at 626-27.

In another footnote, the State suggests that *Jones* is irrelevant because the State believes it dealt with a purely legal interpretation of F.R.C.P. 41(e). (Resp. Br., p.12 n.5.) The State cites no authority to support that assertion. (*See generally* Resp. Br.) That is not actually surprising since, as recently as last year, the United States Supreme Court has relied on *Jones* for the same legal principle as Mr. Allen does now. *Byrd v. United States*, ___ U.S. ___, 138 S. Ct. 1518, 1528 (2018) (quoting *Rakas v. Illinois*, 439 U.S. 128, 149 (1978)) ("This situation would be

similar to the defendant in *Jones*, *supra*, who, as *Rakas* notes, had a reasonable expectation of privacy in his friend's apartment because he "had complete dominion and control over the apartment and could exclude others from it.'"[1]). Thus, the State's attempt to distinguish *Jones* on this basis is frivolous.

That conclusion is reinforced by the fact that the Supreme Court has continued to rely on *Jones* in this regard despite the fact that Rule 41(e) has since been amended and no longer contains the language upon which the State tries to rely to conjure its distinction. The prior version of the rule provided that "a person aggrieved by an unlawful search and seizure" could move for suppression on various grounds. *Jones*, 362 U.S. at 260-61 (quoting the applicable version of Rule 41(e)). The new rule, now codified as Rule 41(h) does not contain the standing requirement; rather, it simply provides that "[a] defendant may move to suppress evidence in the court where the trial will occur as Rule 12 provides."[2] F.R.C.P. 41(h). Thus, the fact that the United States Supreme Court continues to rely on *Jones*'s standing analysis despite the fact that the federal rule no longer requires a showing of standing reveals that *Jones* is not limited in the way the State suggests.

Furthermore, *Jones* only discussed Rule 41(e) with respect to the since-overruled concept of inherent standing. *See Jones*, at 260-64. It did not mention the rule in its still-surviving discussion of standing based on permission to use the apartment. *Id.* at 265-67 (deicing that issue instead on its conclusion that property law concepts should not control the question of standing). As such, the applicable portion of *Jones* was never tied to just Rule 41(e). Therefore, the analysis in *Jones* remains applicable to this case. Under that analysis, Mr. Allen, like the

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[1] The only evidence of this fact came from the defendant's own testimony. *See Jones*, 362 U.S. at 259.

[2] Rule 12 simply requires that the defendant file such motions before trial. F.R.C.P. 12(b)(3)(C).

defendant in *Jones*, could show his standing to challenge the search of the property simply through his testimony that he had the apparent owner's permission to use it. Or, as the Idaho Supreme Court has put it, the district court could not arbitrarily ignore his uncontroverted testimony in that regard. *Hartgrave*, 163 Idaho at 355-56; *Dinneen*, 100 Idaho at 626-27.

However, by its own language, that is exactly what the district court did in this case – it arbitrarily disregarded Mr. Allen's testimony in its entirety based on its conclusion that he "did not produce any *viable* evidence to prove" his allegations. (R., p.74 (emphasis added).) "Viable," in this context, means "[c]apable of independent existence or standing <a viable lawsuit>." BLACK'S LAW DICTIONARY, 760 (3rd pocket ed. 2006). Mr. Allen's testimony – that his boss gave Mr. Allen permission to drive the truck while he paid the boss back for buying it from its original owner – is capable of independent existence, as demonstrated by the fact that *Hoffman* and *Jones* found similar testimony to be sufficient to prove standing.

In attempting to justify the district court's decision in this regard, the State confuses the concept of "viability" with the concept of "credibility." (*See* Resp. Br., pp.11-12 (arguing that what the district court must have done was implicitly find Mr. Allen's testimony in this regard to be not credible). "Credibility" is simply "[t]he quality that makes something (as a witness or some evidence) worthy of belief." BLACK'S LAW DICTIONARY, *supra*, at 164. As such, testimony can be both viable and not credible – it could be *capable* of standing on its own, but ultimately fail to do so because it is found to be unbelievable. Thus, the district court's assertion that Mr. Allen's testimony was not "viable" indicates that the district court did not consider his testimony at all, not that it considered it and found it to be incredible, as the State now contends. As such, the district court's decision to deny Mr. Allen's petition was inconsistent with the legal

standards set forth in *Jones*, *Hoffman*, and *Dinneen*, in that it failed to conduct the analysis required by arbitrarily refusing to consider Mr. Allen's otherwise-uncontradicted testimony.

Even if the State is correct, and the district court had properly determined Mr. Allen's testimony was not credible, the State's conclusion – that this means this Court should affirm the denial of his petition (Resp. Br., pp.13-14) – is improper, as that argument ignores the fact that the officer's preliminary hearing testimony, which was also uncontroverted, was also presented and supported Mr. Allen's claim for relief. (App. Br., pp.10-11.) Specifically, the officer testified he was actually acting based on his conclusion that Mr. Allen was in lawful possession of the car as a potential buyer. (Tr., p.26, Ls.24-25.) In other words, the officer was testifying that, even though the truck had fictitious plates, Mr. Allen was not clear as to who owned the truck, he was not able to immediately remember his boss's address or telephone number, and he did not have documentation of the sale, the officer still concluded that Mr. Allen had possession of the truck because he was intending to purchase it. That this was the officer's actual conclusion is not inherently improbably, nor was it rendered so by the facts and circumstances, and therefore, it cannot be arbitrarily ignored just because the State's attorneys would reach a different conclusion. *Dineen*, 100 Idaho at 626-27.

That conclusion is reinforced by the fact that the Idaho Supreme Court has recently and repeatedly reaffirmed that the officer's expressed conclusions are relevant considerations within the totality of the circumstances. *State v. Albertson*, ___ P.3d ___, 2019 WL 1397277, *6 n.8 (Mar. 28, 2019) ("We note that, although the test is an objective one, if an officer is actually aware that a person has not acted to revoke the implied license, he would not be free to approach the home."), *not yet final*; *State v. Lee*, 162 Idaho 642, 651 (2017) (holding that, even though, objectively, there was probable cause for the officer to arrest the defendant for driving without

privileges, the search of the defendant's person was ultimately *not* justified as a search incident to arrest because the officer actually did not intend to arrest the defendant, instead, telling the defendant he would receive a citation).) Here, as in *Lee*, the State is attempting to justify the search through a determination of objective reasonableness in hindsight by contradicting what the officer actually did at the time of his actions, and that is improper. *See also State v. Downing*, 163 Idaho 26, 31 (2017) (holding that the appellate courts only evaluate such cases based on what the officer actually did, not what he might have otherwise lawfully done).

In other words, the State's argument on appeal is actually a perfect illustration of arbitrarily disregarding the testimony of an unimpeached witness. As a result, if Mr. Allen's testimony was properly deemed not credible, the only other testimony presented during the hearing which spoke as to whether Mr. Allen's possession of the truck was lawful was the officer's preliminary hearing testimony. Since the officer's testimony confirmed that the he was acting from the perspective that Mr. Allen was in possession of the car as a prospective buyer, the only credible evidence in the record made it more likely true that Mr. Allen was driving it with the owner's permission, and thus, that he was in lawful possession of the truck. Therefore, that evidence was sufficient evidence to show, by a preponderance of the evidence, that the unfiled motion to suppress would not have failed for lack of standing. *See Oxley v. Medicine Rock Specialties, Inc*., 139 Idaho 476, 481 (2003) (defining the preponderance standard). As a result, and the district court's decision to deny Mr. Allen's petition for failure to carry his burden with respect to standing was erroneous.

B. Mr. Allen Met His Burden To Prove The Motion To Suppress Would Likely Have Been Successful Because The Officer's Decision To Impound The Truck In This Case Was Objectively Unreasonable For Numerous Reasons

The State devotes much of its argument on the merits of the unfiled motion to the idea that, because the officer testified he was following his understanding of the office policy, his actions were reasonable. (*See, e.g.,* Resp. Br., pp.16-19.) That argument carries no weight if the policy itself was objectively unreasonable – if a policy tells the officer to seize property in a manner which is inappropriate under the Fourth Amendment, the officer's actions under that policy will still violate the rights of the person from whom the property was seized. Thus, his actions pursuant to an unreasonable policy would still be objectively unreasonable.

The Idaho Court of Appeals has actually held precisely that in the related context of inventory searches. *State v. Owen*, 143 Idaho 274, 278 (Ct. App. 2006). In that case, the testimony was that the officer believed he was following an unwritten policy to inventory everything taken into police custody when he opened a locked safe. *Id.* at 277-78. The Court of Appeals held that the search was objectively unreasonable because the verbal policy was impermissibly vague, and so, failed to satisfy the overarching legal requirement that the officer's discretion in conducting an inventory search be guided by standardized criteria. *Id.* (citing *Florida v. Wells*, 495 U.S. 1, 3-4 (1990) (in which the United States Supreme Court found that opening a locked container found in an impounded car was unconstitutional because the department had no standards regarding such inventory searches)).[3] Thus, "[a]ny suspicion the officers had that the safe contained contraband did not alleviate the necessity for the sheriff's

[3] The rule that *Wells* applied in the context of an inventory search came from *Colorado v. Bertine*, 479 U.S. 367 (1987), and *South Dakota v. Opperman*, 428 U.S. 364 (1976). *Wells*, 495 U.S. at 3-4 (quoting *Bertine*'s explanation of *Opperman*'s rule). *Bertine* and *Opperman* are also the cornerstone precedent which define what is required under the impoundment exception to the warrant requirement. *See State v. Weaver*, 127 Idaho 288, 291 (1995).

department to either get a warrant or to establish, and its officers follow, a standardized criteria for dealing with locked containers pursuant to the inventory search exception to the warrant requirement of the Fourth Amendment." *Id*. at 278.

The rationale behind that rule is, as the Tenth Circuit has succinctly explained, applicable to the impoundment exception as well: "Protection against unreasonable impoundments, *even those conducted pursuant to a standard policy*, is part and parcel of the Fourth Amendment's guarantee against unreasonable searches and seizures." *United States v. Sanders*, 796 F.3d 1241, 1250 (10th Cir. 2015) (emphasis added). Were it otherwise, policymakers could simply eliminate the constitutional protections "by requiring plainly unconstitutional searches of every nook and cranny of a vehicle." *State v. Nordloh*, 144 P.3d 1013, 1015 (Ct. App. Or. 2006). Of course, legislative and executive orders cannot require the government to provide less protection than what the United States Supreme Court has declared the Constitution to require. *See State v. Donato*, 135 Idaho 469, 471 (2000) (reiterating that the United States Supreme Court sets the constitutional floor). Therefore, an officer following a policy that authorizes an unreasonable impoundment of the car has acted in an objectively-unreasonable manner under the Fourth Amendment.

This conclusion – that an officer following an unreasonable policy is not acting in an objectively reasonable manner – is reinforced by that fact that "the absence of a well-defined, written policy establishing standardized criteria for inventory searches increases a department's exposure to liability." *Owen*, 143 Idaho at 278. As the United States Supreme Court has explained, it is precisely *because* the objectively-unreasonable policy causes the government's agent to violate a person's constitutional rights that the government is civilly liable. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978) ("[I]t is when execution of a government's

policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983."); *accord Lewis v. City of Topeka*, 305 F.Supp.2d 1209, 1216 (D.Kan. 2004) ("A municipality may only be held liable for a § 1983 claim if it has established a policy or custom which causes the alleged injury.").

The verbal policy upon which the State relies in Mr. Allen's case – to impound every car upon arrest – is the same sort of impermissibly vague and generic policy that the Court of Appeals found to be objectively unreasonable in *Owen*. It does not meet the overarching requirement to establish standards to guide the officer's exercise of discretion in the field, and so, does not allow for objectively reasonable impoundments. *See Owen*, 143 Idaho at 278. For example, that verbal policy the officer used in Mr. Allen's case would require the officer to impound a car regardless of whether a capable driver were on scene to remove the car, which is problematic because the Idaho Supreme Court has held impoundment is not permissible in that situation because it would not serve either of the historical justifications for the impoundment exception. *Weaver*, 127 Idaho at 291-92. Therefore, the verbal policy upon which the officer relied was objectively unreasonable, and as such, the officer's actions under that policy were also objectively unreasonable.

The Court of Appeals' decision in *State v. Stewart*, 152 Idaho 868 (Ct. App. 2012), does not, as the State believes, compel a different conclusion. (*See* Resp. Br., pp.17-18.) That is because *Stewart* was dealing with an officer's *failure* to comply with an established policy, not with a question of whether the policy *was itself* unreasonable. *Stewart*, 152 Idaho at 872. If the policy is reasonable (or not in question), the Fourth Amendment analysis should, indeed, turn on whether what the officer actually did was objectively unreasonable. *Owen*, on the other hand, explains that, when the policy is not reasonable, that impacts the determination of whether the

officer's ensuing actions were reasonable. *Owen*, 143 Idaho at 278. Therefore, *Owen*, not *Stewart*, represents the controlling law in this regard.

Even if *Stewart* did stand for the principle that an unreasonable policy does not make the seizure under that policy objectively unreasonable, that would not fully resolve the question in this case because *Stewart* still allows for the possibility that the search would still ultimately be unreasonable within the totality of the circumstances presented by a particular case. *See Stewart*, 152 Idaho at 872 n.1 (noting that failure to comply with the policy does not make the search "unreasonable *per se*") (emphasis added). Therefore, even under the State's rule, this Court would need to assess the reasonableness of the officer's actions.

Here, the officer's actions were objectively unreasonable because the officer was not simply relying on a verbal policy in a vacuum; he was relying on a verbal policy *despite knowing* a written policy existed and *willfully remaining* ignorant of what the written policy requires. (Tr., p.24, Ls.13-14, p.30, Ls.5-6.) The United States Supreme Court has made it clear that an officer can gain no advantage under the Fourth Amendment, that it is objectively unreasonable for him to act, with willful ignorance of the standard he is supposed to be enforcing. *Heien v. North Carolina*, ___ U.S. ____, 135 S. Ct. 530, 539 (2014); *cf. State v. Pettite*, 162 Idaho 849, 854-55 (Ct. App. 2017) (holding that even an officer's reasonable mistake of law will not render his actions objectively reasonable under the State constitution's counterpart to the Fourth Amendment).

Nevertheless, the State would have this Court join the minority of jurisdictions in the current split of authorities on this point and hold that the officer's actions should be considered regardless of the controlling criteria. (Resp. Br., p.18.) This Court should reject that argument because "to hold, as have the First, Third, and Fifth Circuits, that standardized criteria are never

relevant is to ignore the plain language of *Bertine*, which holds that police discretion to impound a vehicle is constitutional only '*so long as* that discretion is exercise according to standardized criteria.'" *Sanders*, 796 F.3d at 1249 (quoting *Bertine*, 479 U.S. at 375) (emphasis from *Sanders*). Rather, "*Bertine* makes the existence of standardized criteria the touchstone of the inquiry into whether an impoundment is lawful," though in doing so, it "did not purport to overrule *Opperman*, and *Opperman* envisioned a situation in which an impoundment is immediately necessary, regardless of any other circumstances, in order to facilitate the flow of traffic or to protect the public form immediate harm." *Id*. at 1248-49. Thus, the majority rule better adheres to the controlling United States Supreme Court precedent by "recognizing the centrality of standardized criteria, yet allowing broader officer discretion to promote public safety." *Id*. at 1249.

Moreover, the majority view is, in fact, already reflected in Idaho's precedent on this subject. *State v. Weaver*, 127 Idaho 288, 291 (1995); *Owen*, 143 Idaho at 278; *accord State v. Reimer*, 127 Idaho 214, 218 (1995) (explaining that, while officers have discretion in conducting inventory searches, the standardized criteria guiding that discretion is still central to the evaluation of those searches because those standards ensure the exercise of discretion does not divorce the exception from its historical rationales);. As such, this Court should reject the State's call for it to depart from Idaho's precedent, which it has not shown to be unjust, unwise, or otherwise improper, and adopt a minority view that is, itself, inconsistent with the applicable United States Supreme Court precedent.

Finally, the State contends that impoundment was reasonable to protect the public from the risk of damage or theft, and to protect the police department from a corresponding claim of liability. (Resp. Br., pp.20-21.) That argument is specious, since *impoundment* is only allowed

for "vehicles impeding traffic or threatening public safety and convenience." *Opperman*, 428 U.S. at 369. The justifications for *impounding* a car are simply where it is parked in such a manner that it, in and of itself, is posing a hazard or inconvenience to the motoring public. *Id.*; *Opperman*, 428 U.S. at 369; *cf. State v. Schulz*, 151 Idaho 863, 868 (2011) (discussing the common-sense principle relating to this sort of list of applicable scenarios – *noscitur a sociis*, a word is known by the company it keeps).

The concerns about claims of liability for theft relate to the ensuing *inventory* search, which was "developed in response to three distinct needs: the protection of the owners property *while it remains in police custody*; the protection of the police against claims over lost or stolen property; and the protection of the police from potential danger." *Bertine*, 479 U.S. 367, 373 (1987). In other words, one of the justifications for *inventorying* a car after deciding to impound it is to prevent specious claims that the officers stole something valuable out of the car. *Id*. at 373 n.2. Thus, the potential for claims of liability for stolen or damaged property within the car only justifies the intrusion into the car once it is taken into police custody; it does not justify the initial decisions to take it into police custody. A car properly parked in a parking lot, particularly one for which the driver has already paid for the privilege of parking it, does not pose the hazard to the motoring public sufficient to justify the initial decision to warrantlessly seize the car.

Besides, there was no evidence presented that the truck in question was at any more risk to theft or damage than any other car left in that hotel parking lot. There was, for example, no evidence that this was a high crime area. *Compare Stewart*, 152 Idaho at 871 (specifically noting the testimony that the car in that case was going to be left at a gas station which was in a high crime area). As such, what the State is really asking for is a rule that allows an officer to impound any car in a hotel parking lot based on the mere speculation that someone could

potentially vandalize it. Thus, adopting the State's position would completely sever the impoundment exception form the rationales which keep it moored to the Fourth Amendment's principles. As the Idaho Supreme Court recently reaffirmed, such arguments are untenable. *Lee*, 162 Idaho at 651. Therefore, this Court should reject the State's attempt to expand the impoundment exception to the extent that it would swallow the rule prohibiting warrantless seizures.

The State tries to avoid this problem with its argument by pointing out that Mr. Allen's reservation at the hotel, and thus, his privilege to park his truck in that parking lot, would expire, at which point the officers would have potentially been more justified to impound the truck. (Resp. Br., p.21.) That argument is also meritless because it is asking this Court to consider what the officers might have otherwise lawfully done had they not actually violated the Constitution, and the Idaho Supreme Court has made it eminently clear that the appellate courts do not consider such hypothetical analyses. *Downing*, 163 Idaho at 31. In this case, the officers actually impounded the truck *while* it was lawfully parked in a place where Mr. Allen had paid for the privilege to park it. Neither of the rationales identified in *Opperman* were actually served by impounding this truck in that particular set of circumstances.

The evidence Mr. Allen presented showed it was more likely true than not that the unfiled motion to suppress would have been successful because the decision to impound the car was not conducted pursuant to objectively-reasonable standardized criteria, it did not serve either of the historical rationales which justify such seizures, and he had standing to challenge that warrantless seizure. As such, the district court erred by denying his petition for post-conviction relief, since Mr. Allen met his burden to show his trial attorney was ineffective for not filing that motion to suppress.

CONCLUSION

Mr. Allen respectfully requests that this Court reverse the district court's order dismissing his petition for post-conviction relief.

DATED this 17th day of April, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas